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COMMENTS

CASENOTES

RECENT DEVELOPMENTS

The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands

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I. INTRODUCTION

The five island political communities in the Pacific and Caribbean that are part of the United States but are not states have always had a unique legal status under U.S. law. This status occasionally works for the benefit of the inhabitants of these islands, but it frequently creates hardships or awkward situations. This article examines the legal framework within which these communities operate and presents alternatives that can be pursued for the future.

The island groups that now fly the U.S. flag but are not states are the Territory of American Samoa, the Territory of Guam, the Commonwealth of the Northern Mariana Islands (CNMI), the Commonwealth of Puerto Rico, and the Territory of the U.S. Virgin Islands. Most of the island groups from the Trust Territory of the Pacific have chosen to become "free associated states," and their new political entities—the Federated States of Micronesia and the Republic of the Marshall Islands—are taking their places in the community of nations, while the Republic of Palau is still struggling to decide some key details of its future relationship with the United States. The United States also has a number of Pacific islands without permanent populations, including, at present, Baker, Howland, Kingman Reef, Jarvis, Johnston, Midway, Palmyra, and Wake Islands. These islands are sometimes referred to as "possessions" rather than "territories," although the distinction is not by any means precise. Because they have no permanent population, they are not self-governing and have no inhabitants seeking self-determination. The legal issues regarding their governance are, therefore, substantially different from those discussed in this article.

Puerto Rico's status is now once again undergoing reexamination, and its residents are again reviewing the options of statehood, independence, or an "enhanced" commonwealth status, which is discussed below. The four other populated U.S.-flag political communities—American Samoa, Guam, the Commonwealth of the Northern Marianas, and the U.S. Virgin Islands—may never become states because of their unique cultures, their small size, and their distance from the U.S. mainland, but they deserve greater stature than is provided by the concept of "territory" under U.S. law. They are each unique and they require individualized treatment by Congress and the federal agencies. They are entitled either to more autonomy than they now have or to more power to participate in decision making in Washington.

This article will examine the propositions (1) that the Constitution and U.S. laws have been interpreted and applied to these U.S. insular

political communities in a manner that is different from the way they have been interpreted and applied to the states of the United States, (2) that matters in these insular political communities should continue to be treated differently in the future and in particular that federal agencies can and should establish different regimes for these insular communities than those that govern the states, and (3) that these communities should have more autonomy under a newly-defined political relationship with the United States or should have some voting representation in the U.S. Congress.

II. The Status of "Territories" Under the U.S. Constitution

A. An Overview, with Preliminary Definitions

The first "territory" of the United States was the Northwest Territory, which was already being settled by immigrants from the original states at the time of the drafting of the United States Constitution in 1787. The status of this vast area was unsettled at the time, with Virginia claiming a substantial portion of it. Others argued that the land should be held by the federal government. Smaller states were concerned with the degree of representation in Congress that would be granted to the new states to be created in this area.[1]

In response to these different concerns, the framers adopted Article IV, Section 3 which provides the only language in the Constitution dealing with the question of territories. This "Territory Clause" provides that:

> The Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[2]

Subsequent judicial decisions have recognized broad Congressional power to administer territories. For example, an 1885 decision stated that Congress could pass legislation applicable to the territories "subject

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[1] Arnold H. Leibowitz, *The Applicability of Federal Law to Guam*, 16 Va. J. Int'l L. 21, 23 (1975) [hereinafter Leibowitz, *Guam*].

[2] U.S. Const. art. IV, § 3. The drafting history of this clause is described in Arnold H. Leibowitz, Defining Status 10-16 (1989) [hereinafter Leibowitz, Defining Status].

only to such restrictions as are expressed in the Constitution . . . ."[3] On the basis of this case and others discussed below, two principles have emerged: (1) the power of Congress comes not only from the Territory Clause, but also from other provisions of the Constitution, and (2) the Constitution imposes some restrictions on the power of Congress in relation to the civil rights of residents of the territories.[4]

1. "Unincorporated" and "incorporated" territories

The concepts of "unincorporated" and "incorporated" territories were introduced in the *Insular Cases*[5] decided by the United States Supreme Court in 1901. In these decisions, Justice Edward D. White formulated the view that if a government had the power to expand its territory by any means, then that power also included the right to establish and determine the status of the newly-acquired territory.[6] A newly-acquired territory does not, therefore, automatically become "incorporated" and does not achieve that status until Congress acts to "incorporate" it. In Justice White's view, the provisions of the Constitution are fully applicable to the residents of an incorporated territory, but not necessarily to those in an unincorporated territory. In the *Insular Cases*, the Court determined that Puerto Rico was an "unincorporated" territory, and, therefore, that the Uniformity Clause of the Constitution[7] was not applicable to Puerto Rico unless it was found to be a "fundamental" aspect of our constitutional system (which it was not).[8] Territories that have become formally "incorporated" are usually thought to be in a transition stage on their way to becoming a state,[9] although this linkage is not necessarily inevitable. All five of

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[3] Murphy v. Ramsey, 114 U.S. 15, 44 (1885).

[4] Leibowitz, *Guam*, supra note 1, at 26; *see infra* notes 138-41 and accompanying text.

[5] DeLima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

[6] Downes v. Bidwell, 182 U.S. 244, 287-344 (1901) (White, J., concurring); *see* Leibowitz, *Guam*, *supra* note 1, at 27.

[7] U.S. Const. art. I, § 8, cl. 1.

[8] *See* Leibowitz, *Guam*, *supra* note 1, at 28.

[9] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 268-69 (1990) (citing Dorr v. United States, 195 U.S. 138, 149 (1904), quoted *infra* note 61). Alaska and Hawai'i were, for instance, formally incorporated into the United States before they became states.

the current U.S.-flag insular political communities—American Samoa, Guam, the Northern Marianas, Puerto Rico, and the U.S. Virgin Islands—are now considered by the federal government's executive branch to be "unincorporated" territories.[10]

2. "Organized" and "unorganized" territories

An "organized" territory is one that has established a civil government under an organic act passed by Congress.[11] The civil government need not adopt any particular structure.[12]

Utilizing these definitions, Guam is an "organized" territory because it is subject to the terms of the Guam Organic Act of 1950.[13] Guam remains "unincorporated" because Congress has not taken steps to incorporate it.[14] American Samoa is an "unorganized," "unincorporated" territory—it has a legislature (*fono*) and an elected governor, but the operation of the civil government is not the result of the enactment of an organic act.

3. "Commonwealth"

The term "commonwealth" has several different meanings when used in different contexts. The Commonwealth of Nations consists of

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[10] *See infra* note 14 and accompanying text. During hearings before the House Committee on Interior and Insular Affairs, the Resident Representative of the Commonwealth of the Northern Marianas (CNMI) stated that "[t]he United States apparently intended this result because the Covenant makes no provision whereby the Northern Mariana Islands would be considered for statehood." He further noted that "[t]he idea of 'unincorporated' status, however, is a negative definition in that it stresses what we are not, i.e., that the Northern Mariana islands is not an 'incorporated' territory with the right to be considered for statehood, rather than clarifying what our status is." *Hearing on Federal Policies Regarding the Insular Areas Before the House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. (Apr. 10, 1986).

[11] Laurent B. Frantz, *States, Territories, and Dependencies*, 72 AM. JUR. 2d § 131, 401, 518.

[12] Although a legislature has sometimes been thought to be a necessary element, there have been some instances where the existence of a legislature was held not to be essential to the concept of an organized territory. *See* Interstate Commerce Commission v. United States, 224 U.S. 474 (1912).

[13] 64 Stat. 384 (codified at 48 U.S.C. § 1421-28e (1988)).

[14] The Virgin Islands is also unincorporated. *See* Granville-Smith v. Granville-Smith, 349 U.S. 1, 6 (1955); United States v. Husband R. (Roach), 453 F.2d 1054, 1058 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) (holding that the Panama Canal Zone is an unicorporated territory); Government of Virgin Islands v. Rijos, 285 F. Supp. 126, 129 (D.V.I. 1968).

independent sovereign nations formerly part of the British Empire. Kentucky, Massachusetts, Pennsylvania, and Virginia all refer to themselves as "Commonwealths" for historical reasons.

As used in connection with insular political communities affiliated with the United States, the concept of a "commonwealth" anticipates a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated. The commonwealth derives its authority not only from the United States Congress, but also by the consent of the citizens of the entity. The commonwealth concept is a flexible one designed to allow both the entity and the United States to adjust the relationship as appropriate over time. Puerto Rico and the Northern Marianas now have "commonwealth" status,[15] and Guam is currently seeking this status.[16] The Philippines was a "commonwealth" before it became independent in 1946. The precise meaning of this concept as applied to these entities is uncertain, however, and it may have different meanings as applied to each entity.[17] To illustrate the uncertainty, the Spanish name for the "Commonwealth of Puerto Rico" is "El Estado Libre Asociado de Puerto Rico" which translates to "Free Associated State of Puerto Rico."

Puerto Rico was an unincorporated territory until the 1950-52 period when it became a commonwealth.[18] In 1950, Congress offered the Puerto Ricans a "compact" to enable them to organize a government pursuant to a constitution of their own adoption.[19] The voters of Puerto Rico approved their compact on June 4, 1951, and their constitution was ratified on March 3, 1952.[20] Although Puerto Rico can amend its constitution without congressional approval, any amendment must be consistent with the 1950-52 Compact and the U.S. Constitution.[21] After this renegotiation of Puerto Rico's status was completed, Judge Calvin Magruder of the United States Court of Appeals for the First Circuit wrote that Puerto Rico's commonwealth status was "unprecedented in

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[15] *See infra* notes 148 and 192-94 and accompanying text.

[16] *See infra* notes 227-35 and accompanying text.

[17] *See infra* notes 142-223 and accompanying text.

[18] *See infra* notes 142-48 and accompanying text.

[19] Pub. L. No. 600, 64 Stat. 319 (1950) (codified at 48 U.S.C. §§ 731b-e (1988)).

[20] *See* 48 U.S.C. § 731d note (1988).

[21] *See* H.R. CONF. REP. No. 2350, 82d Cong., 2d Sess., at 1 (1952); H.J. Res. 430, 82d Cong., 2d Sess., 66 Stat. 327 (1952).

our American history [with] no exact counterpart elsewhere in the world."[22]

One difference that could be recognized between a "commonwealth" and a "territory" is that a "commonwealth" involves a relationship between the United States and the commonwealth entity that has developed through a negotiating process or other historical relationship and that cannot be altered unilaterally by Congress. The Commonwealth of the Northern Marianas was established by a "covenant" agreed upon in 1975 by Congress and the people of the Northern Marianas.[23] The Commonwealth argues that it would be improper for the United States to be allowed to alter some aspect of this negotiated relationship unilaterally.[24] The broad power that Congress can exercise over territories pursuant to the Territory Clause of the United States Constitution[25] should not, according to this view, apply to commonwealths. The federal courts have, however, interpreted the 1950-52 Compact between the United States and Puerto Rico to permit Congress unilaterally to make at least some new federal statutes applicable in Puerto Rico.[26] Although it is possible to view this continuing authority as a more restrained power exercised pursuant to a negotiated agreement instead of the plenary power Congress enjoys over territories under the Territory Clause, the United States Supreme Court continues to refer to the broad power of the Territory Clause.[27]

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[22] Calvin Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 5 (1953). In Examining Board v. Flores de Otero, the U.S. Supreme Court wrote that "Puerto Rico occupies a relationship to the United States that has no parallel in our history . . . ." 426 U.S. 572, 596 (1976). *See also* Jose A. Cabranes, *The Status of Puerto Rico*, 16 INT'L & COMP. L. Q. 531 (1967); Juan M. Garcia-Passalacqua, *The Legality of the Associated Statehood of Puerto Rico*, 4 INTER-AM. L. REV. 287 (1962).

[23] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (set out under 48 U.S.C. § 1681 note (1987), *reprinted in* 15 I.L.M. 651 (1976)) [hereinafter CNMI Covenant]; *see infra* notes 190-223 and accompanying text.

[24] *See infra* notes 200-03 and accompanying text.

[25] U.S. Const. art. IV, § 3 (quoted *supra* note 2).

[26] *See infra* notes 149-84 and accompanying text.

[27] *See* Harris v. Rosario, 446 U.S. 651 (1980) (discussed *infra* notes 175-77).

For the position that Congress's power comes from the negotiated agreement rather than the Territory Clause, see, e.g., Hodgson v. Union de Empleados de los Supermercados Pueblos, 371 F. Supp. 56 (D.P.R. 1974) (*infra* notes 169-71 and accompanying text); United States v. Quinones, 758 F.2d 40 (1st Cir. 1985) (*infra* notes 178-84).

Case law also indicates that the Commonwealth of Puerto Rico is governed by the U.S. Constitution with regard to the protection of fundamental individual rights. In 1974, a three-judge federal district court invalidated on constitutional grounds Puerto Rico's anti-abortion statutes holding that the "fundamental" guarantees of the Constitution apply to the Commonwealth under the 1950-52 Compact.[28]

Whether "commonwealths" within the U.S. political community have the capacity to participate in international organizations without Congressional approval is an unresolved question.[29] The CNMI Covenant allows the CNMI "on its request" to participate in "regional and other international organizations concerned with social, economic, educational, scientific, technical and cultural matters when similar participation is authorized for any other territory or possession of the United States under comparable circumstances."[30] In 1987, the Commonwealth made inquiries to the South Pacific Forum Fisheries Agency to determine whether it might be possible to join, but they were advised that they could not.[31]

B. The Scope of Congress's Power Under the Territory Clause[32]

The extent to which Congress has ultimate power over U.S. territories has been a subject of debate for most of the nation's history. As of 1888, the United States consisted of only thirty-eight states. Between 1889 and 1896, seven new states were admitted, but Oklahoma achieved statehood only in 1907, and New Mexico and Arizona became states in 1912. In 1958 and 1959, Alaska and Hawai'i became the forty-ninth and fiftieth stars on the flag.

Until they became states, the extent to which Congress had power over these territories and the extent to which federal law would be applied to them was a topic of frequent contention. Today the same questions are relevant to American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U. S. Virgin Islands.

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[28] Montalvo v. Colon, 377 F. Supp. 1332 (D.P.R. 1974). A similar result was reached more recently in Guam. *See infra* notes 92-94 and accompanying text.

[29] *See* MICHAEL REISMAN, PUERTO RICO & THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION (1975); Richard Camaur, *The Feasibility of an Identifiable Role for Puerto Rico in Foreign Affairs*, 42 GEO. WASH. L. REV. 798 (1974).

[30] CNMI Covenant, *supra* note 23, § 904(c).

[31] Interviews with Don Woodworth, attorney for the CNMI, Washington, D.C. (1989-present).

[32] U.S. Const. art. IV, § 3, cl. 2.

The earliest United States Supreme Court cases involving these issues indicated that Congress's power over the territories was plenary. In *National Bank v. County of Yankton*,[33] the Supreme Court had to decide the extent to which Congress could nullify a law passed by the Territory of Dakota. The territorial legislature had passed a law enabling Dakota's counties and townships to vote for giving aid to the railroad companies.[34] Subsequently, Congress passed an act disapproving of the territorial aid to the railroads unless the granting counties and townships were given in return stock shares of the railroad company.[35] In the ensuing litigation over whether Congress could pass such a law, the Court said:

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution
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> . . . *Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government.* It may make a void act of the territorial legislature valid, and a valid act void. *In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.* It may do for the Territories what the people, under the Constitution of the United States, may do for the States.[36]

The issue of Congressional power to legislate for territories was again raised in the case of *Murphy v. Ramsey*,[37] a dispute originating in the Territory of Utah. At issue was an act of Congress prohibiting bigamists

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[33] 101 U.S. 129 (1880).

[34] *Id.* at 130-31.

[35] *Id.* at 131-32 (quoting 17 Stat. 162).

[36] *Id.* at 133 (emphasis added).

[37] 114 U.S. 15 (1885).

and polygamists from registering to vote.[38] In justifying Congress's power to pass such a law, the Court said:

> The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. *But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress*; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it . . . . The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the United States was expressly reserved. *The personal and civil rights of the inhabitants of the Territories are secured to them, as to other-citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National*; their political rights are franchises which they hold as privileges in the Legislative discretion of the Congress of the United States.[39]

The strongest declaration of Congress's power over its territories was made in 1901 in a series of Supreme Court decisions now commonly referred to as the *Insular Cases*, which dealt with the application of tariff laws to the then-recently-acquired Territory of Puerto Rico.[40] Any thought that these controversial and venerable cases might be of only historical interest[41] was erased in 1990 when the Supreme Court cited

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[38] *Id.* at 26-30 (quoting Act of Mar. 22, 1882, 22 Stat. 30).

[39] *Id.* at 44-45 (emphasis added).

[40] De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

[41] The justification found in Downes v. Bidwell, 182 U.S. 244, 277 (1901), of the partial inapplicability of the Constitution in the territories has been described as "openly racist". LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 22. Leibowitz argues that the cases rely on "weak premises," and he favors Justice Harlan's dissent which

to them extensively in *United States v. Verdugo-Urquidez*.[42]

In the first of the *Insular Cases*, *De Lima v. Bidwell*,[43] the Court expressed the extent of Congress's control over newly acquired territories:

> Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a State upon an equality with other States; it may sell its public lands to individual

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would have extended the Constitution fully to the territories. *Id.* at 26.

The *Insular Cases* were also criticized in Justice Black's plurality opinion in Reid v. Covert, 354 U.S. 1 (1957), where he declared that "neither the cases nor their reasoning should be given any further expansion," *id.* at 14, and by the concurring opinion of Justice Brennan in Terrel Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 476 (1979) (Stewart, Marshall, Blackmun, JJ., joining), in which he quotes Justice Black's statement above.

[42] 494 U.S. 259 (1990). This case held that the Fourth Amendment does not apply to searches and seizures by U.S. agents of property owned by nonresident aliens located outside the United States. *Id.* at 264-75. The majority opinion contained the following paragraph:

> The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the *Insular Cases*, which held that *not every constitutional provision applies to governmental activity even where the United States has sovereign power. See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922) (Fifth Amendment right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Sixth Amendment grand jury provision inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawai'i); Downes v. Bidwell, 182 U.S. 244 (1901) ("revenue clauses of Constitution inapplicable to Puerto Rico"). In *Dorr*, we declared the general rule that in an unincorporated territory—one not clearly destined for statehood—Congress was not required to adopt "a system of laws which shall include the right of trial by jury, and that *the Constitution does not, without legislation and of its own force, carry such right to territory so situated.*" 195 U.S. at 149 (emphasis added). *Only "fundamental" constitutional rights are guaranteed to inhabitants of those territories. Id.* at 148; *Balzac*, supra, at 312-13; *see* Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976). If that is true with respect to territories ultimately governed by Congress, respondent's claim that the protection of the Fourth Amendment extend to aliens in foreign nations is even weaker. *And certainly, it is not open to us in light of the Insular Cases to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.*

Id. at 268-69.

[43] 182 U.S. 1 (1901).

> citizens or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, *and is subject to the disposition of Congress.*[44]

These powers were examined in greater detail in the most important of the *Insular Cases*, *Downes v. Bidwell*.[45] The *Downes* case tested the constitutionality of the part of the Foraker Act[46] that provided for the collection of duties upon goods imported to the United States from Puerto Rico.[47] The purpose of the duties were to produce revenues for the newly organized civil government of the island of Puerto Rico. Importer S.B. Downes & Co. challenged the tariff as being in violation of the U.S. Constitution which requires that "all duties, Imports and Excises shall be uniform throughout the United States."[48] In rejecting the importer's argument, the court drew a sharp distinction between "states" and "territories":

> It is sufficient to observe in relation to these three fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the *United States*, as a union of *States*, to be governed safely by representatives of the *States*; and even the provision relied upon here, that all duties, imports, and excises shall be uniform "throughout the United States," is explained by subsequent provisions of the Constitution, that "no tax or duty shall be laid on articles exported from any *State*," and "no preference shall be given by any regulation of commerce or revenue to the ports of one *State* over those of another; nor shall vessels bound to or from one *State* be obliged to enter, clear or pay duties in another." In short, the Constitution deals with *States*, their people, and their representatives.[49]

Thus, because "territories" were not the constitutional equivalents of "states," they were subject to greater Congressional control:

> *The power of Congress over the territories* of the United States *is general and plenary*, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States

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[44] *Id.* at 197 (emphasis added).
[45] 182 U.S. 244 (1901).
[46] Act of Apr. 12, 1900, 31 Stat. 77 (1900) (codified at 48 U.S.C. § 739 (1900)).
[47] 182 U.S. at 247-48 (quoting Act of Apr. 12, 1900, § 3).
[48] U.S. Const. art. I, § 8, cl. 1.
[49] 182 U.S. at 250-51.

> has power to acquire territory, and no power to govern it when acquired. The power to acquire territory . . . is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. . . . *Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments*; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its power, than by any express and direct application of its provisions.[50]

Congress also has the power to prescribe upon what terms the United States will receive the inhabitants of a territory and what their status shall be.[51] In the cases of Alaska, Florida, Louisiana, and the lands acquired from Mexico, special provisions were made in the treaties denying the right of U.S. citizenship until Congress by further action agreed to extend such to the inhabitants.[52]

The Court further stated that Congress had the authority to determine to what extent newly acquired territories would be covered by the Constitution:

> The practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that *the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct* . . . We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be in what Chief Justice Marshall termed the "American Empire."[53]

The Court did temper this language, however, by saying that the absence of Congressional action would not mean that the territorial inhabitants would be left naked of any Constitutional protection at all:

> Whatever may be finally decided by the American people as to the *status* of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that, in the meantime, awaiting that

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[50] *Id.* at 268 (citing Mormon Church v. United States, 136 U.S. 1 (1889)) (emphasis added).

[51] 182 U.S. at 279.

[52] *Id.* at 280.

[53] *Id.* at 278-79 (first emphasis added).

> decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens, *they are entitled under the principles of the Constitution to be protected in life, liberty, and property.*[54]

Congress may delegate its legislative power under the Territory Clause to federal executive agencies, as it deems fit,[55] and can also grant legislative powers to the territorial legislature.[56] Congress retains, however, the power to amend or abrogate the laws of the territorial legislature. Such power has been described as "an incident of sovereignty," which "continues until granted away,"[57] so that Congress's failure to reserve expressly in an organic act the power to amend or abrogate territorial legislation does not prevent it from exercising such power.

A crucial aspect of the Territory Clause is the dual role assigned to Congress. On the one hand, it is the legislative branch of the United States, limited by the Constitution. On the other hand, it acts as a local legislature.[58] Effective representation in the Congress has not, however, been accorded to the territories; all they have been deemed entitled to are nonvoting delegates.[59]

The full effect of the *Insular Cases* was thus to declare that (1) Congress has general and plenary power over the territories (which it can delegate to executive agencies), but that (2) these powers are limited by certain fundamental rights of the territorial inhabitants. Over the next few decades, subsequent court decisions illustrated the more specific application of these doctrines.

C. The Applicability of the U.S. Constitution in the U.S.-Flag Insular Political Communities

As mentioned above, a territory usually becomes "incorporated" only if it is destined to become a state.[60] Other territories remain

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[54] *Id.* at 283 (second emphasis added).

[55] *See, e.g.*, United States v. Husband R. (Roach), 453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972).

[56] *See infra* note 299 and accompanying text (discussing the power granted to the Alaska legislature).

[57] National Bank v. County of Yankton, 101 U.S. 129, 133 (1880).

[58] *See* Simms v. Simms, 175 U.S. 162 (1899).

> [I]n the territories Congress has the entire dominion and sovereignty, national and local, federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state, and may, at its discretion, entrust that power to the legislative assembly of the territory.

Id. at 168.

[59] *See infra* notes 119-33 and accompanying text.

[60] *See supra* note 9 and accompanying text.

"unincorporated" even though they have evolved into organized semi-autonomous self-governing political communities. In the 1990 decision of *United States v. Verdugo-Urquidez*, the United States Supreme Court restated the rule originally enumerated at the beginning of this century that only "fundamental" constitutional rights apply in unincorporated territories.[61] None of the existing U.S.-flag islands—American Samoa, Guam, the Northern Marianas, Puerto Rico, or the U.S. Virgin Islands—are "incorporated," but two of them (the Northern Marianas and Puerto Rico) have been denominated "commonwealths."[62] What, then, are the "fundamental" rights that apply to the residents of these island communities? Does the law that applies in a "commonwealth" differ from that which applies in other "unincorporated territories"?

One of the early attempts to define the category of rights that apply wherever the U.S. flag is flown is found in dicta from *Downes v. Bidwell*:

> We suggest, without intending to decide, that there may be a distinction between *certain natural rights*, enforced in the Constitution by prohibitions against interference with them, and what may be termed *artificial or remedial rights*, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, *Minor v. Happersett*, 21 Wall. 162, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some

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[61] 494 U.S. 259, 268-69 (1990).

> In *Dorr* [*v. United States*, 195 U.S. 138 (1904)], we declared the general rule that in an unincorporated territory—one not clearly destined for statehood—Congress was not required to adopt "a system of laws which shall include the right of trial by jury, and that *the Constitution does not, without legislation and of its own force, carry such right to territory so situated.*" 195 U.S. at 149 (emphasis added). Only "fundamental" constitutional rights are guaranteed to inhabitants of those territories. *Id.* at 148; *Balzac [v. Porto Rico*, 258 U.S. 298, 312-13 (1922)]; see *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).

Id.; *see also* Wabol v. Villacrusis, 898 F.2d 1381, 1390 n.18 (9th Cir. 1990).

[62] *See infra* notes 148 and 192-94 and accompanying text.

> of which have already been held by the States to be unnecessary to the proper protection of individuals.[63]

Justice Brown's opinion thus draws upon the concept of "natural rights" to define the constitutional rights that are "fundamental" and thus applicable in all U.S. territories.

Many of the subsequent cases that have grappled with this issue concern whether jury trials must be granted to accused persons in the territories, and these decisions conclude that a jury trial is not necessarily "fundamental" for this purpose. In a 1902 case involving the newly acquired Territory of Hawaii, the United States Supreme Court found that the manslaughter conviction of a defendant who was not indicted by a grand jury and was convicted by only nine out of twelve jurors (in accordance with the law of the previous Republic of Hawaii) was valid even though it was not in compliance with the requirements of the Fifth and Sixth Amendments.[64]

The Court ruled that until Congress enacted laws for the newly acquired territory, the existing laws of the previous government would apply as long as they did not violate "fundamental" rights:

> We would even go farther and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [grand jury indictment and unanimous jury verdict] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.[65]

This general waiver of Sixth Amendment rights for territorial residents is echoed in a subsequent Puerto Rico case:

> It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States . . . . But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the union.[66]

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[63] 182 U.S. 244, 282 (1901) (emphasis added).

[64] Territory of Hawaii v. Mankichi, 190 U.S. 197, 217-18 (1902).

[65] *Id.*

[66] Balzac v. Porto Rico, 258 U.S. 298, 304 (1921); *see also* Dorr v. United States, 195 U.S. 138 (1904) (refusing to require an indictment by a grand jury in a criminal libel case in the Philippines); Ocampo v. United States, 234 U.S. 91 (1914) (holding

The applicability of the Sixth Amendment to trials in American Samoa and the Northern Marianas has been addressed in two more recent cases. Until 1977, residents of American Samoa had no right to a jury trial in a criminal case, but the absence of this protection was challenged by Jake King, a non-Samoan citizen residing in American Samoa who was charged with willful failure to pay income taxes and to file annual tax returns.[67] After King was found guilty of the allegations by the High Court of American Samoa without benefit of a jury trial,[68] he appealed his conviction to the District Court for the District of Columbia, claiming that the Secretary of the Interior had failed to provide the Constitutional guarantee of the right of trial by jury in a criminal proceeding.[69]

The district court dismissed the action for lack of jurisdiction,[70] but the United States Court of Appeals for the District of Columbia reversed and remanded the matter back to the district court, instructing it to determine whether the implementation of a jury system was "practicable" in light of "the Samoan mores and *matai* culture with its strict societal distinctions."[71]

District Judge Bryant then took the testimony of thirteen witnesses including eight native Samoans, four government officials, and the noted anthropologist, Margaret Mead.[72] None of those testifying favored immediate implementation of the jury system,[73] but the judge nonetheless found that because of the educational advances in American Samoa and the use of other aspects of the Anglo-American legal system it was practical to implement the jury system there.[74] Juries are thus

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that jury trial was not required in a misdemeanor criminal libel case in Puerto Rico); Government of Virgin Islands v. Rijos, 285 F. Supp. 126, 129 (D.V.I. 1968) ("It is settled that the right to trial by jury and Grand Jury presentments are not among those fundamental rights and therefore do not apply to the Virgin Islands without Congressional approval.").

[67] King v. Morton, 520 F.2d 1140, 1142 (D.C. Cir. 1975).

[68] *Id.* (citing Government of American Samoa v. King, Crim. Case No. 785 (High Ct. Am. Samoa, Trial Div., decided Dec. 11, 1972)).

[69] *Id.* at 1143.

[70] *Id.*

[71] *Id.* at 1147.

[72] Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L. J. 220, 262-63 (1980) (citing from the record).

[73] *Id.*

[74] King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977).

now available in American Samoa and appear to be working properly.[75]

A similar question arose in the Northern Marianas, whose Covenant[76] provides an exception to the Constitution's requirements for jury trials.[77] The Constitution of the Northern Mariana Islands provides that jury trials *may* be authorized by the legislature for civil and criminal cases,[78] and the legislation then in force authorized jury trials in the Marianas only if the offense was punishable by more than five years imprisonment or a $2000 fine.[79] This restriction was challenged by Daniel Atalig who was accused of possessing marijuana, an offense punishable by one year imprisonment or $1,000 fine or both.[80]

Rejecting the district court's holding that the *Insular Cases* had been overruled by *Duncan v. Louisiana,*[81] the United States Court of Appeals for the Ninth Circuit held that the *Insular Cases* were appropriate in this setting.[82] Using "a cautious approach," the court held that the provisions of the CNMI Covenant and Constitution restricting the right to a jury trial did not violate "either the Sixth or Fourteenth Amendments to the Constitution."[83] The court noted that both the CNMI Covenant and Constitution provided other procedural safeguards for criminal defendants.[84] In rejecting the argument that *Duncan* overruled the *Insular Cases,* the Court of Appeals concluded that the

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[75] Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study,* 2 U. HAW. L. REV. 337, 376 (1981) (citing Damon, *The First Jury Trials in American Samoa,* 5 SAMOAN PAC. L. J. 31, 38 (1979)).

[76] CNMI Covenant, *supra* note 23, art. V, § 501. "[P]rovided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law except where required by local law." *Id.*

[77] U.S. CONST. amends. VI, VII, & XIV.

[78] N. MAR. I. CONST. art. I, § 8.

[79] Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 684 (9th Cir. 1984) (citing 5 TRUST TERR. CODE § 501(1).

[80] *Id.* (citing 63 TRUST TERR. CODE § 292(3)(c)).

[81] 391 U.S. 145 (1968). *Duncan* held that the right to a jury trial is a "fundamental" right under the 14th Amendment's Equal Protection Clause. *Id.* at 157-58

[82] 723 F.2d at 688.

> The Insular Cases held that the Fifth Amendment right to grand jury indictment and the Sixth Amendment right to trial by jury are nonfundamental rights that do not apply to unincorporated territories. E.g., Balzac v. Porto Rico, 258 U.S. 298, 309 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).

Id.

[83] *Id.* at 690.

[84] *Id.*

notion of "fundamental rights" for purposes of determining whether rights apply in the territories requires a different analysis from that which applies to the question of whether an element in the Bill of Rights applies to the states under the incorporation doctrine.[85] No specific test is provided for future guidance, but the court emphasizes that respect should be given to the "cultures, traditions, and institutions" of the insular community and that the resulting procedure should be fair.[86]

Another area of uncertainty concerns the applicability of all aspects of the Fourteenth Amendment's Due Process and Equal Protection Clauses to the U.S. insular political communities. The Supreme Court touched upon this issue in the case of *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*[87] in which it invalidated a Puerto Rico statute that said only U.S. citizens could be civil engineers.[88] In this decision, the Court briefly reviewed the ambiguity that exists regarding Puerto Rico's status,[89] but stated explicitly that "the protection accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico."[90]

In 1990, the Guam Legislature enacted a statute restricting access to abortions.[91] The attorneys attempting to defend this statute in the Guam Federal District Court argued that the right to privacy which protects the right to obtain an abortion under the Constitution[92] does not apply in Guam because it is a territory.[93] The U.S. district court

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[85] *Id.* at 689.

[86] *Id.* The *Atalig* result was affirmed by the CNMI Supreme Court in Northern Mariana Islands v. Peters, Appeal No. 90-026 (CNMI Jan. 8, 1991).

See also United States v. Christian, 660 F.2d 892, 898-99 (3d Cir. 1981) (relying on the *Insular Cases* for the proposition that the Fifth Amendment grand jury requirement does not apply in the Virgin Islands).

[87] 426 U.S. 572 (1976).

[88] *Id.* at 599-606.

[89] *Id.* at 599-601.

[90] *Id.* at 600 (citing Downes v. Bidwell, 182 U.S. 244, 283-84 (1901); Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); Reid v. Covert, 354 U.S. 1 (1957); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).

[91] Pub. L. No. 134 (enacted Mar. 19, 1990, signed into law Mar. 23, 1990).

[92] *See* Roe v. Wade, 410 U.S. 113 (1973).

[93] In 1968, Congress amended Guam's Bill of Rights to state that the Due Process and Equal Protection Clauses in the Fourteenth Amendment of the Constitution would have "the same force and effect" in Guam "as in the United States or in any State of the United States." 48 U.S.C. § 1421 b(u) (1988). The attorneys defending Guam's

judge rejected this claim and struck down the Guam statute,[94] but the fact that this argument was made by the Guam Governor illustrates the continuing uncertainty about how the Constitution applies in the U.S.-flag islands.

A result that is based on a different approach to this issue was reached by the United States Court of Appeals for the Ninth Circuit in the case of *Wabol v. Villacrusis*,[95] which involved the important issue of whether the CNMI can restrict the acquisition of permanent and long-term interests in land to "persons of Northern Marianas descent."[96]

Although this nonalienation-of-land provision has been criticized as being a violation of the rights guaranteed under the Constitution,[97] it

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abortion statute argued that the meaning of these clauses as applied to Guam was frozen in time as of 1968, and therefore that no post-1968 judicial decision, i.e., Roe v. Wade (1973), would apply unless Congress affirmatively ruled that it should.

[94] *See* Guam Society of Obstetricians and Gynecologists v. Ada, D.C. No. CV-90-00013-ARM, slip op. at 16-17, *affirmed*, 962 F.2d 1366 (9th Cir. 1992). District Judge Alex R. Munson characterized the argument presented, *supra* note 93, as a "singular reading of the Organic Act," *id.* at 12 n.6, and said that it appeared to him that:

> The express words of the statute [48 U.S.C. § 1421 b(u)] demonstrate that Congress intended that the people of the Territory of Guam would from 1968 onward be afforded the full extent of the constitutional protections added to Guam's Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court.

Id. at 13-14.

Neither counsel nor Judge Munson addressed whether the Due Process and Equal Protection Clauses would apply of their own force in Guam, without regard to whether Congress had enacted the 1968 amendments. *See also supra* note 28 and accompanying text.

[95] 898 F.2d 1381 (9th Cir. 1990), *as amended*, 908 F.2d 411, *as amended*, 958 F.2d 1450, *cert. denied sub nom* Philippine Goods, Inc. v. Wabol, 61 U.S.L.W. 3419 (Dec. 7, 1992).

[96] *Id.* at 1382-83. This limitation is found in the CNMI Const. art. XII, §§ 1, 3. Art XII, § 4 defines "persons of Northern Marianas descent" as follows:

> A person of Northern Marianas descent is a person who is a citizen or national of the United States who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Id. A similar provision is found in the AM. SAMOA CODE ANN. § 27.0204 (1987).

[97] James A. Branch Jr., *The Constitution of the Northern Mariana Islands: Does a Different*

was insisted upon by the Congress[98] as a continuation of the U.S. policy in Micronesia which had prohibited alienation of similar long interests in land to non-Micronesians without the approval of the High Commissioner of the Trust Territory.[99]

The Ninth Circuit's opinion, written by Judge Cecil Poole, framed the question in *Wabol* as follows: "whether the constitutional guarantee of equal protection of the laws limits the ability of the United States and the Commonwealth to impose race-based restrictions on the acquisition of permanent and long-term interests in Commonwealth land."[100] The court began its answer by repeating the principle derived from the *Insular Cases* that "the entire Constitution applies to a United States territory *ex proprio vigore*—of its own force—only if the territory is 'incorporated.'"[101] It then asked the further question, "Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress's power to exclude from operation in the territory under Article IV, section 3 [the Territory Clause]?"[102]

Cultural Setting Justify Different Constitutional Standards, 9 DEN. J. INT'L L. & POL'Y 35, 60 (1980):

> Since these land restrictions are based in fact on purely racial considerations, and since they would deprive many sellers of access to markets, and since they would amount to a "taking," this nonalienation of land provision would seem to violate at least three provisions of the United States Constitution: (a) the equal protection clause of the fourteenth amendment; (b) the privileges and immunities clause of the fourteenth amendment, Article IV, Section 2; and (c) the fifth amendment prohibition against the taking of property without just compensation.

Id.

[98] *See* Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L J. 1373, 1406 (1977). This restriction is required by section 805 of the CNMI Covenant, *supra* note 23. *See* Arnold H. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L. L.J. 19, 70 (1981).

[99] *See* WILLINS & SIEMER, *supra* note 98, at 1407 (citing Trust Terr. Code tit. 57 § 1110.1 (1970)). The United States insisted upon this prohibition on land alienation to protect the people of the Northern Mariana Islands from exploitation. *Id.* at 1406. This protection had three goals: (1) "to protect the culture and traditions" of the CNMI; (2) "to promote their economic advancement;" and (3) to minimize economic dislocation. *Id.* This provision was thought necessary in view of the experiences on Guam, where more than half of the private land was alienated from the native population. *Id.*

[100] 898 F.2d at 1382.

[101] *Id.* at 1390 (citing Balzac v. Porto Rico, 258 U.S. 298 (1922)).

[102] 898 F.2d at 1390.

To answer this question, Judge Poole reviewed the *Atalig* analysis[103] and agreed that the word "fundamental" under the Territory Clause has a different meaning than it has under the Equal Protection Clause:

> What is fundamental for purposes of Fourteenth Amendment incorporation is that which "is necessary to an Anglo-American regime of ordered liberty." *Duncan* [*v. Louisiana*] 391 U.S. at 149-50 n.14. In contrast, "fundamental" within the territory clause are "'those . . . limitations in favor of personal rights' which are 'the basis of all free government.'" *Atalig*, 723 F.2d at 690 (quoting *Dorr v. United States*), 195 U.S. 138, 146, 147 (1904)). In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this international sense.[104]

Judge Poole then took the test from *King v. Morton*,[105] the case involving jury trials in American Samoa, which required a determination whether "this particular constitutional guarantee would be impractical and anomalous in the Commonwealth and therefore should not be imposed."[106] Because the scarce land in the Northern Marianas plays a "vital role . . . in the preservation of NMI social and cultural stability"[107] and because the United States made a "solemn and binding undertaking memorialized in the Trusteeship Agreement" to preserve local culture and land in the Marianas,[108] requiring the free alienation of land by "interposing" the constitutional requirements of the Equal Protection Clause "would be both impractical and anomalous in this setting."[109]

> *The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures* . . . . Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes

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[103] *Id.* at 1390-91.

[104] *Id.* at 1390.

[105] 520 F.2d 1140, 1147 (D.C. Cir. 1975) (quoting Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).

[106] 898 F.2d at 1391.

[107] *Id.* at 1391.

[108] *Id.* at 1392.

[109] *Id.* at 1392.

> toward property and our commitment to the ideal of equal opportunity in its acquisition. *We cannot say that this particular aspect of equality is fundamental in the international sense.*[110]

The court also felt that the role of Congress was important in defining the proper balance of rights and was heavily influenced by the decision of Congress to authorize the nonalienation provision.[111]

D. Summary

The analysis in this section has focused on the problem areas, but it should also be emphasized that most of the constitutional rights accorded to U.S. citizens in the fifty states also apply to residents of the U.S.-flag insular political communities. In *Territory of Hawaii v. Mankichi*,[112] for instance, although the Court held that the rights to grand jury indictment and jury trial were not fundamental in nature,[113] its opinion stated that "most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply [to the territory] from the moment of annexation."[114]

More recently, the Court held in 1979 that the constitutional requirements of the Fourth Amendment's protection against unreasonable searches and seizures apply in Puerto Rico,[115] and indicated in that

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[110] *Id.* at 1392 (emphasis added). In an apparent effort to address the statements in Downes v. Bidwell and *Flores de Otero* (quoted *supra* notes 63 and 90), Judge Poole offered the following statement:

> It is important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

Id. at 1390 n.19.

[111] *Id.* at 1392.

[112] 190 U.S. 197 (1903).

[113] *Id.* at 217-18.

[114] *Id.* at 217-18; *see also supra* note 63 and accompanying text (quoting Downes v. Bidwell). An attempt to provide a comprehensive overview of this subject can be found in GOV'T ACCT. OFF., U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION (June 1991).

[115] Terrol Torres v. Commonwealth of Puerto Rico, 442 U.S. 465 (1979).

time period, effectively approving the applicant's use.[250] Removing the 180-day time period would thwart the possibility that a grossly incompatible use could be approved by default. Conversely, the intent of the 180-day provision makes the agency more responsive to the public and protects applicants from undue administrative delay.[251] Even with the 180-day provision, applicants have experienced administrative delays of years before receiving permission to build.[252] Removal of the 180-day requirement would give the agency license to increase delays in the application process and is inadvisable.

Twin House and Senate bills proposed a different approach to modifying residential use of the Conservation District. House Bill 107, introduced by Representative Thielen, and Senate Bill 1760, introduced by Senator Koki, proposed the elimination of "conditional use."[253] Under the Koki-Thielen proposal the Board could approve only permitted uses.[254] Furthermore, the Koki-Thielen proposal would have removed the term "residential use" from the permitted uses listed under Section (c)(3).[255] The effect of the Koki-Thielen proposal was to eliminate new residential construction entirely.

The Koki-Thielen proposal swept too broadly by radically reducing the powers of the Board and, perhaps for this reason, failed to pass. By removing the discretionary powers of the Board, the proposal would have necessitated the D.L.N.R. to return to management by a comprehensive list of permitted uses.[256] The theory behind the elimination

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[250] AUDITOR, *supra* note 6, at 24.

[251] *See supra* notes 114-16 and accompanying text.

[252] Both the Fazendin and Hurst cases are examples of long delay prior to an applicant receiving permission to build. The legislature originally wrote the 180-day provision before the institution of contested case hearings and Environmental Impact Statements. The law now provides for a 90-day extension when the law requires an environmental impact statement or when an applicant requests a contested case hearing. HAW. REV. STAT. § 183-41(a) (1985).

[253] H.R. 107, 16th Leg., Reg. Sess.; S. 1760, 16th Leg., Reg. Sess. (1991).

[254] *Id.*

[255] S. 1760, at 4, l. 11, 16th Leg., Reg. Sess. (1991).

[256] *See supra* notes 124-31. One effect of the institution of the discretionary "conditional use" was to eliminate the unwieldy procedure of having a comprehensive list of permitted uses. In practice, not every possible use could be anticipated, thus whenever a new use would be proposed, the rules would have to be amended to allow it. Moreover, under a comprehensive list of permitted uses, the Board would be compelled to approve an inappropriate use so long as it was technically permitted. When the D.L.N.R. adopted 1978 Regulation No. 4, it was thought the greater

of a comprehensive list of permitted uses and the introduction of conditional use was the impossibility of anticipating every possibility and the need for administrative flexibility.[257] Representative Thielen contends that Board approval should be confined to permitted uses only.[258] She explains that the language of *Hawaii Revised Statutes* section (c)(3)[259] provides sufficient flexibility for the Board to approve unforeseen uses, even if conditional use were eliminated entirely.[260] Rather than eliminate administrative flexibility in the regulatory framework, a better choice would be to give more guidance to the discretionary process. The legislature could provide guidance through funding a new comprehensive plan for the Conservation District[261] or through direct legislative statements.

Representative Thielen also introduced a second bill relating to Mount 'Olomana.[262] The Legislature passed the bill, House Bill 2107, on April 26, 1991.[263] It directed the Board to take immediate and necessary action to place all Conservation District lands on Mount 'Olomana in the protective subzone.[264] Governor Waihee vetoed the bill on June 26, 1991, because the Board had already directed its staff to place all Conservation District lands on Mount 'Olomana into the protective subzone and designated Mount 'Olomana as a significant

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flexibility of the discretionary conditional use process would streamline and improve management of the Conservation District. *See* Interview with Roger C. Evans, Administrator, Hawaii State Department of Land and Natural Resources, in Honolulu, Haw. (Apr. 19, 1991).

[257] *Id.* Mr. Evans, who participated in the 1978 revision of Regulation No. 4, commented that as part of his research he studied jurisdictions which had lists of hundreds of permitted uses and found such schemes of land use management unwieldy. *Id.*

[258] Telephone Interview with Cynthia Thielen, Hawaii State Representative (Dec. 2, 1991).

[259] Section (c)(3) provides that the department may specify land uses within any forest and water reserve zone "which may include but are not limited to" permitted uses. HAW. REV. STAT. § 183-41(c)(3) (1988).

[260] Telephone Interview with Cynthia Thielen, *supra* note 258.

[261] The most recent Comprehensive plan for the Conservation District was written in 1977. The 1977 plan was hardly comprehensive; it addressed forestry, water, wildlife, state parks, and aquatic life. It did not mention residential use, nor does it provide guidance to the Board on questions of development in general. *See* D.L.N.R., Conservation District Plan O'ahu (1977).

[262] H.R. 2107, 16th Leg., Reg. Sess. (1991).

[263] *Id.*

[264] *Id.*

geological and unique area.[265] In addition, the Governor stated that it was "bad policy for the Legislature to pass session laws that are, in essence, actually resolutions, but put into the form of a law."[266]

Changing Mount 'Olomana Conservation District lands from general to protective subzone would mean that the Board must apply the most restrictive standards to applications for use.[267] A landowner with nonconforming status would have a right to build regardless of the subzone.[268] Assuming a landowner has a legitimate claim to nonconforming status, the state would still have to acquire the property to prevent residential construction.[269]

B. Auditor's Proposals

The 1990 Legislature requested the State Auditor to review D.L.N.R. regulations and procedures regarding residential use in the Conservation District.[270] Completed in January 1991, the Auditor's report suggests that the Legislature eliminate prospective nonconforming use.[271] Within the Auditor's sample of fourteen residential use applications, the Report reveals the Board had incorrectly conferred nonconforming status on three.[272] The Auditor recommends that the D.L.N.R. rules governing nonconforming use be made consistent with the definition of nonconforming use in the statute.[273] The Auditor points out that D.L.N.R. rules expand the definition of nonconforming to include

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[265] Waihee, *supra* note 163.

[266] *Id.*

[267] *See supra* notes 42-45 and accompanying text.

[268] See discussion of nonconforming status *supra* notes 60-67 and accompanying text.

[269] H.R. 139, 16th Leg., Reg. Sess. (1991) (proposing budget of appropriation $7,000,000 for land acquisition on Mount 'Olomana).

[270] AUDITOR, *supra* note 6, at 1.

[271] *Id.* at 24.

[272] *Id.* at 23. The Auditor asserted:

> In the first case, the office erred by giving nonconforming status to a property that was not included in the conservation district until 1969. Prior to that, the land had been designated agricultural and in 1968 the parcel had also been subdivided from a larger lot. In the second case, the office gave nonconforming status to property that had been enlarged by the purchase in 1967 of a separate plot of 2,229 square feet. In the third case, the office incorrectly granted nonconforming status to a lot in the general subzone that had been formed by consolidating two adjoining properties.

Id.

[273] *Id.* at 16.

difficult questions arise, as the discussion of *Wabol* above[141] explains, when Congress is acting to protect the cultural identity of an island community and restricts freedoms that exist in the states to achieve that result.

B. Limitations Based on Agreements with the Inhabitants of the Islands

If the Congress agrees to a negotiated compact or covenant with an island community, does that agreement serve to restrict the power of subsequent Congresses to legislate under the Territory Clause? This question raises complicated issues of constitutional and international law and does not seem to have a definitive answer. The better view is that a compact or covenant should have the capacity to restrain subsequent Congresses, because that is the only way to provide the proper respect owed to the inhabitants of a U.S.-flag political community and the autonomy they deserve and to meet the responsibilities owed to them under international law. This question has been raised in particular regarding Puerto Rico's 1950-52 compact and the Northern Marianas' 1975 covenant, and these two situations will be examined in turn.

1. Puerto Rico

Puerto Rico was acquired by the United States from Spain in 1898 after the Spanish-American War.[142] The U.S. military governed the island until Congress passed the Foraker Act,[143] which provided for the establishment of a local government. Initially, the Puerto Rico political structure was headed by appointees of the President, and locally passed legislation could be vetoed by the President or by Congress. In 1917, Congress passed an Organic Act of Puerto Rico,[144] granting citizenship to most Puerto Ricans and providing some local autonomy,[145] but Puerto Rico remained a "territory" subject to Congress's control.[146]

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[141] *See supra* notes 95-111 and accompanying text.

[142] Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (1898).

[143] 31 Stat. 77 (1900) (codified at 48 U.S.C. § 731 (1900)).

[144] Pub. L. No. 368, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 731-916 (1988)).

[145] *See* Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 434 (3d Cir. 1966).

[146] *See, e.g.*, Cases v. United States, 131 F.2d 916 (1st Cir. 1942) (describing Puerto Rico as an organized but unincorporated territory and stating that Congress's power over such a territory is plenary "except as limited by express constitutional restrictions").

In fact, however, between 1898 and 1950, Congress never used its power to annul any law enacted by Puerto Rico's legislature. David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452, 458 (1985).

By 1950, however, the local pressure for greater autonomy led Congress to enact a law offering the Puerto Rican people a compact whereby they could establish their own constitution and government.[147] Puerto Rico accepted the compact and drafted its own constitution which was approved by Congress on July 3, 1952.[148]

After Congress bestowed the status of "Commonwealth" upon Puerto Rico, a number of cases discussed whether this new status limited Congress's ability to control Puerto Rico. These cases are discussed in some detail because they illustrate a spectrum of viewpoints on this issue.

A year after the compact was signed, the federal courts had to decide the validity of an order by Puerto Rico's Secretary of Agriculture, acting pursuant to a statute of the Puerto Rico legislature, fixing maximum prices for rice.[149] In the initial proceeding, Acting District Judge Ortiz said that the act of Congress[150] setting in motion the Puerto Rico compact process could not be altered unilaterally by either Congress or the Puerto Rico legislature.[151] After this judge denied a motion to enjoin the Secretary of Agriculture's action, an appeal was immediately taken to the United States Court of Appeals for the First Circuit which affirmed the judgment.[152] In an opinion written by Chief Judge Calvin Magruder, who had a long interest in Puerto Rican affairs,[153] the court indicated that Puerto Rico was a new political entity and should be considered to be a "state" at least with regard to the federal statute regulating three-judge courts.[154] The court reached this conclusion even though the United States Supreme Court had previously ruled that this statute did not apply to the Territory of Hawaii.[155]

When the case went back to the district court, Judge Ruiz-Nazario stated, "Puerto Rico is, under the terms of the compact, sovereign over matters not ruled by the Constitution of the United States. Indeed,

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[147] Pub. L. No. 600, 64 Stat. 319 (1950).

[148] 66 Stat. 327 (1952).

[149] Mora v. Torres, 113 F. Supp. 309 (D.P.R. 1953).

[150] Pub. L. No. 600, 64 Stat. 319 (1950).

[151] Mora v. Torres, 113 F. Supp. at 313.

[152] Mora v. Mejias, 206 F.2d 377, 388 (1st Cir. 1953).

[153] *See, e.g.*, Calvin Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1 (1953).

[154] 206 F.2d at 387-88 (referring to 28 U.S.C. § 2281).

[155] Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 374-80 (1949).

not only the legislative history of the compact but governmental action supports this conclusion.''[156]

He then quoted from a U.S. document submitted to the United Nations which states that "Puerto Rico shall have . . . freedom from control or interference by the Congress in respect of internal government and administration . . . .''[157] Even more significantly, the court quoted a statement by a U.S. representative to the United Nations Committee on Information from Non-Self Governing Territories to the effect that a "compact" under U.S. law is a document of greater magnitude than even a treaty:

> A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and the Puerto Rican people. *A compact, as you know, is far stronger than a treaty.* A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.[158]

The understanding that Puerto Rico now has substantial self-governing autonomy was given greater clarity in *Figueroa v. People of Puerto Rico*.[159] In this case, Chief Judge Magruder of the United States Court of Appeals for the First Circuit stated that the new Puerto Rican Constitution was "not just another Organic Act of the Congress''[160] but rather "stands as an expression of the will of the Puerto Rican people''[161] and can be amended unilaterally by them "without leave

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[156] Mora v. Mejias, 115 F. Supp. 610, 612 (D.P.R. 1953).

[157] *Id.* (quoting from U.N. Doc. A/AC 35/L 121, Annex II). The full statement as quoted by the court is as follows:

> By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by Judicial decision. Those laws which directed or authorized interferences with matters of local government by the Federal Government have been repealed.

Id. No specific examples of repealed legislation were provided in this opinion.

[158] *Id.* (quoting a statement of Mason Sears on Aug. 28, 1953); *see infra* notes 303-12 and accompanying text.

[159] 232 F.2d 615 (1st Cir. 1956).

[160] *Id.* at 620

[161] *Id.*

of Congress"[162] to clarify what procedural protections will be provided in Puerto Rican courts.

The United States Court of Appeals for the Third Circuit examined these issues in a 1966 case,[163] and acknowledged that Puerto Ricans have "powers of self government not characteristic of the sovereignty exercisable by citizens of a territory."[164] Nonetheless, the court ruled that the word "territory" means different things in different contexts, and that Puerto Rico remained a territory susceptible to Congress's power under the Territory Clause, Article IV, Section 3, Clause 2.[165]

Two years later, in 1968, in the course of a decision holding that the government of Puerto Rico had sovereign immunity,[166] Chief Judge Cancio of the United States District Court for the District of Puerto Rico stated that Puerto Rico's status is not "that of a Territory, unincorporated or incorporated . . . ."[167] He further stated: "The Commonwealth of Puerto Rico is a body politic which has received, through a compact with the Congress of the United States, *full sovereignty over its internal affairs* in such a manner *as to preclude a unilateral revocation*, on the part of Congress, of that recognition of powers.[168]

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[162] *Id.*

[163] Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431 (3d Cir. 1966).

[164] *Id.* at 434. The court went on to say:

> They were enabled thereby to decide exclusively upon the number of branches of government, the extent of the powers of each branch, the method of election or appointment of personnel in each branch, the duration of terms of office of members of each branch, and the division of power as between each of the said branches.
>
> There can be no doubt that as a matter of political and legal theory, and practical effect, *Puerto Rico enjoys a very different status from that of a totally organized but unincorporated territory, as it formerly was.* The government of the Commonwealth derives its powers not alone from the consent of Congress, but also from the consent of the people of Puerto Rico. However, under the terms of the "compact" the people of Puerto Rico, do not exercise the full sovereignty of an independent nation, since they do not have control of their external relations with other nations. Further, as United States citizens the citizens of Puerto Rico are assured that their right to due process of law is protected by the federal Constitution.

Id. (emphasis added).

[165] *Id.* at 436.

[166] Alcoa Steamship Co. v. Perez, 295 F. Supp. 187 (D.P.R. 1968), *aff'd*, 424 F.2d 433 (1st Cir. 1970).

[167] 295 F. Supp. at 196-97.

[168] *Id.* at 197 (emphasis added); see also Chief Judge Cancio's comment in United

The question of Congress's power over Puerto Rico came up more directly in the 1974 case of *Hodgson v. Union de Empleados de los Supermercados Pueblos*.[169] Chief Judge Cancio held in this case that federal labor laws *did apply* to Puerto Rican union activities affecting commerce, just as they would apply in a state.[170] In the course of reaching this decision, however, he explained that Congress's power over Puerto Rico does *not* emanate from the Territory Clause but stems instead from the 1950-52 compact which was voluntarily entered into by the people of Puerto Rico and the United States. As a result of this compact process,

> Puerto Rico ceased being a Territory of the United States subject to the plenary powers of Congress as provided in Article IV, Section 3, Clause 2 of the Federal Constitution. From July 25, 1952, in which the Commonwealth of Puerto Rico was born, Puerto Rico ceased being governed by the unilateral will of the Congress; now it is being governed by the express, though generic, consent of its people, through a compact with Congress. *Whatever authority was to be exercised over Puerto Rico by the Federal government would emanate thereon, not from Article IV of the Constitution, but from the Compact itself*, voluntarily and freely entered into by the people of Puerto Rico, even without an express recognition of its sovereignty, and the Congress; *a compact which cannot be unilaterally revoked either by Congress or by the people of Puerto Rico*.[171]

States v. Amy Valentine:

> It is only the essential provisions [of the compact] which cannot be revoked by one party acting alone: i.e., the provisions which establish Puerto Rico's status as a commonwealth with plenary domestic authority, its association with the United States, the United States citizenship of its people, and such favorable concessions as its fiscal autonomy.

288 F. Supp. 957, 981 n.24 (D.P.R. 1968). "Peripheral" provisions of the compact, such as those dealing with the federal district court, can be changed without affecting "the inviolability of the compact." *Id.*

[169] 371 F. Supp. 56 (D.P.R. 1974).

[170] *Id.* at 61.

[171] *Id.* at 59 (emphasis added). Continuing with his analysis, Judge Cancio attempted to define the boundary of Congressional power over Puerto Rico:

> The Court sees the situation today as follows: Since the creation of the Commonwealth and the recognition by the Congress of the right of the People of Puerto Rico to form their own local government and govern themselves in all local matters, recognizing "in the nature of a compact" the Commonwealth's authority over its own local affairs, Congress ceased having authority over these local matters which now can be dealt with only by the Commonwealth in the exercise of its local authority, not ceded by Congress as a mere act of grace

Also in 1974, the United States Court of Appeals for the First Circuit reaffirmed the proposition that Congress could pass laws of general applicability to the entire country and have them apply also in Puerto Rico, without any prior consent of the Puerto Rico Legislature.[172]

Two decisions were handed down by the United States Supreme Court in 1978 and 1980 that continue to raise questions about Puerto Rico's status. In *Califano v. Torres*,[173] the Court ruled that Congress could provide lower Social Security benefits to the elderly, blind, and handicapped who live in Puerto Rico based on the following reasons:

> First, because of the unique tax status of Puerto Rico, its residents do not contribute to the public treasury. Second, the cost of including Puerto Rico would be extremely great—an estimated $300 million per year. Third, inclusion in the SSI program might seriously disrupt the Puerto Rican economy.[174]

This decision thus indicates that Puerto Rico is different from the states and can be dealt with on an ad hoc unilateral basis by Congress.

The same conclusion was reached two years later in *Harris v. Rosario*[175] when the Court held that the same three reasons allowed Congress to discriminate against Puerto Rican residents with regard to the program of Aid to Families with Dependent Children.[176] This decision is perhaps even more troubling because the per curiam opinion states that under the Territory Clause Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[177]

> under Article IV of the Constitution, as it did to a certain extent in 1900 and 1917 in the Organic Acts, but as a compact with the people of Puerto Rico. Consequently, as far as local commerce (as distinguished from interstate commerce) is concerned, Congress is barred from regulating it in the manner it used to before 1952 and still can do in relation with the territories. *By entering in the compact between 1950 and 1952, Congress agreed to limit itself permanently from interfering in the local affairs of the people of Puerto Rico.*

Id. at 60 (emphasis added).

[172] Caribtow Corp. v. Occupational Safety and Health Review Commission, 493 F.2d 1064 (1st Cir. 1974) (citing Moreno Rios v. United States, 256 F.2d 68, 71 (1st Cir. 1958), and the Puerto Rico Federal Relations Act, 48 U.S.C. § 734).

[173] 435 U.S. 1 (1978).

[174] *Id.* at 5 n.7.

[175] 446 U.S. 651 (1980).

[176] *Id.* at 652.

[177] *Id.* at 651-52. Justice Marshall wrote a dissent, *id.* at 652-56, and Justices Brennan and Blackmun indicated they thought this case required full consideration by

The Court's approach has not been received with enthusiasm by the lower courts, however, and a decision was rendered by the United States Court of Appeals for the First Circuit in 1985 stating again that Congress could not legislate for Puerto Rico under the Territory Clause. In *United States v. Quinones*,[178] the court had to decide if the Federal Omnibus Crime Control Act (permitting wiretapping in certain circumstances)[179] was paramount to the Puerto Rican constitutional provision prohibiting interception of telephone communications.[180] The court ruled that the federal act prevailed,[181] but in reaching this decision, the appellate court carefully examined the status of Puerto Rico and included the following paragraph which is based on Chief Judge Magruder's earlier analysis:

> Thus, in 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. *The authority exercised by the federal government emanated thereafter from the compact itself.* Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power. See Mora v. Mejias, 206 F.2d 377, 386-88 (1st Cir. 1953).[182]

The court nonetheless upheld the applicability of the federal wiretap law to Puerto Rico because:

> While the creation of the Commonwealth granted Puerto Rico authority over its own local affairs, Congress maintains similar powers over Puerto Rico as it possesses over the federal states.[183]

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the Court, *id.* at 652.

The "rational basis" test applied to Puerto Rico gives Congress enormous discretion regarding entitlement programs.

> If the three reasons accepted in *Califano* and *Harris* are rational, it is difficult to imagine any law assigning funds discriminatorily against Puerto Rico which would not be considered rational. The "rational basis" test is the equivalent of a blank check because in practice any reason will satisfy the Court. After *Harris* Congress is on notice that under the territorial clause it has discretion to exclude totally, or to apply partially to Puerto Rico, any program based on federal funds, without violating the principle of equal protection of the laws.

Helfeld, *supra* note 146, at 462.

[178] 758 F.2d 40 (1st Cir. 1985).

[179] 18 U.S.C. § 2511(2)(c) (1968).

[180] 758 F.2d at 43.

[181] P.R. CONST. art. II, § 10.

[182] *Id.* at 42 (emphasis added).

[183] *Id.* at 43 (citing Hodgson v. Union de Empleados de los Supermercados Pueblos, 371 F. Supp. 56, 60-61 (D.P.R. 1974)).

According to this view, Congress cannot legislate for Puerto Rico under the Territory Clause, but it can legislate as it does for the states on subjects of national importance. This approach appears to be inconsistent with *Califano v. Torres* and *Harris v. Rosario*, discussed above.[184]

Rodriguez v. Popular Democratic Party[185] is also important because it reaffirms Puerto Rican sovereignty over matters of self-governance. A member of the Popular Democratic Party was elected in a 1980 general election to the Puerto Rico House of Representatives. Upon his death, a Puerto Rico statute provided that the party of the Representative could select a replacement who would automatically fill the vacancy.[186] The United States Supreme Court upheld the statute and declared that it did not violate the federal constitution:

> Puerto Rico, like a state, is an autonomous political entity, "sovereign over matters not ruled by the 'Constitution.'" . . . . The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference. Moreover, we should accord weight to the Puerto Rico Supreme Court's assessment of the justification and need for particular provisions to fill vacancies caused by the death, resignation, or removal of a member of the legislature.[187]

2. *Conclusions regarding Puerto Rico*

In the period between 1900 and 1950, Puerto Rico was a territory over which Congress had powers that were general and plenary. As a result of the 1950-52 compact between the United States and the people of Puerto Rico, the power of Congress over the Commonwealth were somewhat curtailed. The best summary of the current situation is that:

(1) Puerto Rico is an autonomous, self-governing political entity. It is not administered by the Interior Department's Office of Territories and International Affairs as are the other island areas—and its budget is not processed through the Interior Department.

(2) Puerto Rico has jurisdiction over matters that are "local in character."

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[184] *See supra* notes 173-77 and accompanying text.

[185] 457 U.S. 1 (1982).

[186] *See* Electoral Laws of Puerto Rico arts. 5.005, 5.007, P.R. LAWS ANN. tit. 16, §§ 3206, 3207 (Supp. 1980).

[187] 457 U.S. at 8.

(3) Congress retains power over Puerto Rico as it does over any of the fifty states. Federal laws of a national character will supersede inconsistent Puerto Rico laws. Congress also appears to be able to legislate for Puerto Rico on an ad hoc basis treating Puerto Rico as a unique entity.

(4) Whether Congress can unilaterally legislate on a subject covered by the 1950-52 compact remains unresolved. The better view is that Congress should not be allowed to do so because significant constitutional and international law issues would otherwise be raised.[188]

(5) The jurisdiction of the U.S. federal courts in Puerto Rico was not disturbed by the 1950-52 compact.

The achievement of commonwealth status has brought about changes in Puerto Rico, and it has a higher level of autonomy and self-governance than it previously had. Nonetheless, its status is ambiguous and efforts are now underway to clarify it.[189] The status of the CNMI is similarly ambiguous, as the following discussion will illustrate.

3. The Commonwealth of the Northern Mariana Islands

In the late 1960s, the Northern Mariana Islands and the other islands in the Trust Territory of the Pacific Islands began negotiating with the United States to end the Trusteeship.[190] Because of distinct cultural, ethnic, and political differences between the Northern Marianas and the other islands in the trust territory, the Northern Marianas entered into separate status negotiations with the United States in 1972.[191] These negotiations culminated with the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" in 1975.[192] A decade later, on November 3, 1986, the Covenant was pronounced as being in full force and effect by Presidential Proclamation, thus officially ending the Trusteeship Agreement at least as far as the United States is concerned.[193]

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[188] *See infra* notes 303-12 and accompanying text.

[189] *See infra* notes 285-98 and accompanying text.

[190] *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 526-27.

[191] *Id.* at 528.

[192] CNMI Covenant, *supra* note 23; *see generally* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 526-36.

[193] Exec. Order No. 12572, Authority of the Secretary of the Interior with Respect to the Northern Mariana Islands, Nov. 3, 1986, 51 C.F.R. 40401 (1986), *reprinted in* 48 U.S.C. § 1681 (1986). The United Nations Security Council formally terminated the Trust (except for Palau) in December 1990. S.C. Res. 683 (Dec. 22, 1990).

Under Section 101 of the Covenant, the Northern Marianas became a self-governing commonwealth in political union with and under the United States.[194] The meaning of the term "self-government" has, however, been the center of much debate.[195] Section 103 gives the CNMI what appears to be plenary power over internal affairs.[196] Under Section 105,[197] however, the United States may enact legislation that will be directly and uniquely applicable to the CNMI, if the CNMI is directly named. The core or fundamental elements of the Covenant[198]

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[194] CNMI Covenant, *supra* note 23, § 101 provides, "The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands," in political union with and under the sovereignty of the United States of America." *Id.*

[195] In the recent "Section 902" consultations, the United States and the CNMI stated they will "continue to strive to reach agreement and understanding of the meaning of the term as used in the Covenant." The Special Representative of the President of the United States and the Special Representative of the Governor of the Commonwealth of the Northern Mariana Islands, Agreements After the Eighth Round of Consultations, Apr. 12, 1990, paras. 13-15.

[196] CNMI Covenant, *supra* note 23, § 103 provides, "The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." *Id.*

[197] *Id.* § 105 provides:

> The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with consent of the Government of the United States and the Government of the Northern Mariana Islands.

Id.

Section 105 of the Covenant thus contains two limitations on federal legislative authority: (1) a procedural requirement that federal legislation specifically mention the CNMI if it is to be applicable to the commonwealth but not also applicable to the states, and (2) the substantive requirement that the mutual consent of the commonwealth be granted as to federal laws within some critical areas. *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 542. "The latter is a unique, specific limitation of Congress' territorial clause authority." *Id.* at 543.

[198] CMNI Covenant, *supra* note 23, art. II (form of local government); *id.* art. III (citizenship rights); *id.* § 805 (applicable parts of the U.S. CONST.). These core or

cannot, however, be altered without agreement of the CNMI. Sections 501[199] and 502 provide for the applicability of certain U.S. constitutional provisions and laws to the Marianas, and Section 503 lists other U.S. laws that will not apply (unless Congress later specifically decides that they should).

The CNMI view is that the Covenant is clear and unambiguous as to the boundaries of each party's share of sovereignty, and that the sovereignty retained by the CNMI when it entered into the Covenant relationship is plenary.[200] In exercising its sovereignty and power to govern its own affairs, the CNMI entered into a limited political union with the United States and delegated a limited and finite portion of sovereignty to the United States.[201]

The Commonwealth Legislature argued before the United Nations in 1986 that the Territory Clause was completely inapplicable and that

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fundamental elements concern the form of local government in the CNMI (art. II), the citizenship rights of the residents of the CNMI (art. III), the parts of the U.S. CONST. that apply (§ 501, quoted *infra* note 199), and the provision on nonalienability of land (§ 805). Stella Guerra uses the term "fundamental" when referring to those elements of the relationship that cannot be unilaterally altered by Congress. *See infra*, note 238 and accompanying text.

[199] CNMI Covenant, *supra* note 23, § 501 provides:

> (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.
>
> (b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

Id.

[200] *See* Commonwealth of the Northern Marianas Legislature, SELF-DETERMINATION REALIZED at 15, 21 (1986).

[201] *Id.* at 20-21.

mutual consent was required before any act of Congress could apply to the Commonwealth. In a document entitled *Self-Determination Realized*, the CNMI Legislature argued that the clause's exclusion was intended "to insure against Congress's use of an independent plenary source of power to encroach upon the sovereign prerogatives of the CNMI."[202] It further argued that neither Congress nor any other branch or agency may use the Territory Clause or any other source of power to supersede the sovereign power of the CNMI to control and regulate matters of local concern.[203]

The U.S. view is that although the CNMI reserved the right to organize its own local government in the Covenant, the Territory Clause of the Constitution gives the Congress full authority to legislate regarding matters in the commonwealth.[204] The Covenant itself gives Congress authority to enact legislation for the CNMI that has only a local impact. Under Section 105, for instance, Congress may enact laws for the CNMI that cannot also be made applicable to the several states. The mutual consent requirement is applicable only to selected provisions in the Covenant (articles I, II, III, and sections 501 and 805), and these limits undercut the contentions of the CNMI that it applies to the entire Covenant.

The question whether the Covenant acts as a restraint on Congress's power to pass legislation governing the CNMI or the executive branch's power to regulate its activities has arisen most recently in the context of efforts by the Inspector General of the Department of Interior to subpoena records of the Mariana Islands Housing Authority to audit the expenditures of funds provided by the federal government to the Authority. The Authority refused to make their records available on the ground that the audit was contrary to the autonomy and self-governance of the CNMI as recognized in the Covenant.[205] The United States then filed a forty-seven-page brief in the United States Court of Appeals for the Ninth Circuit to challenge the Authority's refusal to provide the records.[206] This brief argues not only that the audit is justified because federal funds are involved[207] but more dramatically

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[202] *Id.* at 26.

[203] *Id.*

[204] *See generally* Brief of Appellee (United States), United States *ex rel* Richards v. Sablan, No. 89-16404 (9th Cir. Mar. 1990) [hereinafter U.S. Brief].

[205] *Id.* at 2, 8.

[206] *Id.*

[207] *Id.* at 19.

that the federal government has unlimited power to intrude into the internal affairs of the CNMI[208] and that this audit is authorized by the Insular Areas Act,[209] which instructs the Inspector General to audit all activities of the CNMI government.

The brief quotes from the Report of the Marianas Political Status Commission (M.P.S.C.), which was distributed prior to the plebiscite in the Northern Marianas on the Covenant, to support the proposition that Congress would retain the power to legislate under the Territory Clause and that this retained power was understood.[210] The brief argues that "the Covenant creates no preserve of independent sovereignty for the CNMI"[211] and thus that Congress is free to legislate without restraint from the Covenant concerning the CNMI.

The full force of the arguments made by the United States are found in four long footnotes in this brief. Footnote 8 argues that the U.S.-CNMI relationship is "territorial in nature"[212] and that this relationship was well understood by the inhabitants when they voted for commonwealth status. "While the Covenant describes the Northern Marianas as a Commonwealth, the term 'commonwealth' simply denotes a territory in which the 'local government is the product of a constitutional convention rather than an Organic Act of Congress.'"[213]

Footnote 13 rejects the CNMI argument "that the territorial clause is not applicable to the U.S.-CNMI relationship because that clause is not listed in section 501 of the Covenant." The U.S. position is that the Territory Clause is "applicable of its own force to all areas under the sovereignty of the United States that are not states" thus does not need to be listed in section 501.[214]

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[208] *Id.* at 24-29.

[209] 48 U.S.C. § 1681 (1986).

[210] U.S. Brief, *supra* note 204, at 11 n.8 (quoting from the M.P.S.C. Report, *reprinted in Hearing Before the Senate Comm. on Interior and Insular Affairs on S.J. Res. 107, Joint Resolution to Approve the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" and for Other Purposes*, 94th Cong., 1st Sess. (1975)); *see also* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 540-41 (1989) (supporting the view that both sides understood that the Territory Clause would apply).

[211] U.S. Brief, *supra* note 204, at 27.

[212] *Id.* at 10 n.8 (quoting from Micronesian Telecommunications Corp. v. NLRB, 820 F.2d 1097, 1100 n.2 (9th Cir. 1987)).

[213] *Id.* at 11 n.8 (citing S. REP. No. 596, 94th Cong., 1st Sess. 2, *reprinted in* 1976 U.S.C.A.N. 449).

[214] *Id.* at 15 n.13 (citing National Bank v. County of Yankton, 101 U.S. 129 (1880) (discussed *supra* at notes 33-36 and accompanying text)).

Footnote 25 similarly rejects the "CNMI's argument that the self-government provisions of the Covenant is 'in fulfillment' of the United States' obligations under the Trusteeship Agreement and therefore should be interpreted expansively." The U.S. Brief argues that the U.S. "Trusteeship obligation" was fulfilled when the people of the Northern Marianas "freely chose union with the United States under a territorial arrangement," and rejects the notion "that the United States has a continuing trust obligation."[215]

Finally, footnote 30 rejects the CNMI position that the provisions of the Covenant cannot be altered except by mutual consent and says that the "Covenant, like all other laws or treaties, is 'generally subject to amendment or repeal by a later law of the United States.'"[216]

The United States thus argues that the Covenant provides no restraint whatsoever on the ability of the Congress to legislate regarding the CNMI pursuant to the Territory Clause,[217] and that the obligations of the United States under international law similarly provide no restraint on the federal government's treatment of the CNMI. Is this position sound? The international law issues will be addressed below.[218] The issues under U.S. law are related to the cases regarding Puerto Rico discussed above[219] and some additional cases regarding the CNMI are also relevant.

The unique legal status of the CNMI has been recognized on at least three occasions by the United States Court of Appeals for the Ninth Circuit in recent years. In a 1984 decision, prior to the Presidential Proclamation ending the Trusteeship over the Northern Marianas, the Court included the following footnote in its opinion:

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[215] *Id.* at 26 n.25. The weakness of this argument is discussed *infra* at notes 303-12 and accompanying text.

[216] *Id.* at 32-33 n.30 (citing Second Interim Report on 45 (citing Sutherland, *Statutes and Statutory Construction* §§ 23.03, 23.09, 36.07 (Sands ed., 1973))). Compare the opposite perspective offered earlier with regard to the contractual relationship with Puerto Rico, *supra* note 158 and accompanying text.

[217] This position was also adopted by Tim Glidden, the U.S. representative to the 1990 "Section 902" negotiations between the United States and the CNMI. Max Taylor, *Glidden Backs Territorial Clause*, *The Tribune* (Saipan), Apr. 12, 1990, at 3, col. 1. Glidden is quoted as having said "if the Territorial Clause did not apply, a situation involving free association with the U.S. would exist, and the CNMI chose not to enter into such an arrangement." *Id.* at 4.

[218] *See infra* notes 303-12 and accompanying text.

[219] *See supra* notes 149-87 and accompanying text.

> The NMI argues that its political status is distinct from that of unincorporated territories such as Puerto Rico. This argument is credible. Under the trusteeship agreement, the United States does not possess sovereignty over the NMI. As a commonwealth, the NMI will enjoy a right to self-government guaranteed by the mutual consent provisions of the Covenant . . . . No similar guarantees have been made to Puerto Rico or any other territory. . . .
>
> Thus, there is merit to the argument that the NMI is different from areas previously treated as unincorporated territories. We need not decide this issue because the independent force of the Constitution is certainly no greater in the NMI than in an unincorporated territory.[220]

In 1988, the same appellate court explicitly distinguished the political status of the CNMI from that of Guam:

> Guam's relationship with the United States government distinguishes this case from *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), where we held that the Commonwealth of the Northern Mariana Islands (CNMI) is a person for the purposes of section 1983. *Id.* at 406. *CNMI has a unique relationship with the United States*; the original Trusteeship Agreement obligated the United States to "promote the development of the inhabitants of the trust territory toward self-government or independence;" see Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 6 § 1, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189, quoted in *Fleming*, 837 F.2d at 403. Significantly, "the United States does not possess sovereignty over the Trust Territory" but merely "exercises powers of administration, legislation, and jurisdiction . . . pursuant to an agreement with the United Nations." *United States v. Covington*, 783 F.2d 1052, 1055 (9th Cir. 1985), *cert. denied*, 479 U.S. 831, 107 S. Ct. 117, 93 L.Ed.2d 64 (1986); *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir.), *cert. denied*, 467 U.S. 1244, 104 S.Ct. 3518, 82 L.Ed.2d 826 (1984). *Guam's relation to the United States is entirely different.* Guam has no separate sovereign status; unlike CNMI, it "is subject to the plenary power of Congress and has no inherent right to govern itself." *Atalig*, 723 F.2d at 687; *see also* Leibowitz, 16 Va. J. Int'l L. at 62-63 ("authority of the Guam government depends entirely upon the will of Congress, and is at all times subject to such alterations as Congress may see fit to adopt"); *cf. Barusch v. Calvo*, 685 F.2d 1199, 1202 (9th Cir. 1982) (distinguishing CNMI from Guam with respect to border searches). . . .[221]

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[220] Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 691 n.28 (9th Cir. 1984) (citation omitted) (emphasis added).

[221] Ngiraingas v. Sanchez, 858 F.2d 1368, 1371 n.1 (9th Cir. 1988) (emphasis added).

Finally, in the 1990 case upholding Section 805 of the Covenant, which prohibits alienation of land to persons not of "Northern Marianas descent," this appellate court wrote:

> It is undisputed that the Commonwealth [of the Northern Mariana Islands] is not an incorporated territory, *though the precise status of the Commonwealth is far from clear.* See [*Atalig*, 723 F.2d] at 691 and n.28.[222]

Because of this ambiguity, the arguments made by both the CNMI and the United States have some plausibility and should ultimately be worked out through political negotiations in light of the international law requirements discussed below,[223] and in light of the undisputed fact that the goal of the people of the Northern Marianas throughout this process has been to achieve greater self governance through the exercise of their right of self-determination.

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[222] Wabol v. Villacrusis, 898 F.2d 1381, 1390 n.18 (9th Cir. 1990).

[223] *See infra* notes 303-12 and accompanying text. One element of the political dispute worth noting involves the ocean resources adjacent to the CNMI. On April 12, 1990, the Special Representative of the President (Timothy Glidden) agreed to support the claim of the CNMI for full control of the resources in the 200-nautical-mile exclusive economic zone surrounding the CNMI. The proposal would also allow the CNMI, with the approval of and in cooperation with the United States, to participate in regional and international organizations which are concerned with international regulation of these rights and to negotiate treaties and other international agreements regarding the exercise of those rights. The language memorializing this agreement is as follows:

> The Special Representative of the President agrees to support the Commonwealth's proposal that the authority and jurisdiction of the Commonwealth of the Northern Mariana Islands be recognized and confirmed by the United States to include the sovereign right to ownership and jurisdiction of the waters and seabed surrounding the Northern Mariana Islands to the full extent permitted under international law. Under this proposal, the Commonwealth shall have the rights of a coastal state in the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf as provided in the United Nations Convention on the Law of the Sea; provided that the exercise of those rights shall be done in cooperation with the United States and subject to the responsibility and authority of the United States with respect to foreign affairs and defense under Section 104 of the Covenant.

The Special Representative of the President of the United States and the Special Representative of the Governor of the Commonwealth of the Northern Mariana Islands, Memorandum of Agreement on Ocean Rights and Resources (April 12, 1990).

When this agreement was distributed to the relevant federal agencies in Washington, however, a number of them—including the State Department—objected strongly to this "agreement." The status of this matter remains unresolved.

4. Guam

The legal status of Guam is also in a period of transition, and many of the issues dividing the CNMI and the United States are also being raised during Guam's attempt to attain the status of a "commonwealth." Guam became a possession of the United States in 1898 when it was ceded to the United States from Spain (along with Puerto Rico) in the Treaty of Paris.[224] Congress did not, however, legislate for the territory until it passed the Guam Organic Act in 1950.[225] Between 1898 and 1950, the political status of Guam remained "anomalous," with a military governor holding all legislative, executive, and judicial authority.[226]

In the 1980s, the Guamanians began pushing hard for a new political status, and they prepared and revised several times a draft "Guam Commonwealth Act"[227] expressing their views on a desired political relationship with the United States. Under this proposal, the powers of the United States as sovereign would be limited, in contrast to the present situation in which the federal government has essentially unlimited power because of Guam's status as an "unincorporated" territory.[228] Many of the articles of the draft Guam Commonwealth Act (GCA) delimit U.S. authority in specific ways, and Sections 103[229] and 202[230] provide a general restraint on U.S. action. These sections require "mutual consent" between the Commonwealth of Guam and the United States as to proposed modifications to the GCA and as to the

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[224] Treaty of Paris, Dec. 10, 1988, U.S.-Spain, 30 Stat. 1754 (1898).

[225] Act of Aug. 1, 1950, ch. 512, 64 Stat. 384 (1950) (codified at 48 U.S.C. §§ 1421-28 (1970)).

[226] Leibowitz, *Guam*, *supra* note 1, at 22 n.7 (quoting 25 Op. Att'y Gen. 292 (1904)).

[227] *See* H.R. 98, 101st Cong., 1st Sess. (1989).

[228] *Id.*

[229] *Id.* §103, "Mutual Consent," provides:

> In order to respect the self-government granted to the Commonwealth of Guam under this Act, the United States agrees to limit the exercise of its authority so that the provisions of this Act may be modified only with the mutual consent of the government of the United States and the government of the Commonwealth of Guam.

Id.

[230] *Id.* §202, "Effect of Federal Law," provides, "Except as otherwise intended by this act, no federal laws, rules or regulations passed after the date of this act shall apply to the Commonwealth of Guam unless mutually consented to by the United States and the government of the Commonwealth of Guam." *Id.*

applicability of federal laws, rules, or regulations passed after the date of the act.

Section 103 resembles Section 105 of the CNMI Covenant,[231] but the Guam proposal is broader. Under the CNMI Covenant, mutual consent is required only when fundamental provisions of the Covenant are to be modified. In contrast, Section 103 of the draft GCA requires mutual consent when *any* provision of the act is to be modified. No provision that resembles Section 202 of the draft GCA is in the CNMI Covenant. Sections 103 and 202, if adopted, would signal dramatic changes in the relationship between the United States and Guam.

The applicability of the U.S. Constitution and federal laws is governed by Articles 2 of the draft GCA. Section 201 says those provisions of the Constitution which now apply to Guam[232] would continue, unless specifically modified, and in addition the Tenth Amendment, the first sentence of the 14th Amendment, and Article IV, Section 2, Clause 2, and Section 4 would also apply.[233] The inclusion of the Tenth Amendment was intended to limit Congress's present power (pursuant to the Territory Clause) over Guam's internal affairs. The purpose of extending the first sentence of the 14th Amendment would be to foreclose the possibility of removing U.S. citizenship by federal law. The draft Guam Commonwealth Act thus would create a relationship between Guam and the United States substantially more autonomous than that of a state. Although some provisions of the act follow the CNMI model, several sections appear to create a relationship closer to a free association (i.e., the provisions granting Guam almost complete autonomy over internal affairs, requiring consultation with Guam over foreign affairs and defense matters affecting Guam; and requiring Congress to recognize the Chamorro people as the indigenous inhabitants of Guam and to foster the heritage of the Chamorro people).[234]

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[231] *See supra* note 197 and accompanying text.

[232] U.S. CONST art. I, § 9, cls. 2, 3; amends. I, IV, V (due process and double jeopardy), VI (rights to speedy trial and confrontation), XIII, XIV (second sentence of section 1), XV, XIX.

[233] H.R. 98, 101st Cong., 1st Sess. § 201 (1989).

[234] *Id.* §§ 102, 202, 302. A memorandum of understanding was, in fact, entered into between Guam and the United States Department of Defense and Interior in August 1990 agreeing to regular consultations on defense issues.

It is somewhat surprising that neither arts. 3 nor 10 of the GCA restrict land alienation the way § 805 of the CNMI Covenant does. Guam, like the Northern Mariana Islands, is small and land is scarce. Land plays a significant role in the

The United States has objected vigorously to many of the provisions in the draft Guam Commonwealth Act. A sixty-three-member task force consisting of officials from a range of federal agencies and chaired by Timothy W. Glidden was established in June 1988, and this group issued a long report about a year later.[235] The report is filled with detailed nit-picking concerning the draft Act and asserts that Guam should revise its Act to look more like the CNMI Covenant. Its tone and thrust are fundamentally unsympathetic to Guam's attainment of a truly autonomous status, and it seems to say that the only possible choice for a political community that is not a "state" is to be a "territory" subject to Congress's ultimate control under the Territory Clause.

Assistant Secretary of Interior for Territorial and International Affairs Stella Guerra testified on the Guam draft in Honolulu in December 1989 and said that her vision of a "Commonwealth" status is as follows:

> The term has come to mean an advanced form of political relationship with the United States, under which the people of the jurisdiction, in the exercise of their self-determination, draft and adopt a Constitution, compatible with the Constitution of the United States, creating local institutions of self-government. The United States, in turn, agrees to certain constraints on the exercise of federal authority.[236]

The constraints the United States is willing to accept are those it has accepted for the CNMI, namely "that those Constitutionally-created institutions of self-government shall not be unilaterally abrogated or amended by Congress."[237] But the United States will not agree to limit its ability to apply laws otherwise generally applicable to the states to

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culture and traditions of the Chamorros on Guam. Ownership of land is often equated with identity.

The Guam draft does have a type of local preference, however, in § 102(f)(i) which establishes a "Chamorro Land Trust for the benefit of the indigenous Chamorro people of Guam, and composed of certain lands returned by the United States . . . ."

[235] Federal Task Force Report on Guam's Commonwealth Act, *reprinted in* PACIFIC SUNDAY NEWS (Agana, Guam), Aug. 6, 1989, at 2D. This report was summarized and relied upon by Stella Guerra, Assistant Secretary for Territorial and International Affairs, Department of the Interior, in her testimony before the Subcommittee on Insular and International Affairs of the House Committee on Interior and Insular Affairs, on H.R. 98, the Guam Commonwealth Bill, Dec. 12, 1989, in Honolulu, Haw. [hereinafter *Guerra Testimony*].

[236] *Guerra Testimony*, *supra* note 235, at 6.

[237] *Id.*

its insular political communities *nor* its ability to enact particularized laws applicable to only one or to all of these islands:

> Except where the fundamental elements of self-government are concerned, we firmly believe that federal laws, in most instances, must apply to Guam as they would apply to the States and other U.S. jurisdictions. We also believe Congress' authority under the Territorial Clause should be retained not only because the Constitution specifically restricts application of the Tenth Amendment to States, but also because application of the Tenth Amendment to Guam would, in our view, be hurtful to Guam. We believe this to be true because it is the Territorial Clause that permits Guam to receive special and generous federal treatment and benefits unavailable to the States.[238]

In short, the United States apparently refuses to recognize the possibility of a "commonwealth" relationship in which the commonwealth would have any real elements of autonomy.[239] As this article is being published, serious negotiations are continuing between Guamanian officials and the U.S. government, but the major issues of disagreement remain to be resolved.

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[238] *Id.* at 8. *See infra* notes 312-40 and accompanying text (discussing the "special and generous federal treatment and benefits" Guam and the other territories and commonwealths receive).

[239] A related issue has been raised in recent cases addressing whether 28 U.S.C. § 1983 provides jurisdiction for lawsuits against the U.S.-flag islands. This venerable statute gives persons the right to sue other "persons" who deprive them of constitutional rights while acting under color of law. *Id.* Lower appellate courts have held that the CNMI (Fleming v. Dept. of Public Safety, 837 F.2d 401 (9th Cir. 1988)) and the U.S. Virgin Islands (Frett v. Government of the Virgin Islands, 839 F.2d 968 (3d Cir. 1988)) were "persons" for this purpose and could be sued under § 1983, analogizing them to municipalities or local governmental entities. The United States Court of Appeals for the Ninth Circuit reached the opposite conclusion in the case of Guam, however, characterizing the Guam government as "a creation of Congress" and no more than "an instrumentality of the federal government." Ngiraingas v. Sanchez, 858 F.2d 1368, 1371-72 (9th Cir. 1988) (citing Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1286 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986)). This decision was affirmed by the United States Supreme Court in an opinion that does not discuss the islands in any detail, but says that the legislative history of § 1983 shows no Congressional intent to include "territories" in the concept of "persons" who could be sued under the statute. Ngiraingas v. Sanchez, 495 U.S. 182 (1990). Although the Ninth Circuit's *Ngiraingas* opinion had distinguished the CNMI from Guam, indicating that § 1983 could apply to one and not the other (858 F.2d at 1371 n.1 (reprinted in text *supra* at note 221)), the United States Supreme Court's decision attempts no such distinction. It would appear, therefore, that *Frett* and probably *Fleming* have been overruled.

5. American Samoa.

The status issue has not been as controversial in recent years in American Samoa as it has been in Guam, the Northern Marianas, and Puerto Rico. Nonetheless, it should be noted that the relationship between the United States and American Samoa is also regulated by a type of contractual arrangement and that this contract should be seen to limit the power of Congress to pass legislation applicable to American Samoa.

During the final years of the Nineteenth Century, great interest was shown in the Samoan Islands by Germany, Great Britain, and the United States. From 1878 until 1889, the Samoan chiefs engaged in bitter struggles to determine who would become king.[240] All three of the outside powers were drawn into these disputes.[241] On March 5, 1889, one British, three German, and three U.S. warships were in Apia Bay. That night a horrendous hurricane wrecked six of the warships and killed 142 German and U.S. sailors.[242] The British ship was able to get under way without sustaining any damage.

The three nations met in Berlin in June 1889 to resolve the tensions that had arisen in Samoa and entered into a General Act.[243] Under its terms, Samoa would be an independent and neutral nation. Additionally, a new government for Samoa was established but it was to be controlled by Great Britain, Germany, and the United States, along with Samoa.[244]

During the next decade, the tensions between the three outside powers continued. In 1899, they decided that they would try one more time to resolve their differences.[245] On November 7, 1899, the United States, Germany, and Great Britain agreed to arbitrate their competing claims,[246] and a month later the three countries entered into a convention to divide Samoa into two nations:

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[240] R. Greer, The Government of American Samoa 9-10 (1958) (unpublished manuscript on file at the Hamilton Library, Univ. Haw.-Manoa).

[241] *Id.*

[242] *Id.* at 133.

[243] *See* Leibowitz, Defining Status, *supra* note 2 at 414.

[244] Greer, *supra* note 240 at 133.

[245] *Id.*

[246] Convention between the United States of America, Germany, and Great Britain, Relating to the Settlement of Certain Claims in Samoa by Arbitration, *done* Nov. 7, 1899, 31 Stat. 1987 (1898).

(1) Germany and Great Britain gave the United States all rights to Tutuila and other Samoan islands east of 171 degrees West Longitude.
(2) The United States granted Germany all rights to Upolu, Savai'i, and other Samoan islands west of 171 degrees West Longitude.
(3) The United States, Germany, and Great Britain were to have equal rights to trade in all of the Samoan Islands.[247]

Accepting the inevitable, the Samoan chiefs on Tutuila agreed to sign a deed of cession to the United States and did so on April 17, 1900. This document refers to the 1899 actions by the three outside powers stating that these governments "have on diverse occasions recognized the sovereignty of the government and people of Samoa and the Samoan group of islands as an independent state."[248] It then refers to "internal dissensions and civil war" as the reason why the three powers found it "necessary to assume control of the legislation and administration of the said State of Samoa."[249] The deed states that the signers cede to the United States the islands, rocks, reefs, foreshores, and waters "to erect the same into a separate District to be annexed to the said Government [the United States], to be known and designated as the District of 'Tutuila.'"[250] The deed further states that the chiefs "are desirous of granting" to the United States "full powers and authority to enact proper legislation for and to control the said islands,"[251] but also specifies that the United States shall respect the rights of the Samoans to their lands and property.[252] If the United States "shall require any land or any other thing for Government uses," it may take it on payment of a fair consideration.[253]

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[247] Convention between the United States of America, Germany, and Great Britain to Adjust Amicably the Question Between the Three Governments in Respect to the Samoan Group of Islands, *done* Dec. 2, 1899, 31 Stat. 1878, *reprinted in* AM. SAMOA CODE ANN. § 5 (1973).

[248] Cession of Tutuila and Aunuu, Apr. 17, 1990, Chief of Tutuila to U.S. Gov't, *reprinted in* AM. SAMOA CODE ANN. § 2 (1981); Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. WESTERN INT'L L.J. 220, 229-30 n.76 (1980). The Manua Islands were ceded in a separate document in July 1904, *reprinted in* AM. SAMOA CODE ANN. § 9-11 (1973). Swains Island became part of American Samoa by joint resolution of Congress, approved on March 4, 1925. H.R.J. Res. 244, 68th Cong., 2d Sess., 43 Stat. 1357 (1925).

[249] Treaty of Cession, *supra* note 248.

[250] *Id.* para. 1. The reference to the "waters" may give American Samoa special rights to the ocean resources in relation to the U.S. government.

[251] *Id.* preamble.

[252] *Id.* para. 2.

[253] *Id.*

The section of the Cession on local control reads as follows:

> The Chiefs of the towns will be entitled to retain their individual control of the separate towns, if that control is in accordance with the laws of the United States of America concerning Tutuila, and if not obstructive to the peace of the people and the advancement of civilization of the people, subject also to the supervision and instruction of the said Government. But the enactment of legislation and the general control shall remain firm with the United States of America.[254]

Congress did not formally accept this cession until 1929.[255]

Although providing modern meaning to decades-old agreements is always somewhat challenging, these events and documents codify a set of understandings that should guide U.S.-Samoa relations and act to restrain what Congress can do in the way of passing legislation applicable to American Samoa. The Deed of Cession establishes a trust responsibility on the part of the United States. It should be viewed in a manner similar to the way the 1840 Treaty of Waitangi[256] is now viewed in New Zealand.[257] The Treaty of Waitangi is the document in which the Maori chiefs acknowledged the British presence, but in this document they protected their rights to these lands and to self-governance. This Treaty is now viewed to be of constitutional importance, and the rights of the Maori as articulated in the treaty must be considered by the New Zealand government prior to any major decision.[258]

6. *The relationship between the U.S. Virgin Islands and the United States*

The United States bought St. Thomas, St. John, and St. Croix from Denmark in 1916, after two previous attempts to purchase these islands

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[254] *Id.* para. 3; *see generally* Tony Kaliss, The Legal and Political Relationship of the United States and American Samoa (spring 1990) (paper prepared for the Am. Studies Dept., Univ. Haw., Honolulu, Haw., spring 1990).

[255] 43 Stat. 1253 (Feb. 20, 1929) (codified at 48 U.S.C. § 1431).

[256] Treaty of Waitangi, Feb. 6, 1840, *reprinted in* PETER CLEAVE, THE SOVEREIGNTY GAME: POWER, KNOWLEDGE AND READING THE TREATY at 74-78 (1989).

[257] *See, e.g.*, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUE FISHING CLAIM (1988); JANE KELSEY, A QUESTION OF HONOUR? LABOUR AND THE TREATY 1984-89 (1990).

[258] *See, e.g.*, New Zealand Maori Council and Latimer v. Attorney General and Others, 6 N.Z.A.R. 353 (Ct. App. 1987).

had failed.[259] Fearful that Denmark would sell the islands to Germany, the United States agreed to pay $25 million for the three islands.[260] The Danish voters approved this sale in a plebescite, but no vote was taken among the residents of the Virgin Islands.[261] The United States assigned control over the islands to the Navy Department, planning to use the islands as a base of operations against German Naval activity in the Atlantic Ocean.[262]

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[259] United States interest in the Virgin Islands dates back to 1865 when Secretary of State William Seward expressed to the Danish government a desire to purchase the island group. LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 243. A year later, the U.S. government made an offer to buy the three islands for $5 million. The Danish government replied by offering to sell St. Thomas and St. John together for $10 million or these two plus St. Croix for $15 million. After negotiating, Secretary Seward agreed to purchase St. Thomas and St. John for $7.5 million. This treaty was ratified by the Danish Parliament and signed by their King in 1868, but was rejected by the U.S. Senate in 1870. *Id.* at 244. In 1902, a second attempt was made to purchase the Virgin Islands. The Senate ratified a convention in which the U.S. would buy all three islands for $5 million, but this time, the Danish government failed to ratify the sale, falling short by a single vote. *Id.* at 245.

[260] *Id.* at 245.

[261] Paul M. Leary, *The Virgin Islands' Political Status, 1917 and 1987*, *in* TAKING BEARINGS: THE UNITED STATES VIRGIN ISLANDS, 1917 AND 1987, at 58, 59 (Paul M. Leary, ed., Univ. of Virgin Islands Bureau of Public Administration, St. Thomas, 1988). Because of the property restrictions on voting, even if an election had been held, it would have included only about five percent of the population. A plebescite was held in 1867 in connection with the earlier abortive transfer to the United States with only 1266 persons voting (1244 in favor, 22 opposed). *Id.*

[262] At the time the U.S. took possession of the Virgin Islands, life in the islands was not idyllic:

> Between 1911 and 1917, nearly a third of the infants born each year died before their first birthday—320 per 1,000 live births, about three times the rate then prevailing in the continental United States. The Danish expert, Dr. Hindhede, estimated that 64% of all children between one and five years of age died in St. Croix in the period 1909-13. The debilitating disease of malaria was endemic. Gastroenteritis was a frequent killer.
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> The people of Charlotte Amalie, Frederiksted, and Christiansted—with a majority of the islands' population—depended on night-soil removal, with women laborers carrying buckets on their heads down to the sea before dawn each morning. The discharge of sewage into Charlotte Amalie Harbor was a special problem since the ebb and flow of the tide was only 18 inches.
>
> The islands' educational system was primitive. There were 19 elementary schools and no high schools. Most of the teachers, whose average pay was only $18 a month, had no more than an elementary education; and the total school budget was $21,500 a year—less than $1 per capita.
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> Economically, matters were worse. By 1916, the islands were $3.75 million

Congress passed the first Organic Act on March 3, 1917.[263] This Act provided for a temporary government for the islands authorized the President to and place control of the islands in the hands of the Naval Department.[264] The 1917 legislation created an island government modeled after other U.S. territories but still continuing the structure of the previous Danish government in the islands.[265] Separate legislatures were established in St. Croix and in St. Thomas, and a governor was appointed by the President of the United States subject to the advice and consent of the Senate.[266]

One of the main drawbacks of the 1917 Organic Act was that it failed to address the questions of a permanent government for the islands or citizenship for the islanders.[267] In 1927, citizenship was granted to Virgin Island residents[268] and in 1931, the President transferred jurisdiction of the islands from the Navy Department to the Department of the Interior.[269] As a result of the order, the military governor was replaced by a civilian.[270]

In 1936, Congress enacted a new Organic Act,[271] which provided a greater degree of self-governance. The Act established a "municipal

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in arrears in debts owed to Copenhagen and were operating at a net loss of $190,000 annually. The Danish government's second commission estimated that it would cost $2,240,000—in pre-World War I dollars—just to take care of the islands' most pressing needs.

LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 246-47.

[263] Act of Mar. 3, 1917, 39 Stat. 1132.

[264] *Id.* § 1.

[265] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 253.

[266] *Id.* Because the governor had both military and civil powers, the law specifically provided that the President could appoint an Army or Navy officer. The Presidential appointments to the office were in fact all Navy officers in the period from 1917 to 1931. *Id.*

The Act also established a Federal Court of the District of the Virgin Islands which belonged to the circuit of the Third Circuit Court of Appeals in Philadelphia. Appeals could theoretically be taken from the police courts all the way up to the U.S. Supreme Court. *Id.*

One of the practices retained from the Danish was a restrictive suffrage requirement. To be eligible to vote, a person had to possess "property capable of yielding a clear rental of $60 a year in St. Croix, or $150 a year in St. Thomas, or have an income of $300 a year." Only about 5.5 percent of the islands' population met these requirements. *Id.*

[267] *Id.* at 254.

[268] *Id.*

[269] *Id.* at 255 (citing Exec. Order 5566).

[270] *Id.*

[271] Act of June 22, 1936, Pub. L. No. 749, 49 Stat. 1807 (1936) (codified at 48 U.S.C. § 1405 (1936)).

council'' on each of the main islands.[272] The 1936 Act also eliminated the archaic property-based voting requirements and established universal suffrage. The Organic Act also specifically extended to the citizens of the islands the ''fundamental'' provisions of the Constitution in the Bill of Rights, to protect the Virgin Islanders from actions of their own government. Protection from federal abuses was already understood from the *Insular Cases*.[273]

One disappointment of the 1936 Act was that it did not provide for local election of the governor, who was still appointed by the President. This flaw was uncorrected even in the next significant legislation, the Revised Organic Act of 1954.[274] This Act centralized government in the islands by reorganizing the legislative branch into a single, island-wide body, but it also stated that the Virgin islands was still an unincorporated territory.[275] The power of the President to veto Virgin Island legislation also survived.[276]

Throughout this period, local ambitions for greater self-determination grew. Finally, in 1964, the Virgin Islands had its first Constitutional Convention.[277] The major proposals of the Convention indicated the major goals of the islands' politicians:

(1) An elective Governor and Lieutenant Governor;
(2) The abolition of the limitation on voting for legislative members at large;
(3) Authority in the Legislature to fix the salaries of its members;
(4) A locally appointed comptroller;
(5) Abolition of the President's authority to veto local legislation;
(6) Representation in the U.S. Congress through a Resident Commissioner or Delegate to the House of Representatives;
(7) The right to vote for the U.S. President and the Vice President;
(8) The Organic Act to be amended by local procedures (by the Legislature or by popular initiative).[278]

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[272] *Id.* The council for St. Thomas/St. John had seven members. The council for St. Croix had nine members. Once a year, the two councils met in joint session to enact legislation for all the islands. *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 257-58.

[273] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 258; see discussion of the *Insular Cases*, *supra* notes 5-9 and 40-63 and accompanying text.

[274] Act of July 22, 1954, Pub. L. No. 517, 68 Stat. 497 (1954) (codified at 48 U.S.C. § 1541 (1954)).

[275] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 262-63.

[276] *Id.* at 269.

[277] *Id.* at 271.

[278] *Id.* at 272.

The Convention also adopted a Resolution on Status which stated:

> (1) The People of the Virgin Islands are unalterably opposed to annexation of the Virgin Islands by any State of the Union as a county, city or precinct, or to any commonwealth or other territory under the jurisdiction of the United States.
> (2) The People of the Virgin Islands are unalterably opposed to independence from the United States of America.
> (3) The People of the Virgin Islands desire to have the Virgin Islands remain an unincorporated territory under the constitutional system of the United States with the fullest measure of internal self-government and in the closest association with the United States of America, and the Virgin Islands shall hereafter be designated an "autonomous territory."[279]

The resolutions passed by the Convention and the growing intensity of local feeling led Congress to pass the Elective Governor Act of 1968.[280] Besides providing that the Virgin Islands governor would be locally elected, the Act also eliminated a number of Federal controls—namely:

> (1) supervision by the Secretary of the Interior of the Executive Branch of the Virgin Islands; (2) the Secretary of the Interior's appointment of Acting Governors; (3) the requirement for approval by the Secretary of the Interior of new departments and other agencies of government; (4) the establishment of certain annual salary rates for the executive branch of the Virgin Islands by the Secretary of the Interior; and (5) Presidential veto of local legislature.[281]

Through the 1968 Act, many of the goals listed in the first constitutional convention were achieved, and in 1981, Congress approved a constitution for the Virgin Islands.[282]

The United States Virgin Islands still do not, however, have any autonomy from federal regulation. The cases that have examined the status of the United States Virgin Islands have been consistent in holding that Congress has plenary power to legislate on matters affecting these islands.[283] One recent case states further that "only the most

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[279] *Id.* at 272.

[280] 82 Stat. 837; Pub.L. No. 90-496.

[281] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 272-73.

[282] Pub. L. No. 97-21, 95 Stat. 105 (1981) (codified at 48 U.S.C. § 1541 (1981)).

[283] *See, e.g.*, Harris v. Boreham, 233 F.2d 110, 113 (3d Cir. 1956); Territorial Court of the Virgin Islands v. Richards, 847 F.2d 108, 112 (3d Cir. 1988), *affirming*, 673 F. Supp. 152, 157 (D.V.I. 1987).

fundamental constitutional rights extend to this territory where Congress is silent on the subject."[284]

7. An "enhanced" commonwealth

Are there alternatives that could be pursued by the U.S.-flag islands other than their present status of being at the mercy of the federal government? One possibility that is being developed in the discussions now underway with Puerto Rico is an "enhanced" commonwealth status. Numerous attempts have been made to describe what an "enhanced commonwealth" is. Some of the ideas that have been developed during the 1989-1990 congressional deliberations are of interest to this discussion, and the following description of two approaches are offered to illustrate that additional options and models are available. One of the 1989 Senate proposals[285] began with the following policy statement:

> The policy of the United States shall be to enhance the Commonwealth relationship enjoyed by the Commonwealth of Puerto Rico and the United States to enable the People of Puerto Rico to accelerate their economic and social development and attain maximum cultural and political autonomy within permanent union with the United States, to secure more equitable participation for the People of the Commonwealth of Puerto Rico in all Federal programs that provide grants or services to citizens of the United States as individuals, to secure increased participation by the People of Puerto Rico in United States governmental decisions affecting them, to safeguard the distinct cultural identity of the People of Puerto Rico, and to protect the bilateral nature of the relationship between the Commonwealth of Puerto Rico and the United States.[286]

The next subpart stated that a federal law would be applicable to Puerto Rico only if it is consistent with this purpose statement, and "has the proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions" of Puerto Rico.[287] These requirements can be ignored only if the law concerns grants to individuals directly, or federal citizenship, or foreign affairs/national security, or if Congress "makes a specific finding that there is an

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[284] *Richards*, 673 F. Supp. at 158.

[285] *See* S. REP. No. 120, 101st Cong., 1st Sess. (1989).

[286] *Id.* at 44-45.

[287] *Id.* at 45.

overriding national interest that such law should apply to" Puerto Rico.[288]

This proposal also contained a provision stating that the Governor of Puerto Rico could certify that any given federal law was inconsistent with the Commonwealth policy statement or Puerto Rican law.[289] After such certification, unless Congress specifically acted within sixty days to require that this law must apply to Puerto Rico, it would no longer apply.[290] Finally, under this proposal, all federal agencies would be required to justify any major action taken that affects Puerto Rico in terms of its consistency with the Commonwealth policy statement.[291] This approach strikes a compromise between the positions of the draft Guam Commonwealth Act[292] and the position of the federal task force that criticized it[293] and could be useful in promoting autonomy within the larger political union.

In August 1990, several committees in the Senate reached a consensus on the meaning of "enhanced commonwealth" that was somewhat more vague that the 1989 proposal described above, but which would nonetheless have answered many questions regarding this status.[294] This Senate proposal[295] would have allowed Puerto Rico to seek exemption

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[288] *Id.* at 45-46.

[289] *Id.* at 46.

[290] *Id.*

[291] *Id.* at 47-48.

[292] *See supra* notes 227-34 and accompanying text.

[293] *See supra* notes 235-39 and accompanying text.

[294] The Senate bill was marked up as a substitute to H.R. 4765. The House version left the details of the "enhanced commonwealth" status purposefully vague and anticipated negotiations on the details between Puerto Rico and Congress should that option be chosen. The Senate felt that the voters should understand what the option entails before they are asked whether they prefer it over the statehood and independence possibilities. *See, e.g.*, Editorial, *The House Version*, SAN JUAN STAR, Aug. 4, 1990, at 19.

[295] The Senate language to be incorporated into H.R. 4765 was as follows:

(3) A new commonwealth relationship.

(A) The new Commonwealth of Puerto Rico would be joined in a union with the United States that would be permanent and the relationship could only be altered by mutual consent. Under a compact, the Commonwealth would be an autonomous body politic with its own character and culture, not incorporated into the United States, and sovereign over matters governed by the Constitution of Puerto Rico, consistent with the Constitution of the United States.

(B) The United States citizenship of persons born in Puerto Rico would be guaranteed and secured as provided by the Fifth Amendment of the

from federal laws and authority to enter into international agreements, which would be considered by the President and Congress on an expedited basis.[296] Puerto Rico residents would participate in federal social programs "equally with residents of the several States contingent on equitable contributions from Puerto Rico."[297] Congress would still have had some ability to control Puerto Rico, but it would have been more explicitly recognized that Puerto Rico was "an autonomous body politic" and that the relationship between Puerto Rico and the United States "could only be altered by mutual consent."[298]

8. Territorial nullification

Another option is to give the legislature of the insular political community the power to nullify or amend some of the federal laws

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> Constitution of the United States and equal to that of citizens born in the several states. The individual rights, privileges, and immunities provided for by the Constitution of the United States would apply to residents of Puerto Rico. Residents of Puerto Rico would be entitled to receive benefits under Federal social programs equally with residents of the several States contingent on equitable contributions from Puerto Rico as provided by law.
>
> (C) To enable Puerto Rico to govern matters necessary to its economic, social, and cultural development under its constitution, the Commonwealth would be authorized to submit proposals for the entry of Puerto Rico into international agreements or the exemption of Puerto Rico from specific Federal laws or provisions thereof to the United States. The President and the Congress, as appropriate, would consider whether such proposals would be consistent with the vital national interests of the United States on an expedited basis through special procedures to be provided by law. The Commonwealth would assume any expenses related to increased responsibilities resulting from the approval of these proposals.

Id.

[296] *Id.* para. 3(c).

[297] *Id.* para. (3)(B). The "Summary of Senate Finance Committee Staff Options on S. 712" included the following description of the financial implications of the Enhanced Commonwealth Status:

> Supplemental Security Income, Aid to Families with Dependent Children, Medicaid phased-in over five year period at 100% national levels with 50% federal/50% local funding or reduced levels. (Agriculture Committee expected to extend Food Stamps.) New benefits paid for by: eliminating rebate of rum excise taxes and customs duties; excise taxes on U.S. products shipped to P.R.; curtailing § 936 tax credit; and floor amendment to raise revenues necessary because of Food Stamps. Except Finance issues from fast-track procedures for Congress' reconsideration of application of federal laws at P.R.'s request.

Id.

[298] *See id.* para. 3(A) (quoted *supra* note 295).

that otherwise would apply. This approach was used in Alaska beginning in 1912. The relevant laws are provided in full below because they illustrate that this approach is workable:

> Section 23. Constitution and laws of the United States extended.
> The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. All the laws of the United States passed prior to August 24, 1912, establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; except as herein provided all laws in force in Alaska prior to that date shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature [of the Territory of Alaska].
> Section 24. Authority of Territorial legislature to repeal or amend existing laws limited; additional taxes or licenses.
> The authority granted to the legislature by section 23 of this title to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to sections 41, 47, 161-169, and 322-325, of this title. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.[299]

9. Free association

The "free association" option which has been chosen by the Federated States of Micronesia and the Republic of the Marshall Islands is another possibility. These islands have complete autonomy over local affairs but coordinate their foreign relations with the United States and rely on the United States for military protection. As "freely associated states," they are now thought of as sovereign and are joining regional and international organizations as independent nations. U.S. laws do not apply to them, although some U.S. rules must be complied with contractually if they accept U.S. funds.

The concept of "free association" is not one that arose under the provisions of the Constitution; it finds its legitimacy from the United

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[299] Act of Aug. 24, 1912, 37 Stat. 512 (1912) (codified at 48 U.S.C. §§ 23-24 (1946)).

Nations. U.N. General Assembly Resolution 1541 enacted in December 1960 establishes the principles that were to be utilized in determining when those entities that were governed by other countries had reached a self-governing status and thus were no longer "colonies."[300]

"Free association" is defined in Resolution 1541 as an association between two entities that is "the result of a free and voluntary choice . . . through informed and democratic processes."[301] In a relationship of free association, there must be respect for the individuality and the cultural characteristics of the area and its people. The most essential element is that the people of each of the freely associated states must unilaterally have "the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes." Finally, the people have the right to develop their own constitution without any outside inference.[302]

In addition to the Federated States of Micronesia and the Republic of the Marshall Islands, other examples of free associated states are the Faroe Islands (Denmark), the Cook Islands (New Zealand), Niue (New Zealand), and the Netherland Antilles (the Netherlands).

C. The Role of International Law

The international law principles that govern nonself-governing territories are relevant in evaluating whether the types of controls the federal government imposes on the U.S.-flag islands are lawful. The U.S. position with regard to the Commonwealth of the Northern Mariana Islands, for instance, has been that the people of the Northern Marianas exercised their power of self determination to become a territory of the United States.[303] The requirements of Article 73 of the United Nations Charter[304] and of U.N. General Assembly Resolution

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[300] G.A. Res. 1541 (xv), 15 U.N. GAOR, 25th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

[301] *Id.*

[302] *See generally* DONALD MCHENRY, MICRONESIA: TRUST BETRAYED 37 (1975).

[303] *See supra* note 215 and accompanying text.

[304] U.N. CHARTER art. 73 requires countries that administer "territories whose peoples have not yet attained a full measure of self-government" to take measures that promote "the well-being of the inhabitants of these territories," and in particular "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions . . . ." *Id.*

1541,[305] would not be complied with, however, unless the status adopted by the people of the Northern Marianas allows them to participate in the political life of the nation in a nondiscriminatory basis.[306] The residents of the Northern Marianas do not now vote for the President nor do they have a voting representative in Congress. Congress can pass laws binding on them without their consent. They are not therefore truly self-governing. Even if it could be established that the residents of the Marianas knowingly sought this subservient status,[307] it would not comply with the requirements of international law, just as a contract in which a person agrees to become a slave of another would not be enforced in a domestic court. Only if a people truly have the right to enact the laws that apply to them can it be said that they are self-governing.

The political leaders of the CNMI have tried to convey their concerns to the United Nations but have been told by U.S. officials not to do so.[308] Because the CNMI was part of a trust established by the United Nations, the United Nations maintained a strong role in determining whether the United States has complied with the trust. In December 1990, the Security Council terminated the trust (except for Palau), despite the efforts by the Governor of the CNMI to delay this decision.[309]

Various bodies in the United Nations have taken an active interest in Puerto Rico's status during the past half century,[310] and U.N. missions visited the Virgin Islands and Guam in the late 1970s.[311] Because none of the five U.S.-flag island communities are now fully

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[305] *See supra* note 300 and accompanying text.

[306] *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (xxv) (*adopted* Oct. 24, 1970), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc A/8028 (1970) (stating that having "a government representing the whole people belonging to a territory" is an essential component of self-determination).

[307] The United States has argued that the residents of the Northern Marianas sought their present status knowing that they would be subject to the exercise of Congressional power under the Territory Clause. *See* U.S. Brief, *supra* note 204, at 10-12 nn.8, 9, United States *ex rel.* Richards v. Sablan, No. 89-16404 (9th Cir. Mar. 1990).

[308] *See, e.g.*, Dan Phillips, *U.S. Tells CNMI to Stay Away from U.N. Meeting*, THE TRIBUNE (Saipan), May 17, 1990.

[309] S.C. Res. 683 (Dec. 22, 1990).

[310] *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 228-31.

[311] *Id.* at 231.

self-governing, it would appear that the United States is not fulfilling its obligations under the U.N. Charter and international law. The U.S. response has been that each of these islands has a political status that it has freely adopted, and thus that each has exercised its right of self-determination. The substantial recent unhappiness regarding the relationship with the United States expressed particularly in Guam and the Northern Marianas[312] would appear to undercut the U.S. position.

IV. The Practical Economic Consequences

The preceding discussion shows that the five U.S.-flag insular political communities are not "self-governing" or "autonomous" in the true sense of those words. Congress can pass legislation applicable to them, either through laws that apply throughout the nation or through laws specifically written for one or more island community. Because the islanders have no effective voting representation in Congress[313] and do not vote for the President, they have only limited ability to influence legislation that affects them. In addition, federal agencies have discretion to apply and implement federal laws in the islands, and again the islanders have only limited input about how these laws are will be interpreted and applied to their situations.

Has this state of affairs in fact hurt the islanders? The federal influence has been largely benign, except perhaps for the military bases in Guam, and some statutes and regulations do favor the islanders over residents of the states. Other federal programs do not provide benefits for the islanders or provide them with only a fraction of the benefits received by residents of the states. The greatest annoyance is perhaps that the federal laws and regulations seem frequently to be enacted and applied without concern for or consideration of the special situations in the islands. It is the inability to have direct input into federal decisions through the influence of a voting member of Congress that is most frustrating.

A. Customs

American Samoa, Guam, the Northern Marianas, and the United States Virgin Islands are all now outside the U.S. customs union,[314]

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[312] *See supra* notes 194-239 and accompanying text.

[313] *See supra* notes 119-33 and accompanying text.

[314] 48 U.S.C. § 1421(h) (1976); 19 C.F.R. § 718 n.5; CNMI Covenant, *supra* note 23, § 603(a); *see* Leibowitz, Defining Status, *supra* note 2, at 303, 382, 469, 569-70. Puerto Rico is in the U.S. customs union. *Id.* at 203, 218.

which means articles can be imported without duty to their shores. If these same items are then shipped to a U.S. state, duty must be paid. No duty needs to be paid on any items, however, if either thirty percent or fifty percent (depending on the product and island) of their value has been added in the U.S.-flag island and the items are substantially different from items brought into the island.[315]

This scheme has been somewhat helpful in promoting the development of local manufacturing in Guam, the Marianas, and the Virgin Islands,[316] but Congress has been watchful to ensure that this development does not compete with stateside industries,[317] and quotas have been imposed upon imports of watches and textiles.[318] American Samoa has been able to take advantage of these statutes only through its two tuna canneries; an effort was made in the 1970s to promote a jewelry industry, and the American Samoan government is now considering a textile operation.[319] Under the regime proposed in Guam's draft Commonwealth Act, Guam would remain outside the U.S. customs union (meaning goods would enter without duty as at present), but the percentage of value required to be added for products to be exported to the U.S. states without duty would be lowered from fifty to thirty percent.[320]

B. Immigration

American Samoa,[321] and the Northern Marianas[322] are authorized to control the immigration in and out of their islands, but Guam, Puerto Rico, and the Virgin Islands are not.[323] This issue has been a major cause for concern in Guam during the past two decades,[324] and under the draft Guam Commonwealth Act the authority to control immigration into Guam would shift from the United States to the Commonwealth of Guam.[325]

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[315] Pursuant to Headnote 3(a) of the U.S. Tariff Code. *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 303-04, 383, 469-70, 569-70.

[316] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 304-06, 383-84, and 570-72.

[317] *Id.* at 306, 383-84, 571-72.

[318] *Id.* at 383-84.

[319] *See id.* at 469-70.

[320] Guam Commonwealth Act, *supra* note 227, § 501.

[321] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 447-51.

[322] *Id.* at 558-62.

[323] *Id.* at 161-62, 278-84, 387-92.

[324] *Id.* at 388.

[325] Guam Commonwealth Act, *supra* note 227, art. 7.

C. Taxation

None of the residents of the five insular political communities pay taxes to the United States Treasury.[326] American Samoa, Guam, the Northern Marianas, and the U.S. Virgin Islands have "mirror image" taxes whereby residents pay to their local government what they would have paid to the United States had U.S. tax law applied.[327] Puerto Rico taxes its citizens at rates far higher than any state and, at certain levels of income, far more than federal rates.[328]

D. Other Federal Laws

The application of other federal laws to the insular communities is a patchwork of ad hoc decisions. The U.S. shipping laws requiring the use of U.S.-flag vessels to transport passengers and cargo between any two points in the United States applies to Guam and Puerto Rico, but not to American Samoa or the Virgin Islands, or to the Northern Marianas (except for activities of the U.S. government and its contractors).[329] American Samoa, Guam, and the Northern Marianas are exempt from the Nicholson Act[330] prohibiting the landing of fish in U.S. ports by foreign vessels, and the Virgin Islands are exempt for landings by vessels of less than fifty feet in length.[331] The minimum wage laws applicable in the states are currently mandatory in Guam, Puerto Rico, and the United States Virgin Islands, but not in American Samoa and the Northern Marianas where lower minimums are permitted.[332] Social welfare programs are applied erratically in the islands,

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[326] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 203-14, 288-95, 376-82, 466-68, 565-69.

[327] *Id.*

[328] Helfeld, *supra* note 146, at 455 and n.8.

[329] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 310, 395 (citing 46 U.S.C. §§ 13, 289, 292, 316, 808, 877, 883, 883-1, and § 502(b) of the CNMI Covenant, *supra* note 23)). Article 9 of the draft Guam Commonwealth Act, *supra* note 227, would provide a limited exception for Guam from the coastwise shipping laws.

[330] Nicholson Act, Pub. L. No. 87-220, 75 Stat. 493 (1961) (codified at 46 U.S.C. § 251(a)).

[331] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 470 and n.300.

[332] *Id.* at 216, 386, 468-69. The U.S. Department of Labor reviews the minimum wage rates in American Samoa every two years. Under § 802 of the draft Guam Commonwealth Act, *supra* note 227, the power to enact and enforce labor laws would be transferred from the U.S. Congress to Guam.

with most programs providing lower benefits or no eligibility at all.[333]

E. Third-Country Assistance

The Commonwealth of the Northern Marianas has been particularly eager to receive monetary aid from Japan for a control tower at its airport and a new sewage system, but the United States State Department has stated repeatedly that because the CNMI is part of the United States it is not entitled to receive development assistance from any foreign nation.[334] This position is based on the State Department's view that development assistance should go only to the world's poorest countries and that "subdivisions of the United States, be they states, commonwealths, or territories, may not enter into international agreements with foreign governments, such as generally are required for the provision of development assistance."[335] Governor Lorenzo I. De Leon Guerrero responded with great disappointment at this position, arguing that it raises the question whether "we made the wrong decision in 1975 when we agreed to enter into political union with the United States,"[336] since the other Micronesian entities can receive assistance from Japan. Governor Guerrero also argued that it was appropriate for Japan to assist with Saipan's air control tower because eighty percent of the 300,000 passengers landing at the airport are Japanese.[337]

The United States Interior Department's Office of Territorial and International Affairs has also appealed to the State Department for

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[333] *Id.* at 223-24, 384-85, 474-76, 575-76; Helfeld, *supra* note 146, at 460 and n.42. This discriminatory treatment has been upheld regarding Puerto Rico in Califano v. Torres, 435 U.S. 1 (1978), and Harris v. Rosario, 446 U.S. 652 (1980). *See supra* notes 173-77 and accompanying text.

[334] *See, e.g.*, Letter from Marilyn A. Meyers, Deputy Assistant Secretary of State for East Asian and Pacific Affairs, to Stella Guerra, Assistant Secretary of Interior for Territorial and International Affairs (Mar. 30, 1990); Letter from Marilyn A. Meyers to Lorenzo I. De Leon Guerrero, Governor of CNMI (June 5, 1990); Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs to Representative Ron de Lugo, Chair of the U.S. House Subcommittee on Insular and International Affairs (July 31, 1990).

[335] *Id.*

[336] Dana Williams, *Guerrero: CNMI Punished*, PACIFIC DAILY NEWS (Agana, Guam), Aug. 17, 1990, at 1.

[337] *Id.*

greater flexibility on this question,[338] as has Timothy Glidden, President Bush's Special Representative to the status negotiations with the Northern Marianas Government.[339] Members of Congress are also seeking some compromise on this issue.[340]

F. Summary

The island communities have benefitted from special treatment under some U.S. laws, but they have felt frustrated that the exceptions seem to be manipulated to protect stateside interests rather than with a clear view of promoting the interests of the islanders. Under U.S. law, it is clear that special ad hoc preferences can be provided to the islanders, but politically the islanders have limited input into which preferences

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[338] Letter of Stella Guerra, Assistant Secretary of Interior for Territorial and International Affairs to Marilyn A. Meyers, Deputy Assistant Secretary of State for East Asian and Pacific Affairs (Apr. 5, 1990). This letter contains the following language:

> First, U.S. territories cannot be regarded as states. They are distant from mainland U.S.A. They are geographically part of areas considered by U.S. policy makers as being foreign. They are closer geographically to foreign independent island nations and territorial areas administered by foreign nations; thus, they are subject to international and foreign regional influences unknown to the 50 states. And from a resource perspective, they cannot in any way be likened to the States. They are unique and must be regarded as *unlike* the States.
>
> At Interior we have acknowledged, and we ask the State Department to acknowledge, there always will be infrastructure and other requirements in U.S. territories unfulfillable by the United States and more favorably fillable by foreign assistance because of the unique circumstances of the insular areas. Any decision to accept foreign assistance would be based on the conditions attached by the profferer and the intended objective.
>
> What I am asking is reconsideration, in the context set forth above, of the U.S. policy set forth in your letter of March 30. Radical shifts I am not seeking; only sufficient flexibility to enable us to be carefully responsive to the needs of U.S. territories.
>
> If the State Department reconsiders U.S. policy on the foreign assistance issue, I have confidence the policy could be tailored to fit the unique circumstances of U.S. insular areas. May I point out that § 302(b) of P.L. 99-239 recognized modification of federal laws and regulations may sometimes be necessary for their application to U.S. insular areas.

Id.

[339] Dave Hughes, *Guerrero to State: 'Did We Make Mistake?'* MARIANAS VARIETY NEWS & VIEWS (Saipan), Aug. 17, 1990, at 26.

[340] Charles Wilbanks, *State Dept. Opposes CNMI Request for Foreign Aid*, PACIFIC DAILY NEWS (Agana, Guam), July 13, 1990.

they will be favored with. Ultimately, they are entitled to greater control over the laws that apply to them.[341]

V. Summary and Conclusion

The United States has always governed its territories and possessions separately from its states. During the past two centuries, the legal regime applicable to the territories has evolved in a patchwork ad hoc fashion, with Congress responding to the unique and individual needs of each territory, sometimes with sensitivity and sometimes with indifference or insensitivity. Executive agencies responsible for the territories have also responded in inconsistent ways to the needs of the territories, sometimes recognizing their particular needs and applying federal statutes in appropriate ways and sometimes refusing to respond to the pleas of the territories for individualized treatment.

Five island communities are currently under U.S. sovereignty but are not states: American Samoa, Guam, CNMI, the Commonwealth of Puerto Rico, and the United States Virgin Islands. What are the rights and privileges of the residents of these islands under the Constitution and international law? Which provisions of the Constitution apply in these islands? Is Congress at liberty to pass any legislation whatsoever under the Territory Clause of the Constitution and impose that law on the people of these islands? In the cases of Puerto Rico and the Northern Mariana Islands, explicit contractual relationships have been developed through Puerto Rico's compact in the early 1950s

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[341] The U.S. Congress recognized that the applicability of U.S. statutes and regulations to the U.S.-flag islands needs reevaluation in 1986 when it approved the Compacts of Free Associations with the Federated States of Micronesia and the Republic of the Marshall Islands. Pub. L. No. 99-239, § 302(b), 97 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681). In the statute approving the compacts, Congress asked the Department of the Interior, working with the Department of State, to prepare a report setting forth clearly defined policies regarding United States, and United States associated, noncontiguous Pacific areas, including:

> (1) the role of and impacts on the noncontiguous Pacific areas in the formulation and conduct of foreign policy;
>
> (2) the applicability of standards contained in Federal laws, regulations, and programs to the noncontiguous Pacific areas and any modifications which may be necessary to achieve the intent of such laws, regulations, and programs consistent with the unique character of the noncontiguous Pacific areas . . . .

Id.

and the Northern Marianas' Covenant in 1975.[342] Do these documents limit what Congress can do, or are they to be viewed as just another statute that Congress can later amend? Should Guam be able to become a commonwealth, too, as its citizens wish, and, if so, can that status be one in which Guam would have meaningful autonomy from the U.S. government?[343] What relationships should ultimately be developed for American Samoa and the U.S. Virgin Islands?[344] Should some, or all, of these islands become states?

In a series of 1901 decisions referred to as the *Insular Cases*,[345] the Court developed the idea that some U.S. territories are not formally "incorporated" into the United States and that the United States Constitution does not fully apply in these areas. Territories are "incorporated" according to this doctrine if they are destined to become states, and ultimately it is up to Congress to decide which territories achieve this status. In a series of related decisions, the Supreme Court concluded that Congress had broad power to pass legislation that would be binding on the territories, although Congress could not violate fundamental constitutional rights and natural law principles in this process.[346] A number of cases, for instance, examined whether residents of the territories were entitled to jury trials, and most concluded that they were not.[347] More recently, the United States Supreme Court ruled that Puerto Rico could not discriminate against aliens with regard to professional licensing,[348] but the United States Court of Appeals for the Ninth Circuit concluded that the CNMI could discriminate against persons who are not "of Northern Marianas descent" with regard to the ability to purchase land.[349] The Governor of Guam has argued that the constitutional right to privacy does not apply there when trying to defend a Guam statute restricting access to abortion, but the federal district court has rejected this argument.[350] In the context of federal social welfare programs, the Court has concluded that Congress can discriminate against residents of the territories and provide them with

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[342] *See supra* notes 147-223 and accompanying text.
[343] *See supra* notes 224-39 and accompanying text.
[344] *See supra* notes 240-84 and accompanying text.
[345] *See supra* notes 40-59 and accompanying text.
[346] *See supra* notes 50-90 and accompanying text.
[347] *See supra* notes 64-86 and accompanying text.
[348] *See supra* notes 87-90 and accompanying text.
[349] *See supra* notes 95-111 and accompanying text.
[350] *See supra* notes 91-94 and accompanying text.

fewer services.[351] These cases form an inconsistent pattern and many questions remain unresolved regarding the power of Congress and the constitutional rights that apply in the islands.

A similarly inconsistent pattern is found by examining the federal statutes and regulations that apply to the islands. American Samoa, Guam, the CNMI, and the United States Virgin Islands are outside the U.S. customs union, but Puerto Rico is in it.[352] Goods of any sort from any place in the world can be imported into the four communities outside the customs union without any obligation to pay U.S. duties or taxes on them. If these imported goods are then exported to other locations in the United States, U.S. customs duties must be paid on them unless the items have been transformed into something substantially different on the U.S.-flag island and either thiry or fifty percent (depending on the product and island) of their value has been added through this transformation. This status has provided some economic benefits for some of these island communities. It is, however, a relationship that is subject to alteration by Congress, which has established quotas on certain goods when mainland industries seemed threatened by the economic activities in the islands, and by the decisions of federal agencies acting on their own, without any lead from Congress.

Other legal arrangements also seem to form no clear pattern. Two of these island communities control their own immigration (American Samoa and the CNMI), three do not.[353] U.S. coastwise shipping laws apply in two (Guam and Puerto Rico), but not in the other three.[354] Minimum wage laws apply in some, but not others.[355] And so on.

In practical financial terms, the islands have received some economic benefits from their association with the United States, but these benefits have been erratic and unpredictable. This puzzling set of statutes and regulations surely exist in large part because the islands have only limited abilities to affect decisions made in Washington.

None of these islands now have full and effective voting representation in Congress and their residents do not vote for the President.[356] Each island community elects either a Delegate (American Samoa, Guam, and the United States Virgin Islands), a Resident Commissioner

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[351] *See supra* notes 173-77 and accompanying text.
[352] *See supra* notes 314-20 and accompanying text.
[353] *See supra* notes 321-25 and accompanying text.
[354] *See supra* note 329 and accompanying text.
[355] *See supra* note 332 and accompanying text.
[356] *See supra* notes 119-33 and accompanying text.

(Puerto Rico), or a Resident Representative (CNMI) to Washington. The Delegates and the Commissioner are located at the House of Representatives; they can introduce bills and vote in committees, but have no vote when the House meets in plenary session to consider whether to enact a bill or approve a budget. They cannot effectively form coalitions or bargain with their vote for the benefit of the islands. The CNMI Resident Representative has no rights or privileges in Congress, except the same right to present testimony that any person has. If Congress can impose legislation on the islands when the islanders have no effective representation in that legislative body, then these islands are not self-governing in any meaningful sense. Even though they have local legislatures, their enactments can be overturned by Congress.

In the early 1950s, Puerto Rico negotiated a compact with the United States that led to the "Commonwealth of Puerto Rico."[357] This new status was meant to provide more autonomy for Puerto Rico, and in several judicial opinions in the late 1950s and 1960s, federal judges wrote that Puerto Rico's compact provided protection to Puerto Rico and that it could not be unilaterally altered by Congress.[358] In the late 1970s and early 1980s, however, the United States Supreme Court upheld Congressional statutes that explicitly discriminated against Puerto Rico, apparently feeling that Congress can treat Puerto Rico as it wishes under the Territory Clause.[359] Because of these conflicting views, Congress and the people of Puerto Rico have been reexamining Puerto Rico's status, looking again at the options of statehood, independence, and an "enhanced" commonwealth status.

The Commonwealth of the Northern Mariana Islands was established in 1975 by virtue of a negotiated Covenant that was approved by the voters of the Northern Marianas and the United States Congress.[360] The CNMI government has viewed this Covenant as limiting Congress's power to pass legislation affecting it, but the U.S. government has argued that Congress still has broad powers to legislate under the Territory Clause. According to the U.S. view, expressed recently in a long legal brief,[361] the Covenant is just an ordinary statute which

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[357] *See supra* notes 147-89 and accompanying text.

[358] *See, e.g., supra* notes 169-71, 178-83 and accompanying text.

[359] Harris v. Rosario, 446 U.S. 652 (1980); *see supra* notes 175-77 and accompanying text.

[360] *See supra* notes 192-223 and accompanying text.

[361] *See supra* notes 204-17 and accompanying text.

Congress can unilaterally amend pursuant to the Territory Clause, except for the few provisions specifically requiring mutual amendment that are listed in Section 105 of the Covenant.[362]

The United States argues that the people of the Northern Marianas exercised their right to self-determination in 1975 by voting to be affiliated in permanent union with the United States in a status in which Congress can impose laws upon them under the Territory Clause, without their consent or meaningful representation in the legislative process. If the historical facts support such a conclusion, is that relationship acceptable under international law?[363]

The Territory of Guam has been seeking to become the "Commonwealth of Guam" and has drafted and revised a Guam Commonwealth Act during the past several years.[364] A task force of federal officials has issued a long analysis of this Act sharply criticizing its attempts to establish a degree of real autonomy for the island.[365]

The negative responses of U.S. officials to the CNMI claims that its Covenant provides it with a degree of autonomy and to Guam's attempt to obtain more autonomy through its Commonwealth Act indicate that the executive branch of the United States is not yet willing to acknowledge that a status can exist between being a "state" and being a "territory."[366]

Members of Congress have, however, been more flexible on this subject. In the current discussions on Puerto Rico's status, the option of becoming an "enhanced commonwealth" has been developed,[367] and it is clear that this option would provide more autonomy to this island community. Several versions have been proposed, but all include some mechanism whereby Puerto Ricans could play an active role in determining which federal laws will apply to them. These new alternatives provide useful options that should be examined by the Pacific U.S.-flag islands as well.

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[362] CNMI Covenant, *supra* note 23, § 105; *see supra* note 197.

[363] *See supra* notes 303-12 and accompanying text.

[364] *See supra* notes 224-39 and accompanying text.

[365] *See supra* note 235 and accompanying text.

[366] *See, e.g.*, statements of Tim Glidden, *supra* note 217, and Stella Guerra, *supra* notes 236-39 and accompanying text; US Brief, *supra* note 204, at 10 n.8; *supra* notes 212-13 and accompanying text.

[367] *See supra* notes 285-98 and accompanying text.

International law is relevant to this analysis, because the international community now prohibits the maintenance of colonies.[368] All peoples are entitled to self-determination. As mentioned above, the residents of these islands do not have full and effective representation in the United States Congress or the right to vote for the President of the United States. If they do not have a meaningful say in deciding what laws apply to them, then their status is akin to that of subjects in a classic colonial situation.

These islands deserve the dignity of a more carefully defined autonomous status. The position of U.S. officials that the U.S. system can envision only two types of political entities—"states" and "territories"—is untenable. Our political system can certainly also include a true "commonwealth," in which the island residents can have direct input into the federal laws that apply to them and in which their decisions that certain laws should not apply would be respected unless Congress identifies an overriding national necessity to have a uniform law on the subject. Two models outlining this approach taken from the Puerto Rico bills now under consideration in Congress are described above.[369]

Without this degree of autonomy, these communities must have representation in Washington. If they have neither autonomy nor representation, they cannot be described as "self-governing" and then their colonial status must be seen as a violation of international law.[370] Arnold H. Leibowitz argues that the islands should have the option of statehood,[371] and Puerto Ricans are again looking closely at this possibility. If some of the other islands are thought to have too few residents to qualify as a state, they could be given some new arrangement, such as a voting Representative in the House, or one Senator and one Representative. Surely lawyers could adapt our Constitution to absorb such an idea if it were thought to be a wise one. Some mechanism also should be devised to allow the islanders to participate in presidential elections.

The present situation in which the islands are at the mercy of Congress and a federal bureaucracy that can be erratic, inconsistent, and insensitive cannot be allowed to exist indefinitely. The uncertainties

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[368] *See supra* notes 303-12 and accompanying text.

[369] *See supra* notes 285-98 and accompanying text.

[370] *See supra* notes 303-12 and accompanying text.

[371] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 69-83.

created by this situation thwart development and discourage initiatives in the islands.

Each of these island communities have demonstrated the ability to exercise local self government. They each have a mature and lively political structure in which the basic values of fairness and full opportunities for participation are maintained at the local level. They each have unique cultures that should be allowed to develop in ways that are true to their traditions. In terms of their subservience to the Congress and the federal agencies, however, they are still colonies.

The present ambiguous situation requires attention and new solutions. International law does not permit a perpetuation of colonial servitude, nor does that status comport with the traditions of fair play and justice that have marked our nation's heritage. Our nation should either recognize the legitimacy of a real or "enhanced" commonwealth status giving these islands true control over their affairs or we should give them meaningful voting representation in Washington.

ADDENDUM

On December 8, 1992, the Democratic Caucus of the House of Representatives voted to authorize the delegates representing American Samoa, Guam, Puerto Rico, and the United States Virgin Islands (and the District of Columbia) to vote on amendments to bills on the House floor and virtually all other matters relating to legislation except final passage.[372] The delegates were pleased by this step,[373] but it was seen as a partisan move by the Repulicans who immediately denounced it.[374] The House Republican leader, Robert H. Michel, directed his staffto assemble a team of lawyers to challenge the constitutionality of this move in the courts.[375]

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[372] Clifford Krauss, *House Democrats Grant 5 Delegates More Power*, N.Y. TIMES, Dec. 10, 1992, at A12, col. 1 (Nat'l ed.).

[373] Delegate-elect Carlos Romero-Barcelo of Puerto Rico said "The fact that we get that vote does not necessarily mean we're another step closer to statehood. But it's another step toward more participation in the decision-making process. After all, we are 3.6 million U.S. citizens who are disenfranchised, who are ruled by laws passed by Congress." *Id.*

[374] Representative Newt Gingrich of Georgia, the House Republican Whip said, "The Democrats are creating five artificial votes . . . . It's the most extraordinary power grab in modern times. They are mugging us." *Id.*; *see also* George Will, *Democrat Power Grab Stinks*, HONOLULU ADVERTISER, Dec. 16, 1992, at A18, col. 3.

[375] Krauss, *supra* note 372.

Although this rule change—if it stands—is a positive step in recognizing the right of the U.S.-flag islands to either a more significant voice in national decision making or more autonomy, it is insufficient to address the concerns raised in the preceding article. The islands need to have a new status that is recognized as permanent in nature, not one that can be changed with each shift in the winds of political power.

Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts

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FOR LILI'U
We are singing a requiem for our mother,
Our voices a shroud across this land.
Wrenched we were, from Kamakaeha's soft bosom,
Wretched, our grief inconsolable.
We are feeble scratchings against cold granite vaults,
Grasping, tremulous as moondark trees,
Our fire-spirits burned black as cinders—
Our mouths filled with ash.
Our mother's spirit was incandescent color. Green
Ocean of emerald stars, mosses, living grass:
Know you our sweet-voiced mother?
Know you her children's sorrow?
Cloudless azure, blue-veined petal:
Her blood was a firebrand night,
Her bones iridescent light;
She sang the sunlit bird.
Fire-spirits burned black as cinders,
Mouths filled with ash,
We search the empty garden, Uluhaimalama,
Papery flowers on melancholy earth. Now
Our song is for our mother,
Our nation,
Our rebirth. **

A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair. ***

I. INTRODUCTION

Hawai'i is the only state in the United States to have been an independent kingdom prior to statehood.[1] It is also the only state, though not by any means the only land, acquired by overthrowing a sovereign government and imposing American citizenship upon the inhabitants. The as-yet-unremedied injustice of the United States against

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** Mahealani Kamauu, published in the *Progress Edition*, HONOLULU STAR-BULL., 1987 (reprinted with author's permission).

*** President Grover Cleveland, MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess. 13 (1893).

[1] Texas was also a nation, although not a kingdom, prior to statehood.

Native Hawaiians[2] continues to imperil their survival and that of their culture.

In 1893, United States Marines landed in Honolulu harbor and seized control of the Hawaiian government. Americans annexed the islands after a "bloodless coup" and installed their own government without so much as a plebiscite of the people living there. This overthrow devastated the indigenous Hawaiian culture, which derives from Native Hawaiians' relationship to the land. A central tenet of the Hawaiian culture is *aloha 'āina*, the love of the people for the land. This rich concept encompasses many values: the protection and conservation of nature, respect for the inherent value of living things, the interdependence of people and nature, and cooperation and sharing among people and extended families, called *'ohana*.[3] The Hawaiian religion, hula dances and chants, artworks, language, mythology, history, diet, medicine, and other cultural practices revolve around the land which spawned them. The toppling of its monarch and subsequent confiscation of crown and government lands left this previously land-

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[2] The term "Native Hawaiian" has many definitions depending on several criteria including race, self-identification, genealogy, political considerations, culture, and geography. For example, the federal and state governments, in its censuses, use a self-identification method for categorizing race. 1990 U.S. CENSUS, question 4; 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS OF HAWAII B12 (1990). Congress, in the Hawaiian Homes Commission Act of 1920 (Pub. L. No. 34, ch. 42, §§ 203-21, 42 Stat. 108 (1921) [hereinafter H.H.C.A.]) defined "Native Hawaiian" as any person with fifty or more percent of the blood of the races of those living in Hawai'i before 1778, when Westerners first arrived. *Id.* § 201. The Office of Hawaiian Affairs (O.H.A.), an arm of the Hawai'i state government that officially represents "Hawaiians" to the state, defines a "Hawaiian" as anyone descended from an indigenous Hawaiian, regardless of blood quantum. HAW. CONST. art. XII, § 6; HAW. REV. STAT. § 10-3 (1985). Under the state constitution, O.H.A. was established to serve both "Native Hawaiians" (those with 50 percent or more Hawaiian blood) and "Hawaiians" (those with any amount of Hawaiian blood). *Id.*

The term "Native Hawaiian" is used by some separatists to denote those who make a political statement by considering themselves citizens of the Nation of Hawai'i. Telephone Interview with Pōkā Laenui, Vice-President of the World Council of Indigenous Peoples, Honolulu, Haw. (Apr. 1989). Others in the Native Hawaiian community describe members as persons who honor and practice the ancient culture. *Id.* A broader definition would encompass anyone who was born in Hawai'i.

Unless otherwise stated, the term "Native Hawaiian" as used in this article will refer to any person recognized by the Native Hawaiian community as a member, or in the alternative, anyone descended from a person indigenous to Hawai'i.

[3] Haunani-Kay Trask, *Hawaiians, American Colonization, and the Quest for Independence*, 31 SOCIAL PROCESS IN HAWAII 101, 125-26 (1984-85).

based community virtually landless. As a result, the dignity, culture, and physical condition of the Hawaiian people were severely compromised.

Hawai'i's indigenous people descend from several groups of South Pacific islanders who migrated there more than 1800 years ago.[4] Today, just over 200,000 people living in Hawai'i are descended from these original inhabitants,[5] comprising between 12.0%[6] and 19.1%[7] of the state's population.[8]

Native Hawaiians are the worst-off ethnic group in Hawai'i. Their life expectancy, 67.62 years, is the lowest of all the ethnic groups in Hawai'i; their median family income is 75.7% of that of the general Hawai'i populace; Hawaiians account for 30.8% of the State's A.F.D.C. recipients and constitute 23% of all arrestees; at 11.6%, theirs is the highest unemployment rate in the state, compared with a statewide average of 6.5 percent.[9] These discrepancies show no sign of diminishing over time; although students of Hawaiian ancestry account for 30% of the elementary and secondary school populations, they constitute only 5% of the graduating high school seniors and only 2.9% of those enrolled at the University of Hawaii's main campus at Manoa.[10]

Hawaiians are assimilated into American lifestyles to varying degrees; many have adopted Christianity as their religion and nearly all speak English as their primary language, although this does not preclude them from using their indigenous religion and language as well.[11] By one informal account, most do not live in predominantly Native

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[4] DAVID E. STAMMARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT 33-34, 126 (1989).

[5] 1990 U.S. CENSUS. There are also several thousand people of Hawaiian extraction living in other parts of the United States. *Id.*

[6] *Id.*

[7] DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, THE STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT 40 (1990).

[8] There is some discrepancy about the exact number of Native Hawaiians owing to the differing definitional criteria. *See supra*, note 2.

[9] DEPARTMENT OF BUSINESS & ECONOMIC DEVELOPMENT, THE STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT 79-82 (1987).

[10] *Id.* There are some bright spots in this otherwise bleak picture. The state elected a governor of Hawaiian descent, its first, in 1986. In addition, one of the newly appointed justices to the Hawaii Supreme Court is of Native Hawaiian descent. Christopher Neil, *Waihee Names Two to High Court*, HONOLULU STAR-BULL. & ADVERTISER, Mar. 8, 1992, at A1.

[11] Telephone Interview with Mililani Trask, Kia'aina of Ka Lāhui Hawai'i, Honolulu, Haw. (Apr. 1989).

Hawaiian communities and a number are distributed among low-income public housing projects.[12] Nevertheless, a leader in the Native Hawaiian Rights movement estimates that one-third to one-half of Native Hawaiians consider themselves Hawaiian nationalists.[13]

The decline of the Hawaiian people began shortly after Westerners arrived in Hawai'i in 1778 and was especially aggravated by Western encroachment onto native land in the mid- to late nineteenth century.[14] Ostensibly to alleviate the continuing decimation of the Native Hawaiian people, in 1920 and 1959, Congress created land trusts for the benefit of Native Hawaiians.[15] As part of the statehood compact, the federal government turned the administration of these lands over to the new state.[16]

Under both federal and state stewardship, the trusts have failed to provide an adequate land base for the survival and protection of the Hawaiian people. One of the trusts, the Hawaiian Homelands Trust, consists of a number of small, non-contiguous parcels of little agricultural value.[17] The other land trust, the Ceded Lands Trust, names the general public as co-beneficiary with the Native Hawaiians and has been used mostly for general public purposes, thus undermining the beneficial value to the Native Hawaiian community.[18] The federal and state trustees have badly mismanaged the trust lands and abused their position of trust.[19] There is little hope that these patterns will abate, and, this paper argues, little possibility that they even can.[20]

Compounding the inadequacy and mismanagement of the trust lands is the political abandonment of Native Hawaiians by the federal government. Unlike mainland Native American and Alaskan groups, Native Hawaiians are not recognized by the federal government as

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[12] *Id.*

[13] *Id.*

[14] Estimates of the pre-contact population range from 300,000, *see* NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS (MAJORITY) 102-04 (1983), to 800,000 or 1 million, Stannard, *supra* note 4, at 30. By 1866 there were only 57,000 Hawaiians left. LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 13 (1961).

[15] H.H.C.A., *supra* note 2; Admission Act of 1959, Pub. L. No. 86-3, §§ 4, 5(f), 73 Stat. 4, 5-6 (1959) [hereinafter Admission Act].

[16] Admission Act § 5(f).

[17] *See infra* part II.E.

[18] *See infra* part III.C.

[19] *See infra* part III.

[20] *See infra* part IV.

members of tribes and do not have relations directly with the federal government.[21] For the most part indigenous Hawaiians are not eligible for the benefits accorded to indigenous mainlanders, including reservations for community living, recognized tribal civil and criminal laws,[22] protected access to natural resources, and educational and vocational programs under the Bureau of Indian Affairs (BIA).[23] Nor have Hawaiians been awarded a land and reparations package, as the Alaskan natives obtained in 1971.[24]

In short, with respect to Native Hawaiians, the United States government has all but abdicated to the State of Hawaii the trust responsibilities toward indigenous people ordinarily thought to inhere in the federal government.[25] Because Native Hawaiians' relationship with

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[21] *Id.; see* Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985), *cert. denied sub nom.* Hou Hawaiians v. Hawaii, 474 U.S. 1055 (1986) (refusing to recognize a group of Native Hawaiians as a "tribe"); 50 Fed. Reg. 52829-35 (Dec. 29, 1988) (listing federally-recognized Indian and Alaskan Native entities).

[22] Hawai'i law provides that Hawaiian customary law may expressly govern in state court alongside the constitution, federal or state laws, and judicial precedent. HAW. REV. STAT. § 1-1. There is an exception for criminal proceedings. *Id.* English common law, as interpreted in English and American courts, governs where the above-mentioned sources of authority are silent. *Id.*

It is not clear which entity is the final arbiter of Native Hawaiian custom for purposes of American law. Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977) (enjoining enforcement of state court interpretation of customary law as tantamount to a taking), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *cert. granted and judgment vacated by* 477 U.S. 902 (1986), *on remand*, 796 F.2d 339 (9th Cir. 1986), *on remand*, 676 F. Supp. 1002 (1987), *opinion vacated by* 887 F.2d 215 (9th Cir. 1988).

[23] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 803 (2d ed. 1982) (Native Hawaiians not eligible for BIA programs) [hereinafter COHEN]. Only since 1974 has Congress specifically included Native Hawaiians as beneficiaries in bills providing services to Native Americans. *Id.* at 797. This comparison is not intended by any means to extol the civic benefits enjoyed by mainland Native Americans. Mainland Native Americans continue to struggle with the United States for civil rights, self-determination, and cultural survival. Examples abound of the inadequacy of the BIA and of the current federal-Indian arrangements. However, even those governmental programs aimed at helping Native Americans have, by and large, excluded Native Hawaiians from their scope. *Id.*

[24] Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971), 43 U.S.C. § 1601 (1971) (Dec. 18, 1971). Efforts during the early 1970s to secure a reparations package for Native Hawaiians failed, but new efforts are underway. *See* NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha MacKenzie, ed.) 80-83 (1991) [hereinafter N.H.R.H.].

[25] *See infra* part IV.A.

government takes place at the state rather than the federal level, their concerns are isolated from the national political arena.

Native Hawaiian dignity, health, and cultural survival cannot be secured through the existing trust mechanisms. Even if the trusts functioned perfectly, state or federal government ownership and control of indigenous peoples' lands presents insoluble philosophical problems.[26] As a first step Native Hawaiians should recover a land base, where Hawaiian self-governance would be recognized by the state and federal governments. Ultimately, they should be accorded a measure of *self-determination*.[27] Native Hawaiians must be permitted to pursue the greater good of their community in their own time-tested and unique way.

Native Hawaiians' claims resonate with aspirational principles of the American people: principles of self-governance, justice and fairness, civil rights and civil remedies, compensation for takings, similar treatment for those similarly situated, and avoidance of conflicting interests.[28] Thus, it is a great American oversight that indigenous Hawaiians' claims have gone unnoticed by the American public. Non-Hawaiian citizens of the United States unquestionably benefit, militarily and economically, from continued American use and possession of Hawaiian lands. It is incumbent upon Americans to reverse the political processes that have excluded this issue from the national forum and to honor the claims of those who originally settled, cultivated, and governed that land.[29]

This article briefly reviews the history of the relationship between Americans and Hawaiian land[30] and then describes the current status of American-Hawaiian relations, including the functioning (or malfunctioning) of the two trusts.[31] Next, it offers a comparison of the Native Hawaiians' relationship with the federal government to that of

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[26] *See infra* part V.

[27] "Self-determination" refers to a broad array of concepts, from limited communal self-governance to full sovereignty as a separate nation. *See infra* part VI.

[28] *See, e.g.*, The Declaration of Independence, para. 1 (U.S. 1776); U.S. CONST. amends. V, XIV; Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

[29] Since the passage of the Admission Act in 1959, the issue of Native Hawaiian land rights has for the most part disappeared as a national political question (if ever it was one), and has been relegated to its current status as a question of primarily local concern. One of the major tasks of the emerging Native Hawaiian Rights movement is to return that issue to its place in the national forum.

[30] *See infra* part II.

[31] *See infra* part III.

mainland Native Americans.[32] The article then argues that the existing trust arrangements should be discarded altogether and replaced with structures that allow for more self-governance.[33] It concludes with a discussion of various solutions that would accord Native Hawaiians a greater measure of autonomy.[34]

II. A Brief History of Hawai'i and the American-Hawaiian Relationship

A. Hawai'i Before the Arrival of Westerners

Hawai'i is an archipelago spanning 3200 miles of the central and northern Pacific Ocean and located more than 2500 miles southwest of the west coast of the United States. It comprises eight major islands and hundreds of minor ones.[35] Hawaiian oral tradition teaches that Hawai'i's Polynesian settlers were guided to the islands by the sun and the lodestar *Hōkūlea*, the clouds and birds, wave formations, and the flashing of lights under water.

The islands these settlers found were startlingly beautiful: huge volcanic mountains, some still actively erupting, that rose out of the sea; *pali*, or dramatic cliffs; natural waterfalls; large tracts of unspoiled rain forest; abundant natural resources; and an array of unique autochthonous plants, insects, birds and animals. A nature-centered culture and religion grew up in conjunction with the growing population of islanders. The prevailing values were respect and love of the land and all the things on it (*aloha 'āina*) and the generosity of spirit for which the Hawaiians are famous. The Hawaiians settled the islands one by one, making expeditions to the further islands as the inner ones became more densely populated.[36]

A sophisticated political and economic order developed in harmony with natural features of the environment.[37] The basic unit of the

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[32] *See infra* part IV.

[33] *See infra* part V.

[34] *See infra* part VI.

[35] Ralph S. Kuykendall, The Hawaiian Kingdom 1778-1854, at 1 (1938) [hereinafter Kuykendall 1938].

[36] *Id.* at 1-11.

[37] A history of Hawai'i land law can be found in Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), and Estate of his Majesty Kamehameha IV, 2 Haw. 715 (1864).

indigenous landholding system was the *ahupua'a*.[38] These units divided the islands into pie-shaped slices, the borders typically drawn from the mountaintops down to the sea.[39] Thus, each *ahupua'a* contained farmland, drainage, water, and access to the sea for fishing. Each was in theory self-sufficient.[40]

Indigenous Hawaiian culture did not recognize land ownership; to aboriginal Hawaiians, a person could no more own a piece of land than a patch of ocean or a swath of sky. Land was held by the chiefs in trust for the gods and for the common benefit. Chiefs (*ali'i*) controlled the *ahupua'a*, and land agents (*konohiki*) or subchiefs controlled subdivisions of the *ahupua'a*, known as *ili*.[41]

The common people, the *maka'āinana* (people of the land) bore a spiritual relationship to both the land and the chiefs, based on the Hawaiian concept of *malama 'āina* (to care for the land). The *ali'i* (chiefs) gave spiritual life to the *'āina* and the *maka'āinana* cultivated the land for the *ali'i*.[42] Both the land and the chiefs were considered to bear an elder sibling-like relationship to the people.[43] *Maka'āinana* had plots for their own use and gathering rights in certain noncultivated portions of the *ahupua'a*.[44]

B. The Arrival of Captain Cook and the Rise of Foreign Influence in Hawai'i: 1778-1887

Captain Cook and his ships first landed on the Hawaiian Islands in 1778,[45] and the islands quickly became active in world trade and politics. The islands were a convenient refreshment and trading stop

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[38] *See* Palama v. Sheehan, 50 Haw. 298, 300, 440 P.2d 95, 97 (1968).

[39] *Id.*

[40] N.H.R.H., *supra* note 24, at 3-5.

[41] *Id.*

[42] *Id.*

[43] Telephone Interview with Haunani-Kay Trask, Professor of Hawaiian Studies, University of Hawaii at Manoa, Honolulu, Haw. (Apr. 1989).

[44] Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 849 (1975) [hereinafter Levy]. Some commentators characterize the indigenous land arrangement as a modified kind of feudalism, with many (though not all) of the hierarchical features of that system. *See, e.g.*, *id.* at 848. Other scholars of the period argue that the analogy between the traditional Hawaiian landholding system and medieval European feudalism is inapt in that, for example, the *maka'āinana* were free to leave if they were unhappy. N.H.R.H., *supra* note 24, at 4-5.

[45] KUYKENDALL 1938, *supra* note 35, at 12-13.

for ships voyaging between the newly-opened hunting grounds of the northwest coast of America and the Chinese port city of Canton.[46] By 1820, merchants and missionaries were flocking to the island paradise to pursue adventure, wealth, and the salvation of Hawaiians' souls.

At approximately the same time as Captain Cook's visit to the Islands, Kamehameha, one of the chiefs on the Island of Hawai'i, united all the islands into a single kingdom under his rule.[47]

The period following these two events was one of vast change for Hawaiians. Their interactions with other nations of the world multiplied prodigiously. The Hawaiian Kingdom signed treaties with foreign governments and administered complex domestic structures such as controls over immigration, trade, and land acquisition by foreigners. Between the 1820s and 1887, it had signed international accords with twenty other nations, including several with the United States.[48] The Kingdom of Hawai'i was also a member of the Universal Postal Union. Had the United Nations existed during the nineteenth century, the Kingdom of Hawai'i would have been a member.[49]

The United States initially intended to respect the Hawaiian government's sovereignty;[50] but Americans ultimately betrayed those good

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[46] GAVAN DAWS, SHOAL OF TIME 32 (1968).

[47] Kamehameha's feat is attributed by some commentators to the Western-style weapons, military training, and advice provided to him by Cook's sailors. *See* KUYKENDALL 1938, *supra* note 35, at 33-51.

[48] *See, e.g.*, Treaty with Hawaii on Commercial Reciprocity (I), Jan. 30, 1875, U.S.-Haw., 19 Stat. 625, T.S. No. 161; Treaty with Hawaii on Commercial Reciprocity (II), Dec. 6, 1884, U.S.-Haw., 25 Stat. 1399, T.S. No. 163. One of these agreements, the Treaty of Friendship Commerce and Navigation with the United States, stated that "[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors." Dec. 20, 1849, U.S.-Haw., 9 Stat. 977, T.S. No. 160, art. I.

[49] Charles F. Wilkinson, The Idea of Sovereignty: Native Peoples, Their Lands, and their Dreams, Address before the Native Hawaiian Rights Conference (Aug. 5, 1988), *in* 13 N.A.R.F. LEG. REV. No. 4, 1 (Fall 1988).

Further evidence of world recognition of Hawaiian sovereignty came in reaction to an 1845 takeover attempt: a renegade British warship, the *Carysfort*, had entered Honolulu harbor and its captain took over virtually all functions of government for five months. As soon as the British government found out about its seaman's action, it repudiated the action as a violation of Hawai'i's sovereignty. KUYKENDALL 1938, *supra* note 35, at 211-16.

[50] S. Exec. Doc. No. 77, 52d Cong., 2d Sess. 40 (1893) (quoting Secretary of State in 1842 as saying that "no power ought either to take possession of the islands as a conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing Government . . . .").

intentions—and the Hawaiians.[51]

During the mid-1800s the King began to accede to foreign demands for private ownership of land and structural political changes.[52] Foreign gunboats began to appear frequently in Hawai'i's waters,[53] and an 1845 takeover attempt by the captain of the British ship *Carysfort*, later repudiated by the British government,[54] served to remind the King of his nation's military vulnerability.[55] As Professor Levy explains: "To the Hawaiian Kingdom, the lesson [of the repudiated 1845 takeover] must have been clear: its independence was at the whim of great Western powers, whose nationals increasingly desired to own the lands of Hawaii."[56]

By 1848, responding to foreign economic and military pressures to modify further the land holding scheme, the Hawaiian government (which by this time was partially infiltrated by American missionaries) undertook to divide the lands so that clear title could be determined and transferred. The King's private lands were distinguished from those he held as a public official. A formal division of land, known as The Great *Mahele*,[57] provided that the King retained all his private lands, with a right in his tenants to a "fee simple title to one-third of the lands possessed and cultivated by them" as directed by the King or his tenants.[58] The remaining land of the kingdom was to be divided into thirds: one-third to the Hawaiian government, another third to the chiefs and land agents, and the final third to the tenant farmers. The day after the Great *Mahele*, the King set apart "forever to the chiefs and people of my Kingdom" approximately 1.5 million acres, subsequently referred to as Government Lands, and retained for him-

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[51] One commentator attributes the shift in the United States' policy towards Hawai'i to the protection of increasing American trading interests on the islands. Karen Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B. J. 13, 21 n.70 (1981). Another scholar of the period notes that anti-expansionist sentiment in the United States relaxed in the latter part of the nineteenth century. COHEN, *supra* note 23, at 803.

[52] Levy, *supra* note 44, at 852.

[53] *See* KUYKENDALL 1938, *supra* note 35, at 112-20.

[54] *See id.* at 211-16; *see also supra* note 49.

[55] Levy, *supra* note 44, at 853.

[56] *Id.*

[57] An Act Relating to the Lands of His Majesty the King and of the Government, signed King Kamehameha III (June 7, 1848), *reprinted in* CIVIL CODE OF THE HAWAIIAN ISLANDS 374-402 (1959).

[58] Privy Council Rules 4 (1847), *reprinted in* PRIVY COUNCIL RECORD.

self, his heirs and successors approximately one million acres, known as Crown Lands.[59]

In 1850 an act was passed that completed the process of establishing a private property land tenure system.[60] The *Kuleana* Act was supposed to operate by parceling out small fee simple interests in land (*kuleana*) to the common people.[61] The *kuleana* could come from the Crown lands, from the Government Lands, or from the other 1.5 million acres of the kingdom.

A commoner's *kuleana* land could include only land that the commoner had "really cultivated," plus a 1/4 acre lot for a house.[62] During the *ahupua'a* period, commoners had only small fields to work for their own benefit, and their use of noncultivated *ahupua'a* land for gathering, pasturing, and growing their own crops was excluded by the Act from the tally of land "really cultivated."[63] Because of the "really cultivated" restriction, commoners received very little *kuleana* land.[64] Fewer than 30,000 acres, or less than one percent of the land, ended up in commoners' hands.[65]

The Act terminated gathering rights on common land,[66] and an early judicial interpretation of the Act prohibited *maka'āinana* from exercising any traditional gathering and pastoral rights on uninhabited *ahupua'a* lands other than what was specifically provided in the Act.[67] Ultimately, the *Kuleana* Act, while putatively enacted to benefit commoners, in fact served to deprive Native Hawaiians of an adequate land base.

During the years 1850-51 the process of transforming Hawaiian land law from common ownership to private ownership was completed. New

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[59] Today, Native Hawaiians claim an interest in the Government Lands by virtue of the fact that the lands were set aside by their King for their use and benefit, and the King's rightful successor, Lili'uokalani, was wrongfully caused by force of arms to cede them to the United States. These lands are now known as "Ceded Lands." *See infra* part I.G.

[60] Act of Dec. 21, 1849, § 6, 1850 Haw. Laws 203, *reprinted in* REVISED LAWS 2142 (1925).

[61] *Id.*

[62] Levy, *supra* note 44, at 856 (citing Kuleana Act, *supra* note 60).

[63] *See* Act of Dec. 21, 1849, *supra* note 60.

[64] For other explanations of why the commoners did not acquire land as a result of the Act, see N.H.R.H., *supra* note 24, at 10.

[65] *Id.* at 8.

[66] Kuleana Act, *supra* note 60.

[67] Oni v. Meek, 2 Haw. 87 (1858). One commentator attributes this harsh interpretation to "poor drafting of early statutes." COHEN, *supra* note 23, at 805.

laws provided for the sale of government lands and allowed for aliens to own land in Hawai'i.[68] In the forty years that followed, over 600,000 acres of government land were sold at an average price of ninety-two cents per acre.[69] By 1890, foreigners, mostly Americans, owned over a million of Hawai'i's total of 4 million acres.[70] Some of the acquisitions were made by overreaching or actual fraud.[71] Non-Hawaiians leased another 750,000 acres of former Crown and Government land, often at unconscionably low rates.[72] Westerners also obtained some *kuleana* lands from Hawaiian commoners, sometimes through harassment, purchase at nominal prices, or acquisition of surrounding land followed by adverse possession.[73]

The result of the Great *Mahele* was that Hawaiian land became concentrated in the hands of a few large owners.[74] Huge Western-owned sugar plantations began to dominate the Islands' economy,[75] and American business interests imported Asian and European laborers to work the land.[76]

C. Consolidation of Western Political Power: 1887-1893

Economically powerful Westerners were now well-situated to force changes in Hawai'i's political structure. In 1887, the Hawaiian League, a group of Western plantation owners, effected a coup d'état. The growers forced King David Kalākaua to adopt a "Bayonet Constitution," limiting the King's veto power, replacing the Native Hawaiian nobility with wealthy Western landowners in the upper house of the legislature and limiting the franchise.[77] American or European taxpayers

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[68] 2 Revised Laws of Hawaii 2177-79 (1925).

[69] R. HOROWITZ, LEGISLATIVE REFERENCE BUREAU REP. NO. 5, PUBLIC LAND PPOLICY IN HAWAII: AN HISTORICAL ANALAYSIS 186 (1969) [hereinafter HOROWITZ 1969].

[70] R. HOROWITZ, LEGISLATIVE REFERENCE BUREAU REP. NO. 3, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS 4-5 (1967).

[71] Levy, *supra* note 44, at 859-60.

[72] HOROWITZ 1969, *supra* note 69, at 137.

[73] Levy, *supra* note 44, at 861; N.H.R.H., *supra* note 24, at 9.

[74] N.H.R.H., *supra* note 24, at 43-44. The effects of this concentration continue well into this century. *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

[75] Levy, *supra* note 44, at 858.

[76] *Id.*

[77] Constitution of 1887, *republished in* RALPH S. KUYKENDALL, CONSTITUTIONS OF THE HAWAIIAN KINGDOM 45-50 (1940) [hereinafter KUYKENDALL 1940].

literate in a Western language were permitted to vote, regardless of citizenship, while illiterate Hawaiians under the age of forty-seven could not.[78] The Bayonet Constitution also rescinded women's right to vote and eliminated funding for Hawaiians' education abroad.[79] The cumulative effect of these provisions was to place enormous political power in the hands of American annexationists known as the Missionary Party.[80]

Kalākaua's successor, Queen Lili'uokalani, tried in 1893 to proclaim another constitution increasing the Crown's power and reinstituting rights and privileges suspended by the Bayonet Constitution.[81] In response, the United States Minister in Hawaii, John L. Stevens, conspiring with the Missionary Party and citing protection of American safety and property interests, sent 162 heavily armed Marines into Honolulu.[82] The Queen, under protest, signed a treaty of surrender in order to avoid bloodshed; her signature was conditioned upon an investigation by the United States of Minister Stevens' actions. The Queen wrote:

> Now to avoid any collision of armed forces, and perhaps the loss of life, I do under . . . protest and impelled by . . . force yield my authority until such time as the Government of the United States shall upon the facts being presented to it undo the action of its representative [Minister John L. Stevens] and reinstate me in the authority which I claim as Constitutional Sovereign of the Hawaiian Islands.[83]

According to the treaty of surrender, Queen Lili'uokalani fully expected that when the United States government investigated the incident, its "enlightened justice" system would repudiate Stevens' and the Marines' actions and restore her to power.[84] In the meantime, Minister

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[78] *Id.* arts. 59, 62. The literacy provision was especially onerous because the traditional Hawaiian language was oral, not written.

[79] *Compare* Constitution of 1864, KUYKENDALL 1940, at 36-40 *with* Constitution of 1887 arts. 59, 62, *id.* at 45-50.

[80] Levy, *supra* note 44, at 861-62.

[81] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893, at 585-86 (1967) [hereinafter KUYKENDALL 1967].

[82] JAMES H. BLOUNT, REPORT OF THE COMMISSIONER TO THE HAWAIIAN ISLANDS, Exec. Doc. No. 47, 53d Cong., 2d Sess. 356-57 (1893) [hereinafter BLOUNT REPORT].

[83] Lili'uokalani's Statement of Surrender, Jan. 17, 1893, *quoted in* Lili'uokalani v. United States, 45 Ct. Cl. 418, 435 (1910).

[84] *Id.*

Stevens recognized the Missionary Party's newly-established provisional government.[85]

Lili'uokalani was only partially right about America's ideals of "enlightened justice." President Grover Cleveland sent a commissioner, James H. Blount, former Chair of the House Foreign Relations Committee, to investigate the overthrow. Blount uncovered a conspiracy between the Missionary Party and Stevens, purportedly acting on behalf of the United States.[86] He also determined that Hawaiians were against annexation by a margin of five to one.[87] President Cleveland then issued a Declaration to Congress, calling the annexation a "disgrace" and a violation of international law.[88] In his words:

> It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality; that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory.
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> By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.[89]

President Cleveland refused to submit a treaty providing for the annexation of Hawai'i to the Senate.[90]

The members of the Missionary Party were undaunted. They simply formed a puppet "Republic of Hawaii," to which they transferred the land and power of the provisional government while they waited for the political winds to shift in Washington.[91] Hawai'i was occupied in this manner for five years until the new McKinley administration,

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[85] KUYKENDALL 1967, *supra* note 81, at 601.

[86] BLOUNT REPORT, *supra* note 82.

[87] *Id.*

[88] MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. NO. 47, 53d Cong., 2d Sess. 13 (1893).

[89] *Id.*

[90] COHEN, *supra* note 23, at 801.

[91] KUYKENDALL 1967, *supra* note 81, at 649; *see generally* WILLIAM A. RUSS, JR., THE HAWAIIAN KINGDOM 1894-1898 (1961).

sympathetic to the annexationists' designs, ratified their actions.[92] The Hawaiian Islands were formally annexed to the United States in 1898 without a plebiscite.[93]

D. Disposition of Public Lands and Social Conditions of Natives in Post-Takeover Hawai'i: 1893-1920

When the Republic transferred these public lands to the United States pursuant to annexation,[94] nearly 1.75 million acres in which Native Hawaiians were to have an interest following the *Mahele* became United States property.[95] Queen Lili'uokalani, as a representative of her people, later sued the United States for compensation for the taking, but her claim was denied.[96]

Significantly, the statute which annexed Hawai'i implicitly recognized the local peoples' interest in that land. The Resolution provided that "all revenues from or proceeds of the [public lands] except [that used or occupied by the United States or assigned to the local government] shall be used *solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.*"[97] The United States Attorney General issued an opinion in 1899 interpreting this language to create a "special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational and other purposes.[98] Despite this language, however, the United States freely used the lands for general federal purposes during the entire pre-Statehood period.[99]

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[92] Joint Resolution of Annexation of 1898, 30 Stat. 750 (1898) (annexing land) [hereinafter Joint Resolution of Annexation]; Organic Act of 1900, ch. 339, § 91, 31 Stat. 141 (1900) (establishing territorial legislature).

[93] One senator proposed that all adult males in Hawai'i be permitted to vote for or against annexation, but the measure was voted down. 31 CONG. REC. 5982 (1898).

[94] Joint Resolution of Annexation, *supra* note 92.

[95] Joint Resolution of Annexation, *supra* note 92, reads, "The absolute fee and ownership of all public, Government, or Crown lands . . . belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining . . . [shall] be cede[d] and transfer[red] to the United States." *Id.*; *see also* JEAN F. HOBBS, HAWAII: A PAGEANT OF THE SOIL 118 (1953).

[96] Lili'uokalani v. United States, 45 Ct. Cls. 418 (1910).

[97] Joint Resolution of Annexation, *supra* note 92, (emphasis added).

[98] 22 Op. Att'y Gen. 574 (1899).

[99] MELODY MACKENZIE, SOVEREIGNTY AND LAND: HONORING THE HAWAIIAN NATIVE CLAIM 78 (1982) [hereinafter MACKENZIE].

The wholesale loss of land by Hawaiians was accompanied by loss of their population base. Many Hawaiians, now landless and displaced in the agricultural labor force by immigrant workers, migrated to the cities. Cut off from their traditional lifestyle, without access to farmland or the sea, the Hawaiian people and their culture deteriorated drastically. The combined effects of immigration, disease, and intermarriage left only 50,000 Hawaiians on the islands by 1900.[100]

E. Creation of the Homelands Trust: 1920[101]

By the 1910s, leaders in the Hawaiian community recognized that the people were suffering grave economic, political, and medical ills. "As of 1920, the position of the Hawaiian community had deteriorated seriously . . . . Economically depressed, internally disorganized and politically threatened, it was evident that the remnant of Hawaiians required assistance to stem their precipitous decline."[102]

A number of Congressmen hoped to stem this tide by creating a program to return Native Hawaiians to the land.[103] Senator John H. Wise, member of the Legislative Commission of the Territory of Hawaii and co-author of Hawaiian homesteading legislation,[104] explained:

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes. I believe it would be easy to rehabilitate them. The people of New Zealand are increasing today because they have had the lands to live on and are working out their own salvation . . . . The Hawaiian people are a farming people and fishermen, out of door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands

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[100] STAMMARD, *supra* note 4, at 32; *see also* Levy, *supra* note 44, at 858.

[101] For a full discussion of the history of this act, see Marylyn M. Vause, The Hawaiian Homes Commission Act, History and Analysis (1988) (unpublished master's thesis, University of Hawaii) [hereinafter Vause]; N.H.R.H., *supra* note 24, ch. 3.

[102] Vause, *supra* note 101; *see* N.H.R.H., *supra* note 24, at 43.

[103] *See, e.g.*, H.R. 12683, 13500, 66th Cong., 2d Sess. (1920). One commentator disputes the professed humanitarian motives of Congress, attributing the Act instead to Congress' desire to amend the land laws and assure stability of control over public lands. Vause, *supra* note 101, at iii.

[104] S. Con. Res. 2, 10th Leg. (Terr. Haw.), *reprinted in* 1920 HAW. SEN. J. 25-26.

> and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[105]

Congress enacted the Hawaii Homes Commission Act of 1920 (H.H.C.A.), holding in trust for Native Hawaiian homesteading about 200,000 of the 1.75 million acres of "ceded" government lands.[106] The homestead lots are for residential, pastoral, agricultural and aquacultural purposes, to be leased to Native Hawaiians for ninety-nine-year terms at $1.00 per year.[107] The program provides loan assistance[108] as well as agricultural and aquacultural consulting assistance[109] to Hawaiian homesteaders. It is also supposed to help in all phases of farming operations and development of water projects.[110] By the terms of the trust, lessees cannot alienate the land, nor may the lots be encumbered, without the consent of the Administrator of the program.[111] Trust income can be generated by the Trustee by leasing out Homelands to the general public, but any funds thus raised must be used for the sole benefit of Native Hawaiians.[112]

The program was frustrated from the outset by the selection of poor-quality lands. This was probably the result of lobbying by sugar and ranching interests on the islands.[113] In 1920, large landowners feared losing their leases to homesteaders under this and other new homesteading programs.[114] They therefore pressured Congress to limit the land to be made available to homesteading so as to exclude the best sugar lands.[115] For example, when Congress began organizing the H.H.C.A. program, sugar growers demanded that land then under sugar cultivation be exempted from Native Hawaiian homesteading.[116] During the House debate of HR 13500, a predecessor version of H.H.C.A., Representative William Jarret said, "They want to give

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[105] H.R. REP. No. 839, 66th Cong., 2d Sess. 4 (1920).

[106] H.H.C.A., *supra* note 2, § 203-04. The program is still in effect, although the trusteeship and responsibility for administering it were delegated to the State of Hawaii as part of the statehood compact. Admission Act, *supra* note 15, § 4.

[107] Admission Act, *supra* note 15, §§ 207(a), 208(2).

[108] H.H.C.A., *supra* note 2, §§ 214, 215.

[109] *Id.* § 219.

[110] *Id.* § 221.

[111] *Id.* § 208(5).

[112] *Id.* § 204.

[113] N.H.R.H., *supra* note 24, at 44-48.

[114] *Id.* at 45 n.29.

[115] *Id.* at 46-47.

[116] *Id.*

the Hawaiians lands that a goat couldn't live on. This whole thing is a joke. The real purpose of this bill is to cut out homesteading. If you want to cut out homesteading, then pass the bill."[117] Congress acceded to the sugar growers' and ranchers' demands, excluding from the H.H.C.A. program all lands then under cultivation.[118] It also excepted forest reserves, lands already under homestead lease, right of purchase leases, and certificates of occupation.[119] As a result, the lands set aside for Hawaiian homesteading are for the most part incapable of supporting homesteading activities.[120] Many lots are arid and lack proximate sources of irrigation water; others are covered with lava or have poor soil.[121] All are of marginal agricultural value.[122]

Local growers also persuaded Congress to restrict eligibility for the program by imposing a minimum fifty percent blood quantum requirement on Hawaiians who could qualify for the program.[123] This stringent eligibility requirement tremendously decreased the fraction of the community which could be assisted by homestead leases.[124]

Early hopes of implementing successful farming and ranching activities on H.H.C.A. lands were quickly dashed. Attempts at diversified farming were made in 1926-28, but irrigation water proved either scarce or too saline.[125] Thereafter, the program focused on providing pastoral or residential lots; by the time of Statehood in 1959, only 1673 Native Hawaiians had been provided with homestead lots and,

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[117] Vause, *supra* note 101, at 89.

[118] H.H.C.A., *supra* note 106, § 204.

[119] *Id.*

[120] N.H.R.H., *supra* note 24, at 51.

[121] *Id.*

[122] *Id.*

[123] H.H.C.A., *supra* note 2, § 201; *see also* N.H.R.H., *supra* note 24, at 47.

[124] Most federal programs for Native Americans on the mainland do not define eligibility so stringently. *See infra* part V.A. Indeed, an earlier version of the H.H.C.A. itself imposed only a 1/32 blood quantum requirement. N.H.R.H., *supra* note 24, at 47-48. This relatively high blood quantum requirement today keeps large numbers of Native Hawaiians from eligibility for H.H.C.A. assistance. As of 1990, over 200,000 people, or nearly twenty percent of Hawai'i's population, is part- or full-Hawaiian, whereas only 56,000 people, or about twenty-seven percent of the total Native Hawaiian community, have the requisite blood-quantum to be eligible for the Hawaiian Home Lands program. 1990 U.S. CENSUS; Task Force for Hawaiian Services, Office of Hawaiian Affairs, Jan. 1990, table 2, fig. 1.

[125] LEGISLATIVE REFERENCE BUREAU, REPORT NO. 1B: LAND ASPECTS OF THE HAWAIIAN HOMES PROGRAM 6, 19-20 (1964); *see generally* N.H.R.H., *supra* note 24, at 56-60.

of those, more than eighty percent were houselots.[126] Twenty-two hundred Native Hawaiians remained on the waiting list.[127]

F. Statehood and the Creation of the Ceded Land Trust: 1959

1. Transfer of trust obligations from the United States to the State of Hawaii.

In 1959, Congress passed the Hawaii Admission Act.[128] As part of the statehood compact, Hawaiian lands previously held in trust by the United States passed to the trusteeship of the new state.[129] These included the 200,000 acres of Hawaiian Homelands under the H.H.C.A. and the remainder of the Ceded Lands set aside in the Joint Resolution of Annexation of 1898 (*i.e.*, the former Crown and Government lands).[130] The ceded lands totaled 1,750,000 to 1,800,000 acres at the time of the annexation;[131] when the federal government conveyed these trust lands to the State of Hawaii upon admission, it retained approximately 400,000 acres for its own use.[132]

Section 5 of the Admission Act spelled out five permissible uses of the Ceded Lands Trust: (1) the support of the public schools and other public educational institutions; (2) the betterment of the conditions of Native Hawaiians; (3) the development of farm and home ownership on as widespread a basis as possible; (4) the making of public improvements; and (5) the provision of lands for public use.[133] From the very inception of the Ceded Land Trust, then, the interests of the beneficiaries were destined to compete; offering neither explanation nor guidance, the Admission Act required that the land was to be held in trust for both the Native Hawaiians and, at the same time, the general public.

2. Federal Indian policy at the time of Hawai'i statehood

It is crucial to understand the significance of the transfer of trust obligations from federal to state government embodied in the Hawaii

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[126] MACKENZIE, *supra* note 99, at 41-42 n.50.
[127] *Id.*
[128] *Supra* note 15.
[129] *Id.* § 5.
[130] *See* N.H.R.H., *supra* note 24, at 43.
[131] *Id.*
[132] Levy, *supra* note 44, at 883.
[133] *Id.*

Admission Act. A full understanding of it requires a brief foray into Indian law.

During the 1950s, just when Hawai'i's statehood was being debated in Congress, the federal government was pursuing a policy of "termination" of Indian tribes.[134] During the period 1945-1961, now known as the Termination Era, Congress sought to dissolve the tribes, curtail BIA entitlement programs and services, and rapidly assimilate Native Americans into the "mainstream."[135] This was to be accomplished by "terminating" the special federal-tribal trust relationship and extinguishing tribal courts' jurisdiction.[136] Congress also shifted responsibility for entitlement programs and enforcement of criminal and civil laws to the states.[137] During this period Congress terminated more than fifty tribes.[138]

Termination has come to be regarded as a failed and inhumane experiment.[139] Beginning in the 1960s, the federal government adopted a policy of Native American self-determination rather than termination.[140] Thirty-one previously terminated tribes have been reinstated to federal status.[141] Congress has also passed several acts strengthening

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[134] *See* COHEN, *supra* note 23, at 152-80; Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

[135] *See* H.R. Res. 698, 82d Cong., 2d Sess, 98 Cong. Rec. 8788 (1952) (pursuing the "earliest practicable termination of all federal supervision and control over Indians"); COHEN, *supra* note 23, at 170-80.

[136] COHEN, *supra* note 23, at 174-75.

[137] Act of Aug. 15, 1953, ch. 505, Pub. L. No. 280, 67 Stat. 588 (1953).

[138] *See, e.g.*, H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (Aug. 1, 1953) (authorizing administrative and Congressional action for the termination of tribes in the states of California, Florida, New York and Texas; the Flathead Tribe of Montana; the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and the Turtle Mountain Reservation of the Chippewa Tribe in North Dakota); *see generally* COHEN, *supra* note 23, at 173-74 and accompanying notes.

[139] COHEN, *supra* note 23, at 180-88.

[140] *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a (1982) ("Congress hereby recognizes the obligation to respond to the strong expression of the Indian people for self-determination"); President Reagan, Statement on Indian Policy, Pub. Papers of Ronald Reagan 96 (Jan. 24, 1983) ("Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian Tribes"); *see* COHEN, *supra* note 23, at 180-206.

[141] *See, e.g.* Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. § 903-903f (1973)); Siletz Restoration Act of 1977, Pub.

federal protection of the Native American rights, including the Indian Civil Rights Act of 1968,[142] the Indian Self-Determination and Education Assistance Act of 1975,[143] the Indian Child Welfare Act of 1978,[144] and the American Indian Religious Freedom Act of 1978.[145] Today, Native American tribes constitute over 400 nations within the United States, with direct relations with the federal government and federal recognition of tribal sovereignty over Indian lands.[146]

The Termination doctrine, now discredited on the mainland, remains in full force and effect in Hawai'i. Both the Hawaiian Homelands Trust and the Ceded Lands Trust continue in the trusteeship of the State of Hawaii, and Hawaiians have no direct relations with the federal government. Native Hawaiian land rights remains isolated from national public attention as a political issue. The federal government foisted responsibility for Native Hawaiians onto the state when Termination was fashionable and has never reclaimed that responsibility, even in the face of the federal government's subsequent change of policy.[147]

III. CURRENT AMERICAN-HAWAIIAN RELATIONS: THE INADEQUACY OF THE TRUSTS

Today, land deprivation continues to take its toll on Native Hawaiians, psychically, politically, and physically. In the words of Professor Haunani-Kay Trask,

> Rendered politically and economically powerless by the turn of the century, Hawaiians continue [today] to suffer the effects of American colonization: land alienation; unemployment and employment ghettoi-

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L. No. 95-195, 91 Stat. 1415 (1977) (codified at 25 U.S.C. §§ 711-711f (1977)); Oklahoma Indians Restoration Act of 1977, Pub. L. No. 95-281, 92 Stat. 246 (1977) (codified at 25 U.S.C. §§ 861-861c (1977)) (restoring the Wyandotte, Peoria and Ottawa Tribes of Oklahoma); Paiute Indian Tribe of Utah Restoration Act of 1980, Pub. L. No. 96-227, 94 Stat. 317 (1980) (codified at 25 U.S.C. §§ 761-768 (1980)).

[142] 25 U.S.C. §§ 1301-03.

[143] *Id.* §§ 450a-450n.

[144] Pub. L. No. 95-608 § 2, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1901 (1978)).

[145] Pub. L. No. 95-341, 92 Stat. 469 (1978), 42 U.S.C. § 1996 (1978).

[146] 50 Fed. Reg. 52,829-35 (Dec. 29, 1988).

[147] According to Mililani Trask, the Hawaiians' relationship with the federal government is "stuck in a time-warp." Mililani Trask, Address before the Native Hawaiian Rights Conference (Aug. 7, 1988).

> zation; the worst health profile in the islands; the lowest income level; a deep psychological oppression manifested in crime, suicide, and aimlessness; and finally, the grossest commodification of their culture for the international market of tourism.[148]

Why have Native Hawaiians not been able to reap the benefits of the two Land Trusts?

A. The Failure of the Homelands Trust

In compliance with the Statehood compact, the State of Hawaii has established a Department of Hawaiian Home Lands (D.H.H.L.), directed by the Hawaiian Homes Commission, as part of the state's executive branch.[149] This Commission is responsible for administering the Homelands program, and its eight members and chairperson are appointed by the Governor.[150]

Nominally, the federal government remains responsible for amending the enabling legislation,[151] approving land exchanges[152] and reviewing statutory changes that operate to the detriment of Native Hawaiians.[153] It also retains the authority to sue the state for breaches of the trust.[154] The United States has never exercised this duty.[155]

1. Non-arability of the land

The H.H.C.A. program under its current state trusteeship has failed just as miserably as it did when under federal guidance in providing

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[148] *See* H. Trask, *Hawaiians, American Colonization, and the Quest for Independence*, *supra* note 3, at 118.

[149] H.H.C.A., *supra* note 2, at § 202.

[150] *Id.*

[151] H.H.C.A., *supra* note 2, at § 223.

[152] H.H.C.A., *supra* note 2, at § 204(3).

[153] 73 Stat. 5 (1959), HAW. CONST. art. 12, § 1 (amended 1978). The federal courts have not enforced this provision. *See, e.g.*, Kila v. Hawaiian Homes Comm'n, No. 74-12 (D. Haw. Sept. 17, 1974) (amendment increasing costs to homesteaders found to *benefit* Native Hawaiians and thus to be effective without Congress' approval).

[154] Admission Act, *supra* note 15, at § 5(f).

[155] On August 7-11, 1989, the Chair of the United States Senate Select Committee on Indian Affairs, Senator Daniel Inouye (D.-Haw.), instituted hearings on the implementation of the H.H.C.A. *See* Informational Hearing before the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs, 101 Cong., 1st Sess. (1989). This was the first federal oversight of the program since statehood in 1959. N.H.R.H., *supra* note 24, at 64.

a land base for Native Hawaiian farming and homesteading. Problems arising from poor soil and lack of irrigation water[156] persist. Few Hawaiians have been placed on land through the Homesteading program; from the inception of statehood in 1959 through 1988, a total of only 5,778 leaseholds have been awarded, 4,592 residential and 1,188 agricultural or pastoral.[157] Over two thousand of these lessees cannot use the land they were awarded because it lacks infrastructural improvements such as roads, water and drainage necessary for farming, ranching or residential uses.[158]

As of June 30, 1989, the last date for which reliable figures are available, the wait list for H.H.C.A. homesteads was 18,500 families long[159] and was growing at a rate of over one hundred families per month.[160] Some have been on the wait list for forty years and, by one informal survey, nearly one-third of those on the 1952 list died waiting.[161] In total, only 32,713 acres, or 17.5% of the available lands, have been leased to Native Hawaiians for homesteading.[162] By contrast, nearly sixty-two percent of the Hawaiian Home Lands inventory is leased out to non-beneficiaries[163] at inordinately low rates of return.[164]

Most of the lots that have been leased to Native Hawaiians are used for residential rather than farming purposes. Seventy-nine percent of the total leases awarded by 1989 were residential leaseholds;[165] over 42% are on O'ahu, the most populous and urban of the Hawaiian islands, where only 3.5% of the homesteading lands are located.[166]

If the homesteading program is ever to function properly, the trustees will have to obtain trust lands more suitable to agricultural purposes. One source for such lands would be those in the Ceded Lands Trust, much of which is arable.

2. Misuse of resources by the State

The Hawaiian Homes Commission Act specifically provides that the governor does not have the power to dispose of trust lands by executive

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[156] *See supra* notes 120-22 and accompanying text.

[157] DEPARTMENT OF HAWAIIAN HOME LANDS, 1989 ANN. REP. 12 [hereinafter D.H.H.L., 1989 ANN. REP.].

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] N.H.R.H., *supra* note 24, at 70 n.109.

[162] D.H.H.L. 1989 ANN. REP., *supra* note 157, at 16.

[163] *Id.*

[164] The average return is $26 per acre per year. *Id.*

[165] *Id.* at 12.

[166] *Id.*

order or proclamation.[167] However, since the H.H.C.A. was passed, Hawaii's governors have issued executive orders transferring over 30,000 acres of Hawaiian Homelands for general public purposes without compensation to the trust.[168] After several lawsuits successfully challenged the practice,[169] in December 1984 the Governor finally withdrew or cancelled most of such executive orders.[170] However, the Hawaiian Homes Commission subsequently conveyed much of that land back to the agencies that had been using the land pursuant to Executive Order.[171]

3. Failure to fund

The state government has not provided sufficient funding to make full productive use of the trust lands; indeed, until 1987, the state legislature never appropriated funds to finance the program at all.[172] D.H.H.L. has instead resorted to leasing out most of the land to non-beneficiaries to pay the Department's administrative costs.[173] Of the rents that are collected from the leasing out of trust lands, nearly all of the money goes towards D.H.H.L.'s administrative costs.[174] While only seventeen percent of the Hawaiian Home Lands is being used by Native Hawaiians for homesteading, over sixty-one percent is leased to non-beneficiaries for various commercial, industrial, and public purposes.[175] These leases, however, generate an average of only about $26 per acre per year.[176]

This arrangement creates a conflict of interest: the Commissioners and other Department officials must choose between making land

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[167] H.H.C.A., *supra* note 2, § 206.

[168] Federal-State Task Force Rep. on the Hawaiian Homes Commission Act, app. 12, at 265-301 (1983).

[169] *See* Department of Hawaiian Home Lands v. Aloha Airlines, Inc., No. 6122 (Haw. 3d Cir. Sept. 24, 1980) (awarding declaratory relief against executive order which permitted state Department of Transportation to use Home Lands for airport); Aki v. Beamer, No. 76-1044 (D. Haw., Feb. 21, 1978) (avoiding executive order creating public park on H.H.C.A. land).

[170] N.H.R.H., *supra* note 24, at 53.

[171] *Id.*

[172] N.H.R.H., *supra* note 24, at 54.

[173] *Id.*

[174] D.H.H.L., 1989 ANN. REP., *supra* note 157, at 16, 20.

[175] *Id.* at 16.

[176] *Id.*

available to homesteading beneficiaries or leasing the land to non-Hawaiians, thus assuring that at least their own salaries will be paid.[177] These leases thus are not entered into because they are a prudent investment of the trust beneficiaries' property, as the trust arrangement requires;[178] instead, they are entered into because the state legislature has failed adequately to fund the Hawaiian Home Lands program.

In addition to violating a trustee's duty to administer the trust corpus solely in the interest of the beneficiary,[179] the state's lack of adequate funding for the program also violates the state constitution. A 1978 amendment[180] to the Hawaii Constitution provides:

> The legislature *shall* make sufficient sums available [to the D.H.H.L.] for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3), and (4) herein, by appropriating the same in the manner provided by law.[181]

This provision replaced language in the original state constitution which permitted, but did not require, the state legislature to fund the Department.[182]

It was not until nine years after the constitutional amendment that the state legislature finally appropriated money to D.H.H.L.[183] In 1987, it appropriated one-half of the funds necessary for D.H.H.L.'s

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[177] *See* Levy, *supra* note 44, at 878; OFFICE OF THE LEGISLATIVE AUDITOR, FINAL REPORT ON THE PUBLIC LAND TRUST, 209 (1986) [hereinafter TASK FORCE REP.]; N.H.R.H., *supra* note 24, at 56, 64; *see also* COHEN, *supra* note 23, at 808.

[178] *See* Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161, 1169 (1982); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Ca. 1973); Rippey v. Denver U.S. National Bank, 273 F. Supp. 718 (D. Colo. 1967); Richards v. Midkiff, 48 Haw. 32, 396 P.2d 49 (1964).

[179] NLRB v. Amax Coal Co., 453 U.S. 322 (1981).

[180] The 1978 amendments were generally upheld by the state Supreme Court, Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979); but the portion defining a Native Hawaiian with a fifty percent blood quantum requirement was invalidated because of procedural errors. *Id.* at 342-43, 590 P.2d at 555.

[181] HAW. CONST. art. XII (1978) (emphasis added).

[182] HAW. CONST. art. XI, § 1 (1959) ("the legislature *may* from time to time make additional sums available" to the D.H.H.L.) (emphasis added).

[183] N.H.R.H., *supra* note 24, at 54.

administrative budget and $22.7 million for infrastructural improvements and planning.[184] The 1989 legislative session further authorized $46.8 million in revenue bonds and $4 million in cash for capital improvements projects for the fiscal 1989-1991 biennium.[185]

This funding, while most welcome, was probably too little and too late. The Department estimates that in order to satisfy the present demand for awards, it would need $1 billion to finance the necessary infrastructural and capital improvements.[186]

At current funding levels, this program will probably continue to be underfunded, and eligible Hawaiians will continue to wait—perhaps for several decades more—for second-class lands promised to them over 70 years ago.

4. Breaches of trust

On several occasions, Hawai'i's courts have addressed the issue of the Commission's trust responsibilities under the H.H.C.A. In *Ahuna v. Department of Hawaiian Home Lands*,[187] an eligible Hawaiian was awarded a homestead lease under the H.H.C.A. program, but discovered that approximately 3.5 acres of the ten-acre lot had been withheld by the Hawaiian Homes Commission because the state was considering a proposal to extend a highway across Hawaiian Home Lands.[188] The court found that the Commission's action was an unreasonable breach of its fiduciary duties.[189] It said that in withholding the portion of land the Commission gave "undue weight to the interests of the State, the County of Hawaii, and the citizens or taxpayers of Hawaii in general."[190]

In its discussion, the *Ahuna* court said that the Hawaiian Homes Commission's trust obligations to Native Hawaiians were "high fiduciary duties," to be judged by the same, "most exacting fiduciary standards" as those applicable to the federal government with respect

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[184] *Ka Nuhou*, D.H.H.L. NEWSLETTER (Dept. of Hawaiian Home Lands, Honolulu, Haw.), May 1987, at 1 (cited in N.H.R.H., *supra* note 24, at 54).

[185] N.H.R.H., *supra* note 24, at 54 n.141.

[186] *Ka Nuhou*, D.H.H.L. NEWSLETTER (Dept. of Hawaiian Home Lands, Honolulu, Haw.), Jan. 1990, at 4 (cited in N.H.R.H., *supra* note 24, at 55-56 n.165).

[187] 64 Haw. 327, 640 P.2d 1161 (1982).

[188] *Id.* at 332, 640 P.2d at 1165.

[189] *Id.* at 340-41, 640 P.2d at 1169.

[190] *Id.* at 342, 640 P.2d at 1171.

to Native Americans or to private trustees.[191] These duties comprise: (1) the duty to administer the trust solely in the interest of the beneficiary; (2) the obligation to make the trust property productive; (3) the obligation to hold and protect the trust property for the beneficiaries; (4) the obligation to adhere to the terms of the trust; and (5) the duty to render a satisfactory accounting.[192]

Ahuna was not the first or only occasion upon which courts have found that the state breached its H.H.C.A. trust duties. The Commission has failed to keep an accurate inventory of the lands over the years.[193] It can only account for 183,000 of the original 200,000 acres.[194] It has transferred over 16,000 acres of Hawaiian Homelands to other government entities for such public uses as airports, schools, parks, military reservations, and forest and game reserves.[195] As one notable example, in the early 1970s the Commission allowed the County of Hawaii to convert 25.5 acres of Hawaiian Homes farm lands into a flood control channel without compensation and pending a future land exchange, as yet undetermined.[196] The project was to benefit the City of Hilo.[197]

The Commission also has failed to adhere to the specific terms of the trust. In one instance, it dispensed permits to homesteaders to use on a permissive basis rather than issuing 99-year leases, as required

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[191] *Id.* at 339, 640 P.2d at 1169 (citing Seminole Nation v. United States, 316 U.S. 286 (1942); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Navajo Tribe of Indians v. United States, 364 F.2d 320 (Ct. Cl. 1966)).

[192] TASK FORCE REP., *supra* note 177, at 205-08; *compare Ahuna*, 64 Haw at 339, 640 P.2d at 1169 (identifying two basic trust duties as the obligation to administer the trust solely in the interest of the beneficiary and to use reasonable skill and care to make trust property productive).

[193] MACKENZIE, *supra* note 99, at 42-43 n.55, *citing* Letter from Cecil D. Andrus, Secretary of the Department of the Interior, to Gov. George Ariyoshi of Hawaii, Dec. 3, 1980, and *Breach of Trust? Native Hawaiian Homelands*, SUMMARY OF PROCEEDINGS BEFORE THE HAWAII ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS (Oct. 1980).

[194] *See* TASK FORCE REP., *supra* note 177.

[195] MACKENZIE, *supra* note 99, at 42.

[196] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216, 1219 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979).

[197] 588 F.2d at 1219 n.4. The district court ruled that the Commission may not lawfully permit the use of Hawaiian Home Lands for the benefit of non-Native Hawaiians without reasonable compensation of the trust. *Id.* 75-Civ.-026 (D. Haw. 1975). The Ninth Circuit reversed that decision on jurisdictional grounds. 588 F.2d at 1226.

by statute.[198] The Hawaii Supreme Court held that this practice violated the terms of the trust.[199]

After decades of abuse, the H.H.C.A. finally came under the scrutiny of a federal-state task force in 1980. The Federal-State Task Force on the Hawaiian Homes Commission Act was assigned to submit to the Governor of Hawaii and the United States Secretary of the Interior a comprehensive report of the program's effectiveness and recommendations for future implementation of the Act.[200] Among the Task Force's conclusions were that the Commission had improved its performance in the preceding decade, but that several problems remained: (1) a failure accurately to account for the lands constituting the trust; (2) a failure to maintain auditable financial records; and (3) unauthorized conveyances of Hawaiian Homelands.[201]

The problems identified by the Task Force are serious. Furthermore, the Task Force's identification of the problem of unauthorized conveyances does not entirely capture the magnitude of the breach; it should have included mention of the unauthorized land exchanges and the below-market leasing of over sixty percent of the available lands for public non-beneficiary purposes.[202]

Under optimal circumstances, the accounting and auditing problems identified by the Task Force would be remediable with a certain amount of patience and time. However, the other problems identified above—the illegal conveyancing, the non-arability of the lands and the lack of sufficient funds[203]—stem from theoretical, rather than practical difficulties. The state owes conflicting duties to both its Native people, under the Admission Act and the 1978 constitutional amendments and also to the general populace under its broadest institutional mandate. It has been instructed by the state Supreme Court and the Task Force not to "allow public needs to influence its decisions in administering Hawaiian Home Lands."[204] State governments, however, by definition must serve public needs, and state officials are elected by a majority of the general voting public. Conflict of interest, and thus failure, is inherent in the Hawaiian Homes program.

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[198] *Ahuna*, 64 Haw. 327, 330 n.4, 640 P.2d 1161, 1163-64 n.4 (1982).

[199] *Id.*

[200] TASK FORCE REP., *supra* note 177.

[201] *Id.* at 211.

[202] *See supra* notes 163-64 and accompanying text.

[203] *See supra* part III.A.

[204] *Ahuna*, 64 Haw. 327, 341, 640 P.2d 1161, 1170 (1982); TASK FORCE REP., *supra* note 177, at 205.

B. *The Failure of the Ceded Lands Trust*

The Ceded Lands Trust has also failed to provide an adequate resource base for Native Hawaiians. A major problem has been mismanagement by the State Department of Land and Natural Resources (D.L.N.R.).[205] Like the Department of Hawaiian Home Lands, the D.L.N.R. has failed to keep an accurate accounting of the actual acreage in the Ceded Lands Trust.[206] Moreover, although D.L.N.R. was required by statute to segregate monies obtained through conveyance of ceded lands from monies received from other public lands,[207] it neglected to do so.[208] Thus proceeds from the sale or lease of ceded lands, part of which should have accrued to the benefit of Native Hawaiians, were commingled with general public funds from non-ceded public lands.[209]

As a result of the 1978 Hawai'i constitutional convention, the state created the Office of Hawaiian Affairs (O.H.A.) to receive and hold in trust all real property and monies for Hawaiians and Native Hawaiians.[210] O.H.A. is to receive, on behalf of its Native Hawaiian beneficiaries, a pro rata share of the proceeds from the Ceded Lands Trust.[211] The state legislature subsequently set that pro rata share at twenty percent.[212]

After thirty years of disputes between representatives of Native Hawaiians and the state about how to define the trust res and trust income from the Ceded Lands,[213] the Governor and O.H.A. finally a reached a settlement.[214] The state admitted that it was in arrears to the Native Hawaiians for Ceded Lands trust revenues, and set the amount at approximately $100 million—*from the past decade alone*.[215] The

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[205] HAW. REV. STAT. §§ 171, 26-15 (1985) provide that D.L.N.R. is responsible for the management of all of the state's public lands.

[206] LEGISLATIVE AUDITOR, AUDIT REP. NO. 79-1 35 (Jan. 1979) [hereinafter LEGISLATIVE AUDITOR'S REP.].

[207] HAW. REV. STAT. §§ 171-18, 171-19 (1985).

[208] LEGISLATIVE AUDITOR'S REP., *supra* note 206, at 32-33.

[209] *Id.*

[210] HAW. CONST. art XII, § 5 (1978).

[211] HAW. CONST. art XII, § 6 (1978).

[212] HAW. REV. STAT. § 10-13.5 (1985).

[213] *See* N.H.R.H., *supra* note 24, at 33-37.

[214] 1990 Haw. Sess. Laws 304.

[215] Becky Ashizawa, *O.H.A. Has Plans Already for its New Cash*, HONOLULU STAR-BULL., Feb. 9, 1990, at A-3.

state will probably make payments in the form of cash, lands and leases, at a rate of about $8.5 million per year.[216] Native Hawaiians reportedly plan to put the funds towards rehabilitating some of the Home Lands sites and obtaining a federal reparations package for Hawaiians.[217]

C. The Trust Arrangements Create Unavoidable Conflicts of Interest for State Officials

Despite the state's recent attempts to resolve the Ceded Lands dispute,[218] the problem is not one to be resolved by legislative tinkering with the existing structures. The core problem is the impossibility of a state ministering to two parties with conflicting interests.

In the Home Lands situation, the conflict is at an abstract level, i.e., the State of Hawaii's broad duty to serve the general public as opposed to its statutory trust obligations to Native Hawaiians.[219] But in the case of Ceded Lands, the conflict is written into the terms of the trust. The trust name two beneficiaries, the general public and Native Hawaiians, with frequently competing interests.[220] Because one of those groups is a discrete subset of the other, furthermore, it is only logical that elected and appointed state officials would resolve the dilemma in favor of the majority and at the expense of Native Hawaiians.

There will always be a conflict when a government, even the federal government, must act both as a trustee in the best interests of a small segment of the populace and also as a servant of the best interests of the entire populace. The "tyranny of the majority" is a well-known problem in democratic society.[221] But the transfer of trust obligations

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[216] *Id.*

[217] *Id.*

[218] *See supra* notes 213-17 and accompanying text.

[219] *See supra* note 133 and accompanying text.

[220] *See supra* note 133 and accompanying text.

[221] *See, e.g.*, JOHN HART ELY, DEMOCRACY & DISTRUST 135-79 (1980) (expounding on countermajoritarian function of constitution and courts for protection of minority rights); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263-87 (vol. 1, P. Bradley ed., 1945); JOHN STUART MILL, ON LIBERTY 6-10 (D. Spitz ed., 1975); THE FEDERALIST No. 51 (J. Madison); Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963); Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

from the federal to the state level aggravates the problem; because of sheer numbers, federal legislators are less directly answerable than state legislators to each constituent.

For example, in the state context, a decision about whether to allot certain trust lands for Native Hawaiian homesteading or to preserve it for a more public function, such as a new road or a flood control project, will affect *all and only* that state's constituency. In *Ahuna*, the Chairperson of the Hawaiian Homes Commission, which approved the reduction of the land award to the Native Hawaiian in favor of the road extension, testified as follows:

> In viewing the Puainako Extension, *which is a benefit to all of the citizens of Hawaii*, and primarily, those on the Island of Hawaii, it is our responsibility, to look at the pluses and the minuses.
>
> And as to how much it is going to *cost the State* to detour or to deviate, versus the loss to the Hawaiian homestead land, or to the homesteader. . . . . The Commission approved of the Puainako Extension. And *our first consideration was the number of people that it would benefit* versus the inconvenience that it might cause, to *a few* . . . .[222]

Similarly, in *Keaukaha-Panaewa*, the court acknowledged that the flood-control project that was to be built on Hawaiian Home Lands was for the benefit of the City of Hilo.[223] These examples demonstrate the majority-driven reasoning of state officials, even those purportedly acting as trustees of a small group of beneficiaries.

On the contrary, when federal lawmakers assess their responsibilities where such decisions arise, they may be less likely to be ousted for siding with the native peoples. A flood control or road extension project in the mainland United States could impact on several states, thus diffusing the direct State/Native conflict. In a geographically isolated state such as Hawai'i, there is no such diffusion.

Thus, Native Hawaiians are doubly injured by state administration of the trust obligations: first by the banishment of their concerns from the national forum, and then by the heightened potential for state officials' failure to act in the best interest of the beneficiaries because of practical political considerations.

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[222] 64 Haw. 327, 341, 640 P.2d 1161, 1170 (1982) (emphases added).

[223] 588 F.2d 1216, 1219 n.4 (9th Cir. 1978) *cert. denied* 444 U.S. 826 (1979).

IV. Native Hawaiians and Native Americans: Contrasting Federal Trust Responsibilities

A. Federal Trust Obligations to Mainland Native Americans[224]

The federal government owes common-law trust duties to Native Americans. The United States Supreme Court first articulated the trust notion in an 1831 case, *Cherokee Nation v. Georgia*.[225] In that case, the Cherokee tribe sued in the Supreme Court for an injunction against the enforcement of Georgia state laws on lands guaranteed to the tribe by treaties.[226] The Court declined to take original jurisdiction over the case, saying that the tribe was not a foreign nation or a state within the meaning of the Constitution.[227] Chief Justice John Marshall wrote that the Indian tribes were "domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[228] While Chief Justice Marshall's intention in so ruling was to preserve the tribe's self-governing status,[229] other Justices' opinions construed the relationship between the United States and the Cherokees to be that of a conqueror and a subject people.[230]

The trust doctrine in *Cherokee Nation* was followed by the view, put forth the next year in *Worcester v. Georgia*,[231] that Congress had "plenary" power over Indian affairs.[232] This power was said to derive from the constitution's grant of power to Congress "to regulate commerce with foreign nations, and among the several states, and *with the Indian Tribes*."[233] Some commentators speculate that the locution "plenary" was not meant to denote "absolute" or "total" power, but rather to

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[224] *See generally*, Cohen, *supra* note 23.

[225] 30 U.S. (5 Pet.) 1 (1831).

[226] *Id.* at 10.

[227] *Id.* at 11-12 (citing U.S. Const. art. III, § 2).

[228] *Id.* at 17.

[229] *Id.*; *see also* Blondin, *supra* 51, at 15 n.14.

[230] *See, e.g.*, 30 U.S. at 16 (Johnson, J., concurring); *id.* at 32-33 (Baldwin, J., concurring); *but see, id.* at 36 (Thompson, J., dissenting) (Cherokees "have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and rights or self-government, and become subject to the laws of the conqueror.").

[231] 31 U.S. (6 Pet.) 515 (1832).

[232] *Id.* at 536-63.

[233] *Id.* (citing U.S. Const. art. I, § 8, cl. 3).

signify federal as opposed to state powers,[234] or general police powers as opposed to the "limited," delegated powers that the federal government bears to the states.[235] Nonetheless, by the late nineteenth century the phrase "plenary power" had come to take on a broader, absolute meaning,[236] a sense that it arguably retains today.[237]

Like "plenary power," the trusteeship language has taken on a variety of meanings over the course of federal-tribal relations. While the trust relationship originated as a means of controlling Indians, more recently it has manifested a protective aspect as well.[238] The federal government currently aids Native Americans through educational, health, social services, economic development and resource management programs.[239]

One promising aspect of the federal public trust duty to Native Americans as presently conceived is the government-to-government relationship between the tribes and the United States.[240] The United States recognizes certain Native American tribal authority, deriving not from grants by Congress, but from inherent, residual powers of sovereignty.[241] Tribal sovereignty means the federal government recognizes Native American tribes' right to establish a tribal government, determine membership, administer justice, exclude persons from the

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[234] *See* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. 507, 524 (1987).

[235] *See* C.F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 78-79 (1987) [hereinafter WILKINSON].

[236] United States v. Kagama, 118 U.S. 375 (1886).

[237] *See, e.g.*, Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613, 601 F.2d 1157, *cert. den.* 318 U.S. 789 (1942).

[238] *See, e.g.*, Joint Tribal Council of the Passamquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (federal government fiduciary obligations to Native Americans to be enforced strictly); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973); Pyramid Lake Piute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

[239] *See, e.g.*, Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1985); Economic Opportunity Program, Native American Program Act, 42 U.S.C. §§ 2701-2995 (1973); Indian Health Care Act, 25 U.S.C. § 1616f (1992); Education Program of the Bureau of Indian Affairs, 25 U.S.C. § 2001 (1983).

[240] *See, e.g.*, Ronald Reagan, *Statement on Indian Policy, published in* Pub. Papers of Ronald Reagan 96, 96 (Jan. 24, 1983) ("Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian Tribes"); *see* COHEN, *supra* note 23, at 232-35.

[241] *Cherokee Nation*, 30 U.S. (5 Pet.) 1, 16 (1831).

reservation, charter business organizations, exercise police power and invoke sovereign immunity.[242]

Tribal status was traditionally accorded to those groups that have reservations created by the United States by treaty or statute and a continuing political relationship with the United States.[243] In 1978, the United States Department of Interior issued regulations for determining when groups lacking in federally recognized lands may be considered tribes.[244] The four criteria are: (1) a common identification ancestrally and racially as a group of Native Americans; (2) the maintenance of a community distinct from other populations in the area; (3) the continued historical maintenance of tribal political influence or other governmental authority over members of the group; and (4) the status of not being part of a presently recognized tribe.[245]

B. Are Native Hawaiians Indians?[246]

The United States does not currently recognize Native Hawaiians as a tribe.[247] A few years ago, a small, recently-constituted group of Hawaiian Natives sought federal judicial recognition as an Indian tribe for purposes of establishing standing to enforce the State's trust obligations under the Hawaiian Homes Commission Act.[248] The Ninth Circuit affirmed the dismissal of the group's claims, stating that it did not fulfill the Interior Department's requirements[249] in that the group lacked "historical continuity," "longstanding tribal political authority," and representativeness of a "substantial portion" of the Native

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[242] *See, e.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963 (1983)) (child custody); Washington v. Confederated Colville Tribes, 47 U.S. 134, 152-55 (1980) (taxation); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (form of government and membership); Fisher v. District Court, 424 U.S. 382 (1976) (domestic relations); Queachan Tribe v. Rowe, 531 F.2d 408 (9th Cir. 1976) (exclusion of persons from territory).

[243] COHEN, *supra* note 23, at 6.

[244] Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 25 C.F.R. 83 (1991).

[245] *Id.*

[246] Thorough discussion of this issue appears in Mililani Trask, Study of Section 5(f) of the Admission Act of the State of Hawaii (Sept. 30, 1978) (unpublished manuscript, on file with the *University of Hawai'i Law Review*) [hereinafter M. Trask-AluLike].

[247] *See* Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985), *cert. denied sub nom.* Hou Hawaiians v. Hawaii, 474 U.S. 1055 (1986).

[248] 764 F.2d 623 (9th Cir. 1985).

[249] *Id.* at 627-28 (citing 25 C.F.R. § 83).

Hawaiian community "inhabit[ing] a specific area or liv[ing] in a distinct community."[250] Furthermore, that particular group of Hawaiians did not meet the non-statutory standards that the BIA used to establish tribal status prior to the 1978 regulation;[251] namely, it did not have treaty relations with the United States, nor was it denominated as a tribe by Congress or Executive Order, nor was it treated as a tribe by other Native Americans, nor did it demonstrate that the group exercised political authority over its members.[252]

Perhaps an older or more representative group of Hawaiians could seek declaration as a "tribe" for purposes of invoking federal protections. Even under those circumstances, the Ninth Circuit warned, it would be hesitant to declare tribal status since "recognition of tribe is 'to be determined by Congress and not by the courts.'"[253]

Regardless of whether Native Hawaiians constitute a "tribe," are they owed the same federal trust protections as are owed Native Americans? The Federal-State Task Force appointed to assess the Hawaiian Homes Commission program attempted to address the question of federal trust responsibilities towards Native Hawaiians, at least in the context of the H.H.C.A.[254] It discussed the Admission Act's provision that the federal government is obliged to enforce the State-Native trust and to oversee land transfers and emendations of the H.H.C.A. But, aside from these statutory obligations, is the full panoply of federal protection implicated in the case of the Native Hawaiians? The Task Force declined to venture an answer.

Those who say yes, the Task Force Report explains, are inclined to point to seeming federal acknowledgement of the "ward-guardian" relationship that appears in the legislative history of the H.H.C.A. of 1920.[255] That legislative history strongly suggests that at the time of passage the federal government perceived itself to be in a trusteeship capacity towards Native Hawaiians.[256] Ex-Secretary of the Interior Franklin K. Lane testified before the House Committee on the Territories:

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[250] *Id.* at 627.

[251] *Id.* at 627-28 (citing Letter from Commissioner of Indian Affairs to Chairman of Senate Committee on Interior and Insular Affairs, 1974).

[252] *Id.* at 628.

[253] 764 F.2d at 628 (citing United States v. Sandoval, 231 U.S. 28, 46 (1913)); *see* COHEN, *supra* note 23, at 4-5.

[254] TASK FORCE REP., *supra* note 177.

[255] *Id.*

[256] H.R. REP. No. 839, 66th Cong., 2d Sess. 4 (1920).

> One thing that impressed me . . . was the fact that the natives of the islands who are our *wards*, I should say, and *for whom in a sense we are trustees*, are falling off rapidly in numbers and many of them are in poverty. They never owned the lands of the islands. The land was owned by the King originally . . . .[257]

In this context the use of the "ward" and "trustee" language strongly implicates *Cherokee Nation*[258] and the protections that it provides.[259]

According to this line of argument, the federal government retains to this day the trust duties it expressed in 1920, prior to statehood.[260] The Hawaii Supreme Court in *Ahuna* noted a pre-statehood federal trust obligation,[261] but also said that "the State of Hawaii assumed this fiduciary obligation upon being admitted into the Union as a State."[262] It did not make clear whether it considers the federal government to have residual trust duties to Native Hawaiians aside from the statutory ones delineated in the H.H.C.A. portion of the Admission Act.

The Department of the Interior considers that the United States owes certain trust duties to Hawaiians, indicating that "prior to statehood, the United States itself held title to the home lands in trust for native Hawaiians," and that since statehood, "it is the Department's position that the role of the United States under Section 5(f) is essentially that of a trustee."[263] However, the Department has not taken a position as to whether the relationship of the federal government to the Indians is analogous to federal-Hawaiian relationship.[264]

The Task Force Report also explains the viewpoint that the United States has no trust duties to Native Hawaiians.[265] This position, it explains, derives from the "absence of trust language applicable to the

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

[258] 30 U.S. (5 Pet.) 1, 17 (1831).

[259] *See supra* notes 225-30 and accompanying text.

[260] TASK FORCE REP., *supra* note 177, at 199.

[261] 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982) (citing legislative history of H.H.C.A.).

[262] *Id.*

[263] Letter from Deputy Solicitor General, Department of the Interior, to Western Regional Office of the United States Commission on Human Rights (1979); *see* TASK FORCE REP., *supra* note 177, at 199-200.

[264] *Id.*; *see* TASK FORCE REP., *supra* note 177, at 200.

[265] TASK FORCE REP., *supra* note 177, at 200-01.

United States" in section 5(f) of the Statehood Act: "The trust language in [that provision] relates by its terms to the State alone."[266] The Task Force Report summarizes the Ninth Circuit's position in *Keaukaha-Panaewa*[267] that the absence of statutory language is dispositive.[268] According to the Ninth Circuit, the Task Force Report explains, it was the State, not the United States, that is the trustee, and Indian cases are therefore "not helpful."[269]

The Task Force Report concludes that, regardless of whether or not the United States "was or was not, or is or is not, a trustee" in relation to the Hawaiian Homes program, the federal government "should bear responsibility for past and present misuses of Hawaiian home lands."[270] This finding should be applied to federal misues of and failures of oversight with respect to the Ceded Lands trust as well.

Recently, Congress has begun to appropriate monies for programs specifically for the benefit of Native Hawaiians[271] and, as of 1974,[272] to include Native Hawaiians in federal programs for other Native Americans involving health[273] and cultural,[274] vocational,[275] and educational services.[276] Congress has begun to recognize that it owes continuing legal and moral duties to Native Hawaiians, duties that could not neatly be relegated to the state by statute in 1959. One federal court, however, has stated that "for all practical purposes these benefits have lost their federal nature."[277] It remains to be seen whether Congress now conceives of its responsibilities to Native Hawaiians as equal to those owed to mainland Native Americans.

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[266] *Id.*

[267] 588 F.2d 1216 (9th Cir. 1978).

[268] TASK FORCE REP., *supra* note 177, at 201.

[269] *Id.*

[270] *Id.*

[271] *See, e.g.*, Native Hawaiian Health Care Act of 1988, 42 U.S.C. § 11701 (1988) (codified at 42 U.S.C. § 11701 (1988)), Pub. L. No. 100-690, 102 Stat. 4223 (1988); Native Hawaiian Gifted and Talented Program, Pub. L. No. 100-297, 102 Stat. 361 (1988) (codified at 20 U.S.C. § 4906 (1988)).

[272] COHEN, *supra* note 23, at 797-98.

[273] Pub. L. No. 93-644, 88 Stat. 2324.

[274] Native American Languages Act, Pub. L. No. 101-477, 104, Stat. 1154 (1990) (codified at 25 U.S.C.A. § 2902 (West Supp. 1992)).

[275] The Indian Manpower Program, Pub. L. No. 93-203, 87 Stat. 239; 20 U.S.C. §§ 2301-02 (1988); the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1987).

[276] Hawkins-Stafford Elementary and Secondary Education Improvement Act, Pub.L. No. 100-297, 102 Stat. 130 (1988), §§ 4001-08, 102 Stat. 358-63.

[277] *Keaukaha-Panaewa*, 588 F.2d 1216, 1226 (9th Cir. 1978), *cert. denied* 444 U.S. 826 (1979).

C. The Case for a Distinctively Hawaiian Solution

Would Hawaiians' political troubles be completely resolved if Congress were to pass a law deeming them Indians? Should Hawaiians simply lobby Congress for status as a tribe, or several tribes, of Indians?[278] Native Hawaiians stand to benefit from having direct relations with the federal government rather than having to deal primarily with the State of Hawaii. Their land would be entrusted to a more disinterested party; their issues would get more attention on the mainland; they would have access to the federal court system; as a matter of federalism, it might be easier to persuade the federal Department of Justice to sue another federal department for breaches of trust than to persuade it to sue the State of Hawaii, something which it is apparently been unwilling to do in over thirty years of state trusteeship. With federal recognition and a land base, Hawaiians would be better able to rebuild their community and to practice their traditional lifestyle without the encumbrance of an additional layer of state regulation.

However, it is also clear that the optimal Hawaiian solution would not simply imitate the Indians' arrangements with the United States. First, Indian tribes are far from satisfied with their relationship to the federal government: among their many concerns, they continue to worry about their status as "domestic dependent nations"[279] without access to international fora;[280] they are threatened by the possibility that the federal government can (and will) "terminate" them when politically expedient;[281] they worry about Congress's willingness unilaterally to abrogate treaties with them.[282] They also object to states' invocation of legislative and judicial power over Indian affairs.[283]

Hawaiians are ethnologically, geographically, and culturally distinct from mainland Native Americans. (One Hawaiian activist insists: "Don't put feathers in my head! I'm not an Indian!")[284] There are

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[278] For an argument that Native Hawaiians should be considered "Indians" for federal government purposes, *see* R.H. Houghton III, *An Argument for Indian Status for Native Hawaiians—The Discovery of a Lost Tribe*, 14 AM. IND. L. REV. 1 (1989).

[279] *Cherokee Nation*, 30 U.S. (5 Pet.) 1, 17 (1831).

[280] WILKINSON, *supra* note 235, at 79.

[281] *See supra* notes 135-47 and accompanying text.

[282] WILKINSON, *supra* note 235, at 79.

[283] *See, e.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 1204 (1989) (permitting county to exercise zoning authority over portions of reservation).

[284] Mililani Trask, Address before the Native Hawaiian Rights Conference (Aug. 5, 1988).

also significant historical differences in the way the United States came into contact with each group.[285] The communities' significant differences should be reflected in solutions tailored to each situation.

A strategy adopted by some Hawaiian-rights lawyers is to distinguish Hawaiians from Indians in those cases where they perceive that Indians have been maltreated by the United States.[286] Of course, distinguishing unfavorable precedent in order to avoid its application to one's own case is a common legal strategy. However, this approach may alienate Indians, a natural ally to Hawaiians, because in distinguishing the two cases the Hawaiians may appear to affirm the correctness of the United States' actions with regard to Indians.

One difference that Hawaiian rights lawyers point to is that Hawai'i was a world-recognized sovereign nation less than 100 years ago—more recently than most of the Indian nations, which have been considered "domestic dependent nations" since 1831.[287]

Another approach is to claim that unlike Indian land, Hawaiian land was not "traded to," "conquered" or "occupied" by the United States; rather, the public lands, i.e., Crown and Government lands, were "ceded" to it.[288] According to this argument, principles of international law in currency during the eighteenth and nineteenth centuries would hold that the United States could lay claim to land obtained under the former three circumstances, but not under the last.[289]

These formulations are problematic. Some Indian tribes may be said to have given away land and sovereignty in exchange for protection. However, one could argue against such an interpretation, using contract law notions of unconscionability,[290] coercion or duress.[291] Also, there are some Indian groups which claim never to have given up their sovereignty.[292]

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[285] *See supra* note 2 and accompanying text.

[286] *See, e.g.*, M. Trask-AluLike, *supra* note 246.

[287] *Cherokee Nation*, 30 U.S. (5 Pet.) 1, 12 (1831).

[288] *See, e.g.*, M. Trask-AluLike, *supra* note 246.

[289] *Id.*; *see Worcester*, 31 U.S. (6 Pet.) 515, 523 (1832).

[290] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (noting that unconscionability includes absence of meaningful choice on part of one party together with contractual terms which unreasonably favor the other party) (citations omitted).

[291] *See, e.g.*, Employers Ins. of Wausau v. United States, 764 F.2d 1572, 1576 (Fed. Cir. 1985) (concerning duress where one side involuntarily accepted terms of another; circumstances permitted no other alternative; and such circumstances were the result of the coercive acts of the opposite party) (citations omitted).

[292] For example, the traditional Hopi people are currently pressing a claim against

Furthermore, international law notions of "discovery and occupation" during the colonial period were meant to bestow rights of occupancy upon the so-called discovering nation only in relation to other colonial nations, not in relation to peoples who might have been there before.[293] Chief Justice Marshall, in the first of the Marshall Indian Law trilogy, said that discovery "gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments . . . The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives . . . ."[294]

Moreover, even under the old international law regime of land acquisition through conquer, a "conquering" country only gained recognizable rights to land if it entered into armed struggle defensively;[295] empire-building expeditions did not qualify as "just wars" and land obtained thereby did not qualify as legitimately conquered territory.[296]

The conquest theory is sometimes cited for the proposition that Congress has legitimate authority over Indians.[297] This usage would add some weight to the Hawaiians' claims of distinction; however, to the extent that it justifies the United States' confiscation of Indian lands, it alienates Hawaiians from a natural ally and betrays the themes of humanism and respect for sovereignty that underlie both groups' claims.

Of course the experience of mainland Native Americans is relevant to Hawaiians—above all, they share a common historical enemy. Certain concepts in the federal-Indian relationship may profitably be borrowed as a starting point, a model, or an analogy. It would be best if a solution could be crafted that draws on the hard-won lessons of Native Americans, but that also is uniquely tailored to the Hawaiians' culture, geography, history, and relations with the United States.

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the United States before the U.N. Commission on Human Rights, based on assertions that they never signed a treaty abandoning their land or sovereignty. *See supra* note 234, at 604-05 nn.517-30.

[293] *Worcester*, 31 U.S at 515-16.

[294] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823); *see also* COHEN, *supra* note 23, at 292 (observing that the discovery doctrine "bound the European governments but not the Indian Tribes").

[295] *See* Kronowitz et al., *supra* note 234, at 521 n.68.

[296] *Id.*

[297] *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290 (1955).

D. *Claims for Reparations*

Many Native Hawaiians claim that the United States government owes them reparations for the American role in the 1893 coup and subsequent annexation of Crown and Government lands.[298] In 1980 Congress called for a federal commission to investigate these claims.[299] The Native Hawaiians Study Commission convened early in 1981, but before their work was completed the commissioners, who had been appointed by President Carter, were dismissed by the new president, Ronald Reagan, and replaced.[300] In 1984, the panel issued majority and dissenting reports, the former declining to find U.S. responsibility to remedy alleged injuries to the Native Hawaiian community, the latter substantiating such claims.[301] The majority report was subsequently criticized as historically and legally inaccurate[302] and politically motivated.[303]

The issue of whether and what kind of reparations the United States owes to Native Hawaiians remains an open question. Fashioning a politically acceptable package is a top priority of Native Hawaiian activist groups.

E. *Federal Trusteeship as an Interim Step*

Removing the trust duty from the state and restoring it to the federal government is a first step towards insuring the integrity of the trust arrangement. But in the end, no trust mechanism can ever be satisfactory, whether administered by the state or federal government. Native Hawaiians should recover full legal *and* beneficial title to their lands. The Homestead Lands and at least a portion of the Ceded Lands belong to Native Hawaiians by virtue of their historical rela-

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[298] *See* N.H.R.H., *supra* note 24, at 80-83.

[299] Native Hawaiians Study Commission Act, Pub. L. No. 96-565, tit. III, § 303(a) (1980).

[300] N.H.R.H., *supra* note 24, at 82.

[301] NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS (1983).

[302] *See Hearings on the Report of the Native Hawaiians Study Commission Before the Sen. Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. (Apr. 16, 1984).

[303] John Heckathorn, *The Native Hawaiians*, HONOLULU MAGAZINE, Dec. 1988, at 91 [hereinafter Heckathorn] (quoting Hawai'i's Sen. Daniel K. Inouye pronouncing the majority report the product of "third-echelon bureaucrats who weren't going to come up with something their superiors wouldn't like").

tionship with that land;[304] their rightful ownership of these lands was recognized by their sovereign king during the Great *Mahele* and again by the United States through the annexation documents.[305] The return of these lands to the Hawaiian community may not be imminent. But, for reasons set forth in the next section, return is both necessary and fair.

V. Philosophical Objections to the Hawaiian Land Trust Instruments[306]

All of the lands in which Native Hawaiians have a recognized communal interest are lands held in trust for them.[307] Throughout their existence, both of the trusts have been managed poorly or not for Native Hawaiians' benefit.[308] There have been task forces and joint commissions investigating the two trusts and making recommendations for improving their management.[309] However, reform is not an adequate solution. The trust format is hampered by irreconcilable conflicts of interest and should be abolished.

This part argues that the trusts are rooted in racism and shot through with paternalism; they deny Native Hawaiians self-determination, freedom, and autonomy, principles upon which this nation was founded.[310] Finally, they may violate United Nations conventions on human rights and self-determination.[311]

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[304] *See supra* part II.

[305] *See* Treaty of Annexation of 1897; Resolution of the Senate of Hawaii Ratifying the Treaty of 1897; and Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (Newlands Resolution). All of these reserved to the inhabitants of Hawai'i a beneficial interest in the revenues and proceeds from the ceded territory.

[306] Whether and to what extent these objections apply to the common law trust relationship between the federal government and mainland Native Americans is open for consideration.

[307] *See supra* part III.

[308] *Id.*

[309] *See supra* part III.A.4.

[310] *See supra* notes 28, 221.

[311] *See infra* notes 340-55 and accompanying text.

A. *Paternalism and Racism Critique*

The Hawaiian trust land arrangements are inherently paternalistic. They are directly traceable to the "guardian-ward" sentiment of the last century,[312] as expressed by members of Congress during the debates surrounding passage of the Hawaiian Homes Commission Act.

According to the law of trusts, a "ward" is an "infant, a lunatic, or a person judicially declared a spendthrift or otherwise lacking in legal capacity."[313] It is inappropriate—at best—to liken Native Hawaiians to a "ward," in light of their rich culture, long history of self-sufficiency prior to Westerners' "discovery" of Hawai'i, and remarkably adroit entrance into world politics and trade shortly after contact with the West.[314]

The guardian-ward concept is mired in racism. This dominant-subordinate relation was originally based upon a firm conviction of the inferiority of native peoples. From the very beginning, the federal-tribal trust doctrine (upon which the existing Hawaiian land trusts are based) explicitly relied upon the "primitivism" of natives to justify interference in their affairs.[315] In *Johnson v. M'Intosh*,[316] the first of the Marshall Court trilogy of Indian cases, the Chief Justice wrote, "the character and religion of [America's native] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[317] Fifty years later, in *Beecher v. Wetherby*,[318] the Court explained the trust obligation as the United States' duty to act as "a Christian people in their treatment of an ignorant and dependent race."[319]

Even into the twentieth century the Court propounded this view:

> Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to crude customs inherited from their ancestors, [pueblo Indians] are essentially a simple, uninformed, and inferior people . . . .
>
> [A]s a superior and civilized nation [the United States has] the power

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[312] *See Cherokee Nation*, 30 U.S. (5 Pet.) 1, 12 (1831).

[313] RESTATEMENT (SECOND) OF TRUSTS § 7 (1959).

[314] *See supra* parts I, II.

[315] This point is eloquently put in Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 425-27 [hereinafter *Rethinking the Trust Doctrine*].

[316] 21 U.S. (8 Wheat.) 543 (1823).

[317] *Id.* at 573.

[318] 95 U.S. 517 (1877).

[319] *Id.* at 525.

> and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders . . . .[320]

Such justifications for holding land in trust for indigenous peoples are seldom expressed today. But, as recently as the summer of 1988, President Ronald Reagan asserted that perhaps the United States "should not have humored [the Indians] in that, wanting to stay in that kind of primitive lifestyle. Maybe we should have said: 'No, come join us. Be citizens along with the rest of us.'"[321]

Racial supremacy will always be present as an underpinning of the guardian-ward relation. The Hawaiian trusts stand as an enduring remnant of that discriminatory mode of thought.

Part of the paternalism of the trusts is the imposition upon the Native Hawaiian community of a definition not of its own choosing.[322] Among tribes of Native Americans on the mainland, courts recognize broad tribal authority to determine their own membership.[323]

The imposition of a fifty percent blood quantum requirement by the H.H.C.A. and the Ceded Lands Trust is unrelated to the Hawaiian community's own understanding of what it means to be Hawaiian. As Native Hawaiian attorney and nationalist Pōkā Laenui explains:

> People in Hawaii were predominantly identified by their relationship to the country or to the society or to the *'aina* [land]. Thus people were called by the terms *Kama'aina* (adopted to the land); *Hoa'aina* (friend of the land); *Kua'aina* (backbone of the land); or *Maka'aina(na)* (eyes of the

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[320] United States v. Sandoval, 231 U.S. 28, 39, 46 (1913).

[321] *Moscow Summit: Remarks on "Humoring" Indians Bring Protest from Tribal Leaders*, N.Y. TIMES, June 1, 1988, at A-13.

[322] M. Trask-AluLike, *supra* note 246, at 61.

[323] COHEN, *supra* note 23, at 20-21; *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897); *see also* Patterson v. Council of Seneca Nation, 157 N.E. 734 (N.Y. 1927) (refusing to grant writ of mandamus to individual seeking to compel tribe's governing council to enroll him).

Congress may define membership in a tribe or group for certain of its own administrative purposes. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84-86 (1977); Wallace v. Adams, 204 U.S. 415 (1907); Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965) (three-judge court), *aff'd*, 384 U.S. 209 (1966); *see also* COHEN, *supra* note 23, at 23 n.29. But, for determinations of membership on tribal rolls, federal administrators at the Department of the Interior defer to the tribe's own law. *See* COHEN, *supra* note 23, at 25-26 (citing Waldron v. United States, 143 F. 413 (C.C. D.S.D. 1905)).

> land). The person who had no such relationship was a *Malihini* (stranger, newcomer). If you study Hawaii's history, you can find where citizenship was not restricted to race. We had people of many different races as citizens of Hawaii. The real question was one of national allegiance. . . . The indigenous people of Hawaii (*Po'e Hawaii*) do have a special interest in Hawaiian nationhood, but it's not an exclusive interest. Every person who loves Hawaii, who grew up here and feels for Hawaii's future, who wants their children to enjoy Hawaii as we have, has an interest in Hawaiian nationhood.[324]

Moreover, the fifty percent blood quantum requirement is more stringent than the membership requirements imposed by most mainland tribes. Membership requirements vary from tribe to tribe, but many tribes set their blood quantum requirement at twenty-five percent, some permit any descendant of a tribal member to be enrolled regardless of blood quantum, and only a few set the blood quantum requirement as high as one-half.[325]

Finally, the blood quantum requirement in the Hawaiian context serves to divide the Hawaiian community, pitting those with fifty percent or more Hawaiian blood against those with fewer Hawaiian ancestors.[326]

As used in the Hawaiian trust situation, the blood quantum requirement is racist, divisive, and uniquely disrespectful of Native Hawaiian traditions of cultural identification.

B. American Self-Interest Critique

One commentator, referring to the long history of abuse of American Indians by the United States, notes that "[a] theory of 'trust' that permits, indeed invites, such oppression of the 'beneficiary' is plainly a misnomer, and a cruel one."[327] According to this commentator, Native peoples do not benefit from the trustee relationship; the occupying power does.[328]

This thesis is fully applicable to the Native Hawaiian situation. The United States has withheld legal title to Native Hawaiian lands in order

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[324] *Dialogue Between Pōkā and Ni'ele*, 'Ai Pohaku! (Jan. 23, 1988).

[325] *See* American Indian Policy Review Comm'n, Final Rep. 108-09 (Comm. print 1977); *see* Cohen, *supra* note 23, at 23.

[326] Tuaiwa Rickard, Address before the Conference on Native Hawaiian Rights (Aug. 7-8, 1988).

[327] *See Rethinking the Trust Doctrine*, *supra* note 315, at 427.

[328] *Id.*

to protect American interests. First, there is the economic lure of tremendous natural and mineral wealth in indigenous peoples' lands. If America can keep a hand in the ownership of those lands, it can access that wealth.[329] Among the trust lands being held "for the benefit of" the native Hawaiians, the federal government is interested in manganese nodules and other sources of strategic minerals which lie on the crust of subsurface reefs.[330] The State of Hawaii is developing geothermal energy from the volcanoes of Hawai'i's Ceded Lands on the Big Island.[331] This latter use is especially disrespectful of the Native Hawaiian religion, in which the volcano is the dwelling place of the goddess Pele, creator of the Hawaiian people.[332]

The United States also enjoys the military advantage offered by Hawai'i's strategic location midway between North America and the Far East. Hawai'i is particularly well-suited to serve as a site for refueling, weapons storage, and quartering troops.[333] The Armed Services use a quarter of the land on O'ahu and significant portions of the other islands for military purposes, including army barracks, missile training, SDI research, and aerial attack sites, and nuclear weapons storage.[334] In 1953, the President of the United States took over the island of Kaho'olawe for military purposes,[335] and until recently the island, which contains burial land sacred in the Hawaiian religion, was used by the United States Navy and its allies for bombing target practice.[336]

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[329] *Id.*

[330] N.H.R.H., *supra* note 24, at 187 n.165.

[331] N.H.R.H., *supra* note 24, at 38; *see* Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990) (upholding dismissal of Native Hawaiian's challenge to land-swap deal that failed to assess the impact on the trust of the exchange).

[332] The Hawaii Supreme Court in Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988), rejected practitioners' claims that the proposed geothermal development project would unconstitutionally burden their First Amendment right to worship in the area. *Id.* at 266-67, 740 P.2d at 36.

[333] MACKENZIE, *supra* note 99, at 44.

[334] *Id.*

[335] Exec. Order No. 10436, 18 Fed. Reg. 1051 (Feb. 20, 1953).

[336] *See* N.H.R.H., *supra* note 24, at 30. In 1976 several Native Hawaiians filed a lawsuit to enjoin the bombing and return Kaho'olawe to native control. Aluli v. Brown, Civ. No. 76-0380 (D. Haw. 1976). In 1980 the parties signed a consent decree, taking steps toward the protection of historic sites and allowing for native stewardship over part of the island. *Id.*; *see* N.H.R.H., *supra* note 24, at 30.

Territorial integrity and contiguity of the national borders is a high priority of American foreign policy.[337] The United States likely perceives a risk in having the Indian reservations or the Ceded Lands in Hawai'i outside the domain of federal laws.

Concern for the national interest is doubtless at the heart of the trust doctrine that maintains federal title over indigenous land. However, legitimate national security and material considerations could be reconciled more effectively with the interests of indigenous communities.

C. Self-Determination Critique

Self-determination is a powerful, internationally recognized concept, analytically related to the ideas of sovereignty, autonomy and, ultimately, democracy. Many of the claims of Native Hawaiians and other indigenous groups are based upon the notion that they have a right to determine the course of their own affairs consistent with the values and priorities of their communities. Where does this claim of right come from?

1. Self-determination as inherent power: the American view

Perhaps the question is better put: Where doesn't self-determination come from? Where does the curtailment of indigenous communal rights originate? In federal Indian law, the sovereignty of indigenous groups is assumed to be inherent, subject only to the limited powers of Congress.

> Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'[338]

The right to self-determination emanates from the doctrine of sovereignty, the well-established conviction that people ought to be the masters of their own fate, subject to internal controls based on conscience and/or communal values. Hawaiians' claims of communal self-

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[337] The "Manifest Destiny" doctrine of the last century is the clearest example of this.

[338] COHEN, *supra* note 23, at 231 (quoting United States v. Wheeler, 435 U.S. 313, 322-23 (1978)); *see* Oliphant v. Susquamish Indian Tribe, 435 U.S. 191 (1978).

determination resonate with civic republican themes in the United States Constitution.[339]

2. Self-determination as human right: The international law perspective

Some commentators attribute the federal government's initial acknowledgement of tribal sovereignty to general principles of international law.[340] More recently, through the United Nations, countries of the world have signed various accords guaranteeing the right of self-determination,[341] especially to indigenous peoples.[342] Such accords recognize that this right should not be subject to defeasance at the preference of the governing nation's officials.[343]

To this end, the nations of the United Nations have enshrined the values of self-determination in the United Nations Charter[344] and several United Nations Declarations,[345] including the Universal Declaration of

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[339] *See generally*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, ch. XIII *et passim* (1969); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

[340] COHEN, *supra* note 23, at 232; Robert G. McCoy, *The Doctrine of Tribal Sovereignty*, 13 HARV. C.R.-C.L. 357 (1978).

[341] *See infra* notes 344-48 and accompanying text.

[342] *See infra* notes 344-48 and accompanying text.

[343] *Compare Wheeler*, 435 U.S. 313, 323 (1978) (tribal autonomy exists "only at the sufferance of Congress and is subject to complete defeasance").

[344] U.N. Charter arts. 1, 55, 56. Articles 1, 55, and 56 of the United Nations Charter call for "mutual respect among nations based on equal rights and self-determination of peoples." Article 73 insists upon the right of self-determination even for non-self-governing peoples, that is, peoples still under the subjugation of colonial or occupation rule, and places an obligation upon member states to help develop self-government among these peoples.

[345] *See generally* 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, 15th Sess. (*adopted* Dec. 14, 1960), Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) [hereinafter 1960 Declaration] (calling for the elimination of "alien subjugation"); *see also* 1965 Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, 20 U.N. GAOR, 20th Sess. (*adopted* Dec. 21, 1965), Supp. No. 14, at 11, U.N. Doc. A/6014 (1965), *reprinted in* 5 I.L.M. 374 (1966) (calling upon states to "contribute to the complete elimination of racial discrimination and colonialism"); 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, 25 U.N. GAOR, 25 Sess. (*adopted* Oct. 24, 1970), Supp. No. 28, at 121, 123 (providing for the right of peoples to determine their own political development), *reprinted in* 9 I.L.M. 1292 (1970). *But see* 1960 Declaration, *supra*, at 67, ¶ 4 (calling for the protection of nations' "territorial integrity").

Human Rights[346] and the International Covenants on Human Rights.[347] Each of these documents emphasizes the right of peoples[348] to pursue their own economic, social, and cultural ends.

Several aspects of international human rights are relevant to the Hawaiian land trusts. First, the trusts arose through the unilateral actions of the United States in annexing Hawai'i. The annexation took place without a vote of the people living there, raising a question about the right to choose one's citizenship and the right to a representative government.[349] In 1959, there was a popular plebiscite to decide about Hawai'i's statehood, but the choices were only whether to become a state or remain a territory.[350]

Second, the land trusts are of dubious legitimacy in light of the international injunction against arbitrary deprivation of property.[351] The United States assumed and has retained (through its delegatee, the State of Hawaii) legal title to Crown and Government lands that were rightfully set aside by the King of Hawai'i for his people.[352]

Several Native Hawaiians have brought their community's claims before the United Nations. Attorney Pōkā Laenui (Hayden F. Burgess)

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[346] G.A. Res. 217(A), U.N. GAOR. 3d Sess., U.N. Doc. A/810, at 71 (1948). This document guarantees the right to a nationality of one's choosing (art. 15), the right against arbitrary deprivation of property (art. 17), and the right to take part in the government of one's country (art. 21).

[347] These are the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, respectively. These documents affirm the right of self-determination in terms of "economic, social and cultural development," art. 1, ¶ 1, and call upon signatories to "promote the realization" of that right, art. 1, ¶ 3. G.A. Res. 2200, 21 U.N. GAOR, 21st Sess. (*entered into force* Mar. 23, 1976), Supp. No. 16, at 49, 52, respectively, U.N. Doc. A/6316 (1966), *reprinted in* 6 I.L.M. 360, 368, respectively (1967). These covenants were approved by the General Assembly in 1966 and became legally binding upon signatory nations 10 years later. Then-President Carter signed the covenants but they have yet to be approved by the United States Senate.

[348] The applicability of these principles to Native Hawaiians depends in part upon whether Native Hawaiians constitute a "people." *See* INTERNATIONAL COMM'N OF JURISTS, THE EVENTS IN EAST PAKISTAN 70 (1972) (noting that a group may be considered "people" if it shares a common history, racial or ethnic ties, cultural or linguistic ties, religious or ideological ties, a common territory or geographical location, a common economic base, and a sufficient number of people).

[349] *Supra* part I, notes 88-94 and accompanying text.

[350] N.H.R.H., *supra* note 24, at 94.

[351] *Supra* note 346.

[352] *Supra* part II; Haunani-Kay Trask, *Hawaiians and Human Rights*, HONOLULU STAR-BULL., Nov. 26, 1984, at A-12, A-13.

regularly appears before the United Nations Working Group on Indigenous Populations (the U.N. W.G.I.P.), the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and the United Nations Commission on Human Rights.[353] Professor Haunani-Kay Trask addressed the U.N. W.G.I.P. in 1984.[354] In 1984 the General Assembly of the United Nations World Council of Indigenous Peoples adopted a resolution calling for an independent international commission to consider the question of the United States' aggression against Hawai'i in 1893 and the continuing effects of those actions today.[355]

VI. Plans for Action

Our treatment of Indians, even more than our treatment of other minorities reflects the rise and fall in our democratic faith.[356]

The trust mechanisms currently used to administer lands held by the State of Hawaii for Native Hawaiian beneficiaries are inconsistent both with the American ideal of native peoples' inherent sovereignty and with international accords which purport to guarantee the rights of indigenous peoples to self-determination. The trust arrangements are founded upon racist and paternalist notions and have been mismanaged during all the years of their existence. The faulty Hawaiian Homelands and Ceded Lands trust mechanisms ultimately must be replaced by an arrangement which pays greater heed to the United States' and United Nations' promises of autonomy.

A two-stage process is necessary to rectify Native Hawaiians' political, cultural, and material deprivation. As a first step, the United States should reassume and honor its trust obligations to Native Hawaiians. This means reestablishing itself as primary trustee of the land trusts, then recognizing Native Hawaiians as one nation among many other nations indigenous to what is now known as the United States of America. Native Hawaiian civil and criminal codes should be

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[353] Telephone Interview with Pōkā Laenui (Hayden Burgess), Vice-President, World Council of Indigenous Peoples, Honolulu, Haw. (Apr. 1989).

[354] Telephone Interview with Haunani-Kay Trask, Prof. of Hawaiian Studies, Univ. of Hawaii at Manoa, Honolulu, Haw. (Apr. 1989).

[355] *See Hearing Before the U.S. Sen. Select Comm. on Indian Affairs*, Honolulu, Haw. (Aug. 26, 1988), 100th Cong., (prepared statement of Pōkā Laenui (Hayden Burgess), Vice-President, World Council of Indigenous Peoples).

[356] Cohen, *supra* note 23, at v.

established and honored by both the state and federal governments; the Hawaiian language, culture, and law should be respected within the areas of Native Hawaiian domain.

As a second stage, the United States should relinquish its legal title to the trust lands and turn them over to their beneficial owners, in recognition of their prior historical and moral claims over that land.

Native Hawaiian groups have varying conceptions about how to regain their sovereignty[357] and how to structure their restored government;[358] they differ as to which lands should constitute their renewed land base,[359] and as to what strategy to use to obtain these goals.[360] Which is the best model and the best strategy? Rather than choosing among various alternatives proposed by Hawaiians, this part will simply lay out the different proposals.[361]

In the late 1960s and early 1970s, simultaneously with indigenous peoples' movements elsewhere in America and across the Pacific, native Hawaiians brought forth a vibrant cultural and political reawakening. Protests against land overdevelopment and continuing relocation of Hawaiians began to materialize in the form of mass demonstrations, lawsuits, and occupation of land.[362] In 1970, a grass-roots organization called "The Hawaiians" formed to protest abuses of the Hawaiian Homelands.[363] In 1975 several other groups, including the ALOHA Association (the Aboriginal Lands of Hawaiian Ancestry, Inc.), the Council of Hawaiian Organizations, the Congress of the Hawaiian People, the Friends of Kamehameha, and the Hawaiian Civic Clubs pressed the United States government for reparations.[364]

One such group, the Protect Kaho'olawe 'Ohana (PKO), was born in 1976 when a group of Hawaiian rights activists staged a series of occupations of the Island of Kaho'olawe, the site of military bombing target practice. By virtue of a consent decree filed in a lawsuit brought

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[357] *See infra* app., part I.

[358] *See infra* app., part II.

[359] *See infra* app., part III.

[360] *See infra* app., part IV.

[361] As a non-Hawaiian American, this author feels that she is unable in good conscience to select and advocate one model of Hawaiian sovereignty. The "correct" answers to these questions can only come from Native Hawaiians themselves.

[362] *See* H. Trask, *Hawaiians, American Colonization, and the Quest for Independence*, *supra* note 3, at 30.

[363] *Id.*

[364] N.H.R.H., *supra* note 24, at 80 n.36.

by the group,[365] PKO has been recognized as the official stewards of the island, has had Kaho'olawe placed on the National Register of Historic places, and has sent representatives to visit the island during 3-4 days of each month. Over 5000 visitors have gone to Kaho'olawe so far to conduct religious ceremonies, study the cultural artifacts, and revegetate the land.[366] As of 1986, in recognition of the cultural significance of the island to Native Hawaiians, Japan, Great Britain, Australia, and New Zealand declined to participate in the military exercises there. In the fall of 1990, the President of the United States directed the Secretary of Defense to discontinue the use of Kaho'olawe as a weapons range.[367] He also directed the Secretary to establish a joint Department of Defense/State of Hawaii Commission "to examine the future status of Kaho'olawe and related issues."[368]

Some Native Hawaiians prefer a strategy of trying to improve the functioning of the existing system. For example, between 1984 and 1987, after a great deal of public pressure, D.H.H.L. pursued an "acceleration program" to lease out Homestead lands to Native Hawaiians more quickly.[369] However, the two thousand parcels that were awarded under the acceleration program are uninhabitable and the lessees cannot occupy until certain infrastructural improvements are put in place.[370] Similarly, after an intensive lobbying effort by Hawaiian groups, the state recently passed a "right-to-sue" law, agreeing to waive its sovereign immunity for its future breaches of land trust obligations.[371] Again, the measures adopted are only somewhat effective: the relief is prospective from July 1, 1988 and the legislation prohibits the court from awarding land or monetary damages to successful plaintiffs; pursuant to the statute all damage awards must be paid back into the trust.[372] Optimally, such legislation would have provided redress for past and present as well as future grievances. Also, paying the

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[365] *See supra* n.336.

[366] PKO organizational literature, Summer 1988 (on file with author).

[367] 26 WEEKLY COMP. PRES. DOC. 1635 (Oct. 22, 1990); *see also* Pub. L. No. 101-511 § 8119 (Congressional Defense Department appropriation for fiscal 1990, defunding munitions delivery training on Kaho'olawe).

[368] 26 WEEKLY COMP. PRES. DOC., 1635 (Oct. 22, 1990). The Commission's work is currently underway; *see* Kaho'olawe Island Conveyance Commission Comprehensive Legal Research Memorandum, (Nov. 13, 1991) (on file with author).

[369] D.H.H.L., 1989 ANN. REP., *supra* note 157.

[370] *Id.*

[371] HAW. REV. STAT. ch. 673 (Supp. 1991).

[372] HAW. REV. STAT. §§ 673-2(a), 673-4(a)(b) (Supp. 1991).

damage awards back into the Trust is troublesome in that eliminates much of the disincentive towards self-dealing.

Certain groups of Native Hawaiians have formed around the theme of obtaining meaningful indigenous control over a land base. The Council of Hawaiian Organizations advocates a restoration of Hawai'i to its pre-1893 status, pursuant to the Constitution of 1840.[373] According to that group's vision, the land base for the newly-reconstituted Hawaiian nation would include the Ceded Lands, submerged lands, and marine resources.[374] Another group, *Na 'Oiwi O Hawai'i*, calls for a return of all the lands and waters of pre-contact Hawai'i[375] and the establishment of a local, decentralized autonomy.[376] *Ka Lāhui Hawai'i*, through its elected governor, Mililani Trask, envisions a constitutional democracy by native blood electorate residing in Hawai'i.[377] It seeks as its land base the Hawaiian Home Lands, rehabilitated, plus one-half of the Ceded Lands.[378]

Other groups have come to the fore in recent years, including Hui Na'auao, an umbrella coalition of about forty Hawaiian organizations, the Pro-Hawaiian Sovereignty working group, and La 'Ea O Hawai'i Nei and Concerned Hawaiians, some of whose members, along with others, were recently arrested at a sovereignty rally at 'Iolani Palace on Kamehameha Day.[379]

Different groups also pursue different strategies for achieving self-determination. For example, *'Ohana O Hawai'i* and *Na 'Oiwi O Hawai'i* each propose an independence model, essentially calling for Native Hawaiian secession from the United States.[380] Under that scenario, Hawaiians would develop and control Hawaiian land apart from United States control.[381] Other groups, such as *E Ola Mau*, propose a solution based on the Indian model, whereby the indigenous group is independent from the federal and state governments, and yet the governing principles are consistent with the American Constitution.[382] A third

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[373] *See infra* app., at parts I, II.

[374] *See infra* app., part III.

[375] *Id.*

[376] *See infra* app., part I.

[377] *Id.*

[378] *Id.*

[379] Stu Glauberman, *Who's Who in Quest for Sovereignty Here*, HONOLULU ADVERTISER, June 13, 1992.

[380] *See infra* app., part IV.

[381] *Id.*

[382] *See infra* app., part II.

possible resolution, utilizing more of the existing structures, might vest an arm of the federal or state government, such as the Office of Hawaiian Affairs, an independent state agency, with trustee responsibilities but with better enforcement mechanisms.[383]

Still other Native Hawaiians, not necessarily connected with any organization, have simply declared themselves citizens of the Nation of Hawai'i, presently occupied by a foreign country. On that platform, Pōkā Laenui (Hayden F. Burgess) was elected to represent the Island of O'ahu to the state's Office of Hawaiian Affairs.[384] He and others who adhere to this view engage in a variety of civil disobedience measures, including conscientious tax objection, refusal to salute the American flag, and refusal to recognize the jurisdiction of federal or Hawaii state courts over matters pertaining to Hawaiians[385] or Hawaiian land.

Hawaiians as a community have not yet adopted any one of these visions as authoritative or representative of a consensus. As a result there is currently no unified voice speaking for Hawaiians before the United States and the world.[386]

A series of conferences on Native Hawaiian Rights, one in August 1988[387] and another in December 1988,[388] have galvanized the Native Hawaiian rights community, given it an opportunity to explore different visions, and develop plans for the future. The August 1988 conventioners passed a package of five resolutions, calling for (1) an apology by the United States to the community of Native Hawaiians for American actions in 1893 leading to the coup d'etat; (2) a substantial land and natural resource base comprised of a "reformed Hawaiian Homes program, a fair share of the ceded lands trust, the return of

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[383] N.H.R.H., *supra* note 24, at 91-92.

[384] Telephone Interview with Pōkā Laenui (Hayden Burgess), Vice-President, World Council of Indigenous Peoples, Honolulu, Haw. (Apr. 1989).

[385] Hayden Burgess (Pōkā Laenui), an attorney, has been censured by the Hawaii State Bar Association for refusal to rise when the judge entered the courtroom where Mr. Burgess was representing Native Hawaiians in a criminal matter. Telephone Interview with Hayden Burgess (Apr. 1989).

[386] Pōkā Laenui (Hayden Burgess) argues, "We need no single leader for there are multiple positions and strategies to consider and test . . . . If and when we need a leader, one will come." (Correspondence on file with author.)

[387] Native Hawaiian Rights Conference, Honolulu, Haw., Aug. 7-8, 1988; *see* N.H.R.H., *supra* note 24, at 91 n.132.

[388] Native Hawaiian Sovereignty Conference, Honolulu, Haw., Dec. 3-4 1988; *see* N.H.R.H., *supra* note 24, at 91 n.134.

Kaho'olawe and other appropriate lands;" (3) recognition of a Native Hawaiian government with sovereign authority over the territory within the land base; (4) guarantees of (a) substantial beach access, (b) fishing, hunting, and gathering rights, (c) protection for Native Hawaiian religious practices and historical sites; and (5) an appropriate cash payment.[389] Several attorneys at the Office of Hawaiian Affairs are drafting legislation that would incorporate these five planks, and United States Senator Daniel Inouye of Hawaii has expressed his support for Hawaiians' efforts at obtaining federally-recognized nationhood status.[390] The Senator's office is considering and circulating draft bills that provide for the reorganization of a Native Hawaiian government and the reestablishment of a federal relationship with the Native Hawaiians.[391]

VII. Conclusion

Whatever the specific definitions and strategies, there is a demonstrable relationship between Native Hawaiian self-determination and Native Hawaiian health, dignity and cultural survival. The present conditions of Native Hawaiians forcefully argue for the need for changes according to one or more of the models presented by the Hawaiian rights community. Native Hawaiians need and deserve a place where they can meaningfully express themselves and their rich heritage.

Changes will come to Hawai'i only when the claims of Native Hawaiians are seen in a national rather than a local context. Mainland perceptions of Hawai'i derive mostly from travel posters and picture postcards; these glossy images hide the pain of a land seized from its rightful stewards and of a decimated people irresponsibly dispossessed from that land. For the sake of Hawaiian land and Hawaiian people, as well as the integrity of the American political process, the wrongs perpetrated against Native Hawaiians must be remedied, and soon.

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[389] Heckathorn, *supra* note 303, at 85; N.H.R.H., *supra* note 24, at 91.

[390] Heckathorn, *supra* note 303, at 90.

[391] Drafts for discussion purposes only (on file with author).

APPENDIX[392]

I. Definitions: Sovereignty/Self-Determination

Council of Hawaiian Organizations

Sovereignty: Restoration of pre-1893 status, including jurisdiction over birthright assets and prerogatives.

Self-Determination: Function of sovereignty to a lesser degree.

Na 'Oiwi o Hawai'i

Sovereignty: The birthright of all of the *kanaka maoli* who share in common: (a) ancestry from Wakea and Papa through Haloa, the first *kanaka maoli*; (b) beliefs, ways of thinking and ways of communicating and living (culture, language, religion); (c) the sacred *'āina*, that is, all of the Hawaiian cosmos. This includes Hawaiians as *lokahi* with all of nature, with its material and spiritual living, conscious and communicating resources for the benefit of all in the past as in the days of the ancestors, and as it should be in the present and future for all time and for all future generations of *kanaka*.

Self-determination means that *kanaka maoli*, not foreigners, decide on their control of their lives and *'āina* in their own way.

Ka Lāhui Hawai'i

Sovereignty is the ability of a people who share a common culture, religion, language, value system and land base, to exercise control over their lands and lives, independent of other nations. The elements of sovereignty are: (a) a people with a shared history, language and culture; (b) spiritual guidance; (c) a national economy; (d) a mechanism for self government, i.e., a governmental structure free from external control; (e) territory-land base.

Self-Determination means that the citizens of the nation determine for themselves how their lands and assets are utilized.

Protect Kaho'olawe 'Ohana

Sovereignty and Self-Determination: Assertion of rights to control and properly manage traditional land base based on concrete community struggles; the practice and exercise of *Aloha 'Aina* in the daily lives of native Hawaiians.

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[392] Summaries created by the organizations themselves, obtained from Mahealani Kamauu, Executive Director, Native Hawaiian Legal Corporation, Honolulu, Haw. (Dec. 1988).

Institute for the Advancement of Hawaiian Affairs

Sovereignty is to be free from any other nation's control — to have no higher legislature but God(s). Sovereignty is not a privilege to be granted by another nation but a right inherent in a people.

Self-Determination is the deciding by the people of a nation what form of government they shall have, without reference to the wishes of any other nation.

E Ola Mau

Sovereignty: a basic need and right of a people in their homeland to establish the following: (a) a common definition of who they are and how they will behave; (b) how they will govern themselves; and (c) by what means will develop and perpetuate themselves as a nation.

Self-Determination: The ability of a people within a nation to determine their own political status.

II. STRUCTURE

Council of Hawaiian Organizations

Structure based on Constitution of 1840.

Na 'Oiwi o Hawai'i

Local, decentralized autonomy (no strong central government except for matters pertaining to international or foreign affairs, interior or domestic affairs, and justice or the judiciary); no hereditary *ali'i* with ruling powers in government; co-equal status with all other nations (no subservience to any national power such as the United States); no national military and weaponry, nuclear or "conventional."

Ka Lāhui Hawai'i

Constitutional democracy providing for initiative, referendum and recall by native blood electorate residing in Hawai'i; four branches of government, three of which are elective (Executive, Legislative, Judiciary), the remaining branch (*Ali'i Nui*) selected on the basis of *ali'i* genealogy; representation from all islands to unicameral legislature (half of each island's delegation must be at least 50% Hawaiian).

Protect Kaho'olawe 'Ohana

Federation governed by a council of representatives from districts on each of the eight major islands. Each island would be divided into districts based upon *moku/'apana*, *ahupua'a* or other units as determined by the Hawaiians who live on that island. The powers of federal council (*'Aha Ho'ulu'ulu Lāhui*) would be defined as distinct from those of the districts. The underlying principle is that control be vested in governing bodies at the district level. Powers of the federal council would be

primarily limited to international affairs, including the United States. Responsibility for health, education, housing, criminal justice and other general welfare programs would be jointly shared by the *'Aha Ho'ulu'ulu Lāhui* and the districts. Actual structure and relationship would depend on the most efficient delivery of services, generation of revenues for operation, and an appropriate balance of power to insure local community self-determination.

Discussions regarding structure are still at a general conceptual level; more research and discussions are planned.

Institute for the Advancement of Hawaiian Affairs

Democratic, allowing citizenship to individuals from different nations and cultures, but maintaining a Hawaiian culture identity as the foundation of the national character; control of immigration; control of the military; assertion of international integrity as independent nation in regional and international forums; Hawaiian the official language; respect accorded to traditional economic system and collective land relationship; traditions and customs of the native people given force and effect of law.

E Ola Mau

Constitutional democracy; independent from the state or federal governments; develop from existing or newly established American laws which deal with Native American Sovereignty so that its founding principles are consistent with the American Constitution; allow for cultural and historical continuity within the governmental structure; no having a ruling monarchy.

III. LAND BASE

Council of Hawaiian Organizations

Ceded lands, submerged lands, marine resources.

Na 'Oiwi o Hawai'i

As it was in pre-Western contact times, including the realms of *Wakea* (the heavens above) and *Papa* (realms below), and all the earth with all its land, waters, minerals, plants and animals.

Ka Lāhui Hawai'i

183,000 + acres of rehabilitated Hawaiian home lands and 1/2 of the ceded lands (1.4 million acres); collateral rights associated with land base; rights to gather, fish, throughout Hawaiian archipelago.

Protect Kaho'olawe 'Ohana

(a) reformed Hawaiian Homes program (b) fair share of ceded lands trust (c) return of Kaho'olawe (d) other appropriate lands such as Bishop Estate, Queen Lili'uokalani Trust, Lunalilo Estate, Queen's Medical Center lands.

Over other lands of Hawai'i, Hawaiian nation would seek continued guarantees of (a) substantial mauka/makai (beach and mountain) access (b) fishing, hunting and gathering rights (c) protection for Native Hawaiian religious practices, historic sites and burials of our ancestors and descendants; (d) traditional water rights and practices.

Institute for the Advancement of Hawaiian Affairs

All the lands of Hawai'i, all the waters that form and lie between a line extended three miles beyond the land mass of the islands which form the Hawaiian archipelago and extending outward to Kalama (Johnson Island).

E Ola Mau

Ceded Lands and Hawaiian Home Lands and/or their revenue.

IV. STRATEGIES

Council of Hawaiian Organizations

Land freeze.

Na 'Oiwi o Hawai'i

Local: (a) public education of all Hawaiians as well as non-Hawaiians (b) overcome opposition by Hawaiian agencies such as O.H.A., D.H.H.L., Alu Like, etc. so that we may coalesce as a people into a United Front.

U.S. National: Win over congressional delegation, Congress, federal executive and Supreme Court; non-government social conscience organizations should be solicited for support and funding.

International: Hawaiians need to take their message to the United Nations, World Court of International Justice, Roman Catholic Church, other international organizations as well as to their fellow native peoples in the Pacific, who are in the same struggle for liberation.

Ka Lāhui Hawai'i

Local: Enroll as many native people as possible and afford them the opportunity to amend Ka Lāhui's Constitution before the first national election; create a united front for sovereignty by utilizing mass media; establish *ahupua'a* councils and stronger island caucuses in each district; form lobbying and advocacy committees to press for implementation of national policies re: native trust and other entitlement and maintenance of the land trusts until recognition is achieved.

National: (a) press for restoration and federal recognition of the nation, segregation of the trust lands and inclusion of Hawaiian people in the federal policy of extending self-determination to native Hawaiians and establishment of nation-to-nation communication with native Hawai-

ians; (b) advocate for inclusion of native Hawaiians in federal statutes allowing Indians access to the federal district court for redress of grievances relating to native entitlements; (c) advocate for maximum entitlements for the nation, i.e., taxing authority, tax exemptions, judicial authority, etc. (d) pursue national recognition.

International: (a) Advocate for United Nations declaration that Hawai'i is a "non-governing territory" and for recognition of Ka Lāhui Hawai'i at the United Nations; (b) educate and communicate to other international groups.

Protect Kaho'olawe 'Ohana

Lokahi. All the Hawaiian organizations supportive of sovereignty should make a concerted effort to put aside any past differences, misunderstandings and ill feelings and work together for the common goal of reunification and reestablishment of the *Lāhui*.

United Planning Effort: Planning group comprised of Hawaiian organizations supportive of Hawaiian sovereignty should plan *Ho'ulu'ulu Lāhui* (the gathering of the *Lāhui*) workshops and networking meetings to empower the *kua'āina* of the Hawaiian communities, particularly in the rural areas.

Following workshops and meetings, a declaration, program and platform for Hawaiian sovereignty should be drafted for endorsement by *Ka Po'e Hawai'i*. When adopted, negotiations for its recognition by appropriate national and international governing bodies should be pursued.

Convene a Constitutional Convention to draft a formal proposal for the governing structure of the *Lāhui Hawai'i*.

Recent Judicial and Statutory Changes Impacting the Maintenance of Securities Actions Filed Under Section 10(b) and Rule 10b-5

by Dana B. Taschner*
Robin L. Filion**

I. Introduction

Litigators, lend me your ears. Important changes have occurred in recent years to the basic terrain of securities litigation. In brief, both the United States Supreme Court and Congress have addressed the issue of statutes of limitation applicable to securities actions, imposing a uniform one-year statute of limitations. This dull topic has obscured the importance of the recent changes concerning the maintenance of securities actions, and litigators not familiar with recent judicial and statutory developments proceed in peril of mistakes or missed opportunities.

II. Evolution Of Statute Of Limitations Applicable To Securities Actions

The federal Circuits have long produced inconsistent decisions on the appropriate statute of limitations to apply to actions filed under

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Section 10(b)[1] of the Securities Act of 1933[2] and the Securities Exchange Act of 1934[3] and rules promulgated thereunder. Section 10(b) and Rule 10b-5[4] actions, over which federal courts have exclusive jurisdiction, have been among the most vigorously contested disputes in the federal courts. Statutes of limitation impacting the maintenance of Section 10(b) and Rule 10b-5 actions have been among the most vigorously litigated federal provisions in the federal courts.

Federal courts traditionally implied a private right of action under these federal laws[5] as the same is now addressed by statute.[6] As such,

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[1] Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of the interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest of for the protection of investors.

15 U.S.C. § 78j(b).

[2] Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77aa (1988)) [hereinafter 1933 Act].

[3] Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1988)) [hereinafter 1934 Act].

[4] Rule 10b-5, promulgated by the Securities and Exchange Commission (SEC) in 1942, provides:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme or artifice to defraud,
>
> (b) To make any untrue statement of a material fact as to make the statement made, in light of the circumstances under which they were made, not misleading, or,
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[5] Neither Section 10(b) nor Rule 10b-5 expressly creates a private right of action under federal law. However, since Kardon v. National Gypsum Co., 69 F. Supp 512 (E.D. Pa. 1946), federal courts have implied a private right of action for violations of the rule. By 1969, ten of the eleven federal circuits had recognized such implied private right of action. *See* 6 L. Loss, SECURITIES REGULATION 3871-73 (2d ed. Supp. 1969). The United States Supreme Court first recognized a private right of action under Rule 10b-5 in Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971). For a discussion of the Supreme Court's Rule 10b-5 jurisprudence, see

no prescribed statute of limitation existed, and the courts were provided with no guidance on the appropriate statute of limitations. Hence, different federal circuits had different methods of calculating statute of limitations for such federal provisions. The United States Supreme Court has now resolved the massive confusion that has surrounded the statute of limitation problem created by legislative silence.

III. The United States Supreme Court Judicially Created A Uniform One-Year Federal Statute Of Limitations For Securities Actions

In the landmark case of *Lampf, Pleva, Lipkind, Prupus, & Petrigrow v. Gilbertson*, the Court imposed a uniform one year federal statute of limitations of one-year for securities actions filed under Section 10(b) and Rule 10b-5.[7]

Subsequent to the *Lampf* decision, on December 19, 1991, President Bush signed into law the comprehensive Federal Deposit Insurance

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Sachs, *The Relevance of Tort Law Doctrines to Rule 10b-5: Should Careless Plaintiffs be Denied Recovery?*, 71 Cornell L. Rev. 96 (1985).

The United States Supreme Court has endorsed exclusive jurisdiction over Rule 10b-5 actions. In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the Court suggested that Rule 10b-5 might be arbitrable in part because of the exclusivity of federal jurisdiction. *Id.* at 514; *see also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985) (White, J., concurring). However, in upholding the arbitrability of Rule 10b-5 claims in Shearson Am. Express, Inc. v. McMahon, 482 U.S. 220 107 S. Ct. 2332 (1987), the Court did not rely upon the exclusivity of federal jurisdiction. In Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), the Court indicated that state courts lacked jurisdiction over Rule 10b-5 damages actions. *Id.* at 666.

The federal courts have consistently said that exclusive federal jurisdiction ensures consistent and efficient enforcement of the Act. *See* Dickinson, *Exclusive Federal Jurisdiction and the Role of the States in Securities Litigation*, 65 Iowa L. Rev. 1201, 1225 (1980). Lower federal courts uniformly uphold exclusive jurisdiction over Rule 10b-5 actions. *See* Emrich v. Touche Ross & Co., 846 F. 2d 1190 (9th Cir. 1988); Murphy v. Gallagher, 761 F. 2d 878 (2d Cir 1985); Brannan v. Eisenstein, 804 F. 2d 1041 (8th Cir. 1986); *see also In Re* Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litigation), 770 F.2d 328 (2d Cir. 1985) (holding district court empowered under 28 U.S.C. § 1651 to issue injunction preventing states from commencing any action against defendants in multidistrict securities litigation that may in any way affect right of any plaintiff or purported class member in multidistrict litigation, and such injunctions does not contravene the Eleventh Amendment where potential onslaught of state actions poses threat to flexibility and authority of the federal courts to approve settlements in multidistrict litigation).

[6] 15 U.S.C. § 78aa (1988).

[7] 111 S. Ct. 2773 (1991).

Corporation Improvement Act of 1991.[8] Section 476 of the Act adds new section 27A to the 1934 Act, as amended, by inserting after section 27[9] the following:

> (a) Effect on Pending Causes of Action—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
> (b) Effect on Dismissed Causes of Action—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff no later than 60 days after the date of enactment of this section.[10]

In essence, Section 27A makes clear that the *Lampf* decision may not be construed retroactively to bar causes of action filed prior to the decision.[11]

IV. Why The United States Supreme Court Adopted The Express Limitations Period Of One-Year Found In The Analogous 1933 And 1934 Acts And Applied Them In Securities Actions Under Section 10(b) And Rule 10b-5

Over the past three years, important trends emerged in the federal courts that impacted the maintenance of securities actions under Section

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[8] Pub. L. No. 102-242, 105 Stat. 2236 (1991) [hereinafter the Act].

[9] 15 U.S.C. § 78aa (1988).

[10] Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (codified as amended at 15 U.S.C. § 78aa (1988)).

[11] Some commentators opine that *Lampf* should be scrutinized in conjunction with section 27A, arguing that *Lampf* simply confirms the state of the law as it existed on June 19, 1991. *See* Verges, *The Statute of Limitations in Rule 10b-5 Cases: Lots of Action, but What Progress?*, 19 Barrister 35 (1992). Section 27A arguably violates the Separation of Powers Doctrine as section 27A may be viewed as overruling a particular decision and reinstating previously dismissed cases, thereby improperly intruding into province of the the judiciary. At least one federal district court has held that section 27A violates the Separation of Powers Doctrine under the U.S. Constitution. *See In re* Bichard, SEC. LITIG., C87-2987 CAL. (N.D. Cal. 1992). Hence, section 27A may have no effect on *Lampf*.

10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereafter.

Almost four years ago, in In Re *Data Access Systems Securities Litigation*[12], the Third Circuit abandoned its prior practice of "borrowing" the most applicable state statute of limitation when determining the limitations period for claims brought under Section 10(b) of the 1934 Act and/or Rule 10b-5 promulgated by the Securities Exchange Commission under the authority of the 1934 Act. Instead, the Third Circuit determined that it would adopt the statute of limitations set forth in sections 9(e)[13] and 18(c)[14] of the 1934 Act.[15] The last two years observed two additional federal circuits, the Second Circuit and the Seventh Circuit, join with the Third Circuit in abandoning their prior practice of "borrowing" state statutes of limitations in Section 10(b) and Rule 10b-5 cases.[16]

V. The Borrowing Doctrine And Prior Case Law

A. Rules of Decision Act

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[17]

In interpreting the Rules of Decision Act, the Court has held that despite the statutory phrase "in cases where they apply," the Rules of Decision Act was intended to require application of state law to "causes of action created by Congressional legislation and enforceable only in the federal court" as well as to state law claims.[18] One of the applications of the Rules of Decision Act is in the "borrowing" of periods of limitations from state law and applying those periods of limitations

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[12] 843 F. 2d 1537 (3d Cir. 1988).

[13] 15 U.S.C. § 78i(e) (1988).

[14] 15 U.S.C. § 78r(a) (1988).

[15] *Id.* at 1550.

[16] Short V. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990); Ceres Partners v. Gel Associates, 918 F.2d 349 (2d Cir. 1990).

[17] 28 U.S.C. § 1652 (1988).

[18] Campbell v. Haverhill, 155 U.S. 610, 614 (1985).

to federal claims which otherwise lack limitations periods.[19] Thus, "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so."[20]

Congress did not explicitly provide a federal cause of action under section 10(b) of the 1934 Act or under Rule 10b-5; federal causes of action under this provision and under Rule 10b-5 were implied by the courts.[21] Hence, it is not surprising that Congress did not provide a statute of limitation for claims brought under Section 10(b). Consequently, federal courts have "borrowed" the most applicable state statute of limitations in Section 10(b) and Rule 10b-5 cases. While the United States Supreme Court has never expressly held that this practice is required, the Court has noted: "Since no statute of limitations is provided for civil actions under Section 10(b), the law of limitations of the forum state is followed as in other cases of judicially implied remedies.[22]

Although the United States Supreme Court has recognized the prevailing practice of borrowing state law for limitations periods for federal securities law claims, the Court's rationale in deciding whether state limitations statutes should apply to federal claims other than Section 10(b) claims leaves some doubt as to whether the borrowing of a state limitations statute is required in the federal securities law area.

In *Del Costello v. International Brotherhood of Teamsters*, the Court considered the claims of union members against their employers for breach of a collective bargaining agreement, and against their unions for breach of the duty of fair representation under the National Labor Relations Act.[23] The district court had considered two state statutes of limitations (a thirty-day statute under which the claims would be untimely and a three-year statute under which the claims would be timely), and held that the shorter of the two limitations periods applied and that the claims were time-barred.[24] The Court of Appeals affirmed.

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[19] *See* Autoworkers v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966) (collecting cases).

[20] Wilson v. Garcia, 471 U.S. 261, 266-67 (1985).

[21] Blue Chip Stamps v. Manner Drug Stores, 421 U.S. 723, 730 (1975).

[22] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976).

[23] 462 U.S. 151 (1983).

[24] *Id.* at 156.

The Supreme Court held that neither state law of limitations applied.[25] Instead, the Court held that a federal statute of limitations, the six-month period provided by Section 10(b) of the National Labor Relations Act[26], not expressly applicable to the case, should be "borrowed" and applied to the case.[27] In this regard, the Court ruled that the federal statute of limitations actually was designed to accommodate a balance of interests very similar to that at stake in the case sub judice[28]—a statute that was, in fact, an analogy to that lawsuit more apt than any of the suggested state law statutes. Thus, while noting that their decision was not a total departure from the general rule that a court should borrow a state statute of limitations where none is provided for a federal claim,[29] the Court adopted the federal statute instead of borrowing a state statute.

The United States Supreme Court next considered the borrowing issue in a case involving a claim under 42 U.S.C. § 1983.[30] The Court noted that 42 U.S.C. § 1983 provides that the law to be applied in adjudicating civil rights claims is to be in conformity with the laws of the United States, so far as such laws are suitable and that state law shall apply only so far as the same is not inconsistent with federal law.[31] The Court further stated that "this mandate implies that resort to state law . . . should not be undertaken before principles of federal

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[25] *Id.* at 163.

[26] *Id.* at 169.

[27] *Id.* at 169-71.

[28] *Id.* at 169.

[29] *Id.* at 171-72.

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy.

Id.; *see, e.g.*, United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 61 n.3 (1981).

> On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to be given federal causes of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, where a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

Id.

[30] Wilson v. Garcia, 471 U.S. 261 (1985).

[31] *Id.* at 266.

law are exhausted,"[32] and that "this requirement emphasizes 'the predominance of the federal interest' in the borrowing process, taken as a whole."[33] The Court noted that:

> When the federal claim differs from the state cause of action in fundamental respects, the states choice of a specific period of limitation is, at which the interest in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones.[34]

Nonetheless, the Court decided that the state law statute of limitations for the state law cause of action most closely paralleling a section 1983 claim should be applied to section 1983 actions.[35] The Court concluded that "the statute [Section 1983] is fairly construed as a directive to select, in each state, the one most appropriate statute of limitations for all Section 1983 claims."[36]

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,[37] the Court ruled[38] that a uniform statute of limitations, borrowed from the Clayton Antitrust Act[39], should be applied to civil actions under the Racketeer Influenced and Corrupt Organization Act.[40] The Court noted that it had rejected the notion that the most analogous state statute of limitations must always be applied when a federal statute is silent on the proper period of limitations.[41] Although acknowledging the long standing practice of borrowing state law, the Court stated:

> Nevertheless, where a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a

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[32] *Id.* at 268.

[33] *Id.* at 269.

[34] *Id.* at 271 (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975)).

[35] *Id.* at 275.

[36] *Id.*

[37] 483 U.S. 143 (1987).

[38] *Id.* at 150-51.

[39] 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 15(b) (1988)). 15 U.S.C. § 15(b) provides: "Any action to enforce any cause of action under Sections 15 or 15a of this title shall be forever banned unless commenced within four years after the cause of action accrued . . . ."

[40] Racketeer Influenced and Corrupt Organizations, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. § 1961 (1988)) [hereinafter RICO]. 18 U.S.C. § 1960 refers specifically to civil remedies.

[41] 483 U.S. 143, 146 (1987).

> significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.[42]

Most recently, in *Reed v. United Transportation Union*,[43] the Court reiterated:

> The general rule [is] that statutes of limitation are to be borrowed from state law. We decline to borrow a state statute of limitations only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicality of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."[44]

In *Reed* the plaintiff brought suit under section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959,[45] alleging violation of his rights to free speech and assembly in union matters.[46] There is no statute of limitations expressly applicable to Section 101(a)(2) claims. Distinguishing *Del Costello*, the *Reed* Court held that a state law statute of limitation should be applied in the case on the grounds that (1) claims under Section 101(a)(2) were akin to claims under 42 U.S.C. § 1983,[47] (2) state law statutes of limitations applied to Section 1983 claims,[48] and (3) policy considerations did not mandate a uniform statute of limitations for a union members' freedom of speech claim under 29 U.S.C. § 411(a)(2).[49] The Court noted that resort to federal law in "borrowing" a statute of limitations remains "a narrow exception to the general rule."[50]

B. The Third Circuit's Decision in Data Access

Against this background the Third Circuit in *In re Data Access Systems Securities Litigation* in 1988 abandoned its previous practice of borrowing

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[42] *Id.* at 147-48 (quoting Del Costello v. International Brotherhood of Teamsters, 464 U.S. at 151, 161, 171-72 (1983)).

[43] 488 U.S. 319 (1989).

[44] *Id.* at 324 (quoting Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 172 (1983)).

[45] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 522 (codified as amended at 29 U.S.C. § 411 (a)(2)(1988)).

[46] *Id.* at 321.

[47] *Id.* at 326.

[48] *Id.*

[49] *Id.* at 330-31.

[50] *Id.*

state law to provide a limitations period for claims under Section 10(b) of the 1934 Act and under Rule 10b-5.[51]

In *Data Access*, the Third Circuit in an en banc decision adopted the statutes of limitations contained in sections 9(e) and 18(c) of the 1934 Act as statutes of limitations for claims under Section 10(b) and Rule 10b-5.[52] These statutes of limitation provide that "No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued."[53] Under these statutes, a plaintiff must demonstrate that suit was brought within one year after the discovery of the facts constituting the cause of action and within three years after the violation occurred or such cause of action accrued.[54]

In *Hill v. Equitable Trust Company*, the Third Circuit Court of Appeals held that its decision in *Data Access* should be applied retroactively.[55]

C. Second and Seventh Circuit Decisions Following The Third Circuit's Decision in Data Access

For more than two years the Third Circuit's decision in *Data Access* stood alone among the circuits in adopting federal statutes of limitation for Section 10(b) and Rule 10b-5 claims. However, in 1990, the Second Circuit and the Seventh Circuit Courts of Appeals joined the Third Circuit in adopting federal statutes of limitation for claims under Section 10(b) and Rule 10b-5. In *Short v. Belleville Shoe Manufacturing Company*, the Seventh Circuit Court of Appeals discarded its long held practice of borrowing statutes of limitations from state law in Section 10(b) and Rule 10b-5 actions.[56] The *Short* Court reasoned that there were differences between federal securities claims and state law claims which warranted the adoption of a uniform federal statute of limitations.

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[51] *In re* Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir. 1988).

[52] *Id.* at 1550.

[53] 1934 Act, 48 Stat. 889 (1934) (codified as amended at 15 U.S.C. § 78i (1988)); 48 Stat. 897 (1934) (codified as amended at 15 U.S.C. § 78r(c) (1988)). The sections may result in different limitation periods where the cause of action does not accrue at the time the violation occurred. *See* Jacobson v. Peat Marwick Mitchell & Co., 445 F. Supp. 518 (S.D.N.Y. 1977).

[54] *Id.* at 526.

[55] 851 F.2d 691, 698 (3d Cir. 1988).

[56] 908 F.2d 1385, 1389 (7th Cir. 1990).

First, the *Short* Court noted that Congress did not explicitly create a claim under Section 10(b).[57] Second, the court noted that where Congress did create an explicit right of action under the 1934 Act, it also provided a statute of limitations for that cause of action.[58] Thus, the *Short* Court concluded that there can be no presumption that Congress meant courts to look to state law for a statute of limitations for Section 10(b) and Rule 10b-5 actions.[59] Third, the *Short* Court noted that turning to state law for periods of limitation creates special problems under the securities acts because the acts do not apply in the first place unless the transactions occurred in interstate commerce (thus the laws of more than one state may apply).[60] The *Short* Court also noted that the Rules of Decision Act does not require federal courts to use state law.[61] The Seventh Circuit Court of Appeals concluded in *Short* that the time was ripe for reconsideration of its prior practice of borrowing from state law for statutes of limitations in claims brought under Section 10(b) and Rule 10b-5, and decided that federal law and not state law is more apt in determining the statutes of limitation in suits brought under Section 10(b) and Rule 10b-5.[62] The *Short* Court adopted section 13 of the 1933 Act, which limits the period for bringing actions to which it applies to one year after discovery of the untrue statement or omission, but not more than three years after the offer or sale.[63] The *Short* Court did not discuss the limitation periods set forth in sections 9(e) and 18(c) of the 1934 Act.

As in the Third Circuit, several courts in other circuits, including the Seventh Circuit, had determined that the new statutes of limitation applied to cases pending at the time *Short* was decided.[64]

Similarly, the Second Circuit Court of Appeals, in *Ceres Partners v. GEL Associates*, held that a uniform federal statute of limitations should be adopted for claims brought under Section 10(b) and Rule 10b-5.[65] The *Ceres* court noted that the practice of looking to state law to

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[57] *Id.* at 1387.

[58] *Id.*

[59] *Id.* at 1388.

[60] *Id.*

[61] *Id.* (citing Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), and Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987)).

[62] *Id.*

[63] 1933 Act, 48 Stat. 84 (1933) (codified as amended at 15 U.S.C. § 77m (1988)).

[64] *See In Re* VMS Securities Litigation, 752 F. Supp. 1373 (N.D. Ill. 1990).

[65] 918 F.2d 349 (2d Cir. 1990).

determine the applicable statute of limitations for implied causes of action under the federal securities laws has been the target of considerable criticism because of the non-uniformity and disarray caused by borrowing state statutes of limitations of varying length.[66] The *Ceres* Court then discussed the United States Supreme Court cases regarding the borrowing of statutes of limitations for federal claims, concluding:

> Among the themes to be distilled from the Supreme Court's recent borrowing discussions are that selection of a uniform federal limitations period may be warranted (1) where the statutory claim in question covers a multiplicity of types of actions, leading to the possible application of a number of different types of state statutes of limitations, (2) where the federal claim does not precisely match any state law claim, (3) where the challenged action is multi-state in nature, perhaps leading to forum shopping and inordinate litigation expense, and (4) or a federal statute provides a very close analogy.[67]

The *Ceres* Court next noted that the Third Circuit and the Seventh Circuit had abandoned their previous practices of borrowing state statutes of limitations in Section 10(b) claims, and stated:

> We agree with the Third and Seventh Circuits that the application of state statutes of limitations to claims under the 1934 Act is not particularly appropriate. Section 10(b) and Rule 10b-5, designed to promote full disclosure, differ in several material respects from state-law claims. . . . . We think that the variety of claims that may be asserted under these federal provisions, and their lack of analog in state law, support the view that reference to state statutes of limitations is not particularly appropriate.
>
> This conclusion is enhanced by the multi-state nature of most of the challenged acts. Unlike claims under [42 U.S.C.] Section 1983, the conduct challenged in a federal securities claim is not normally confined to a single state. . . . Given Congress' enactment of specific periods of limitation for every private right of action that it expressly provided in the federal securities laws, we conclude that judicial selection of a uniform nationwide limitations period is what Congress would have intended for private rights of action judicially implied under those law.
>
> Finally, we join the Third and Seventh Circuits in the view that the 1934 Act itself clearly provides an analogy that is significantly more appropriate than state law.[68]

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[66] *Id.* at 354.

[67] *Id.*

[68] *Id.* at 360.

The *Ceres* Court went on to discuss the various statutes of limitation contained in the 1934 Act, concluding:

> In our view, since Congress has provided in Sections 9(e) and 18(a) express rights of action that so substantially overlap the rights of action implied under Sections 10(b) and 14, and has provided a limitations period with respect to those express rights [Sections 9(e) and 18(c)], the specified period [the one-year/three-year statute of limitations] provides a far more appropriate analogy than do state statutes devoted to different types of claims.
>
> . . . .
>
> In sum, we conclude that the statute of limitations provided in the 1934 Act for express rights of action under Sections 9(e) and 18(a) of that Act clearly provides a closer analogy than do available state statutes, and that both the federal policies underlying the federal securities laws and the practicalities of litigation make borrowing of the 1934 Act's one-year/three-year period significantly more appropriate. Applying this federal period of limitations, we affirm the District Court's dismissal of Ceres' complaint.[69]

Although the *Ceres* Court affirmed the District Court's dismissal of the plaintiff's complaint under the new statute of limitations, the Court also noted that the outcome of the case would have been the same had it applied the previously applicable New York statute of limitations. Consequently, the Court expressly left for the future all questions concerning retroactive application of its decision.[70]

D. Statutes of Limitation in the Ninth Circuit

The question naturally arose whether the Ninth Circuit might follow the Third, Seventh, and Second Circuits in abandoning the practice of borrowing state statutes of limitation in Section 10(b) and Rule 10b-5 cases. In *Nesbit v. McNeil*,[71] decided prior to *Short* and *Ceres*, the Ninth Circuit Court of Appeals considered and rejected a request for an en banc review of its prior decisions in *Davis v. Birr, Wilson & Co., Inc.*,[72] and *Volk v. D.A. Davidson & Company*,[73] in which the Ninth Circuit Court of Appeals had held that state statutes of limitations

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[69] *Id.* at 362-64.

[70] *Id.* at 364.

[71] 896 F.2d 380 (9th Cir. 1990).

[72] 839 F.2d 1369 (9th Cir. 1988).

[73] 816 F.2d 1406 (9th Cir. 1987).

apply to federal securities claims under Section 10(b) and Rule 10b-5.[74] The *Nesbit* Court further stated that the United States Supreme Court's holdings in *Agency Holding* and in *Wilson* did not compel a reassessment and reversal of its position.[75] Further, the *Nesbit* Court stated: "We note, in any event, that we have been most reluctant to apply such a determination retroactively in a manner that would cut off the rights of a plaintiff whose action was timely under our decisions which existed at the time the action was filed."[76]

Given the strong language in *Nesbit*, it was unlikely that any District Court in the Ninth Circuit would take a contrary view of the statute of limitations issue. However, because *Nesbit* was decided before the Seventh and Second Circuits adopted the Third Circuit's position, there was some possibility that the Ninth Circuit would reconsider its prior position. However, the United States Supreme Court accepted the landmark *Lampf* case on certiorari in order to eliminate the diversity of views among the circuits.[77]

VI. Conclusion

The new limitation on the maintenance of securities actions under Section 10(b) and Rule 10b-5 is an important change to the basic terrain of securities litigation. Lawyers handling securities matters who remain unaware of these important recent judicial and statutory developments proceed at their peril.

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[74] 839 F.2d at 1369-70; 816 F. 2d at 1411-12.

[75] 896 F.2d at 384; *see also*, *In Re* Consolidated Securities Litigation, 1990 Fed. Sec. L. Rptr. (CCH) ¶ 95, 238 (N.D. Cal. 1990) (refusing to adopt the Third Circuit ruling in *Data Access*); *accord*, Lubin v. Sybedon Corp., 688 F. Supp. 1425, 1441 (S.D. Cal. 1988).

[76] *Id.* at 384, citing Usher v. City of Los Angeles, 828 F. 2d 556, 558-60 (9th Cir. 1987).

[77] It may still be prudent to raise the statute of limitations defense as an affirmative defense and must be affirmatively pleaded or may be considered waived. It may also be prudent to plead the one-year/three-year statute of limitations wherever applicable. *See*, *In Re* Santos, 112 B.R. 1001 (9th Cir. 1990) (stating that in determining whether failure to timely raise limitations defense should be considered to be a waiver, court should consider a number of factors, including: obviousness of defense's availability, stage or proceeding at which defense is raised, time which has elapsed between filing of answer and raising of defense, amount of time and effort expended by plaintiff in case at a time defense is raised, and prejudice resulting to plaintiff from allowing defense to be asserted).

State-Federal Conflict Over Naval Defensive Sea Areas in Hawai'i

I. Introduction

Coastal states generally hold fee simple title to lands underlying navigable waters[1] within their jurisdiction.[2] As such, states exercise complete sovereignty within their coastal waters out to the seaward limit of the territorial sea.[3] The federal government, however, possesses broad constitutional authority to regulate activities in navigable waters for the benefit of navigation, interstate commerce, national defense, and foreign affairs.[4] One way the federal government controls navigable

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[1] Navigable waters are those waters which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 n.21 (1940) (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)). 33 C.F.R. § 2.05-25 (1991) contains a more detailed description of "navigable waters."

[2] *E.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); Utah Div. of State Lands v. United States, 482 U.S. 193 (1987); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See infra* part V.A.

[3] Some doubt exists as to the geographical extent of state jurisdiction. In 1988 President Reagan issued a Proclamation extending the U.S. territorial sea from three to twelve nautical miles. Proclamation No. 5928, 3 C.F.R. 547 (1989), *reprinted in* 43 U.S.C. § 1331 (1988). The proclamation includes a proviso that "[n]othing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." *Id.* The effect of both the Proclamation and the proviso is unclear. *See generally* David M. Forman, et al., *Filling in a Jurisdictional Void: The New U.S. Territorial Sea*, 2 Terr. Sea J. (forthcoming 1992).

[4] *E.g.*, Submerged Lands Act, 43 U.S.C.A. §§ 1301-1315 (West 1986 & Supp. 1991). The Submerged Lands Act confirms states' title to submerged lands, but the United States specifically "retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." *Id.* § 1314(a).

waters in the interest of national defense is by delineation of naval defensive sea areas (N.D.S.A.s).[5]

N.D.S.A.s are restricted zones established by the President to protect certain coastal facilities of military significance. Three defensive areas exist within the State of Hawaii. Kaneohe Bay N.D.S.A. includes all of Kāne'ohe Bay, while the Honolulu and Pearl Harbor N.D.S.A.s encompass much of the southern coast of O'ahu (see figure). The State of Hawaii contends that N.D.S.A.s are merely a codification of the federal government's right to regulate navigation.[6] The federal government, on the other hand, claims complete ownership and sovereign rights over lands and waters within N.D.S.A.s.[7]

Ownership of these areas is critical to the State of Hawaii. In particular, the waters encompassed by the Kaneohe Bay and Honolulu N.D.S.A.s are of central importance to the state's $500 million ocean recreation industry.[8] If the federal government holds fee simple title to these areas, the public and the state may use them only at the pleasure of local military officials. Moreover, any lands within the defensive sea areas that were filled without a federal quitclaim deed, such as Magic Island,[9] would be the property of the federal government. Federal ownership would also affect a number of state ocean management programs such as ocean and submerged lands leasing[10] and the Ocean Recreation Management Plan.[11]

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[5] See *infra* part III for a discussion of naval defensive sea areas.

[6] *See infra* part III.A.

[7] *See infra* part III.B.

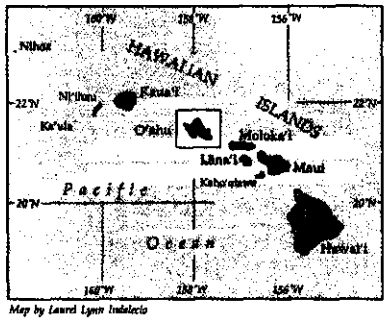
[8] HAWAII OCEAN AND MARINE RESOURCES COUNCIL, HAWAII OCEAN RESOURCES MANAGEMENT PLAN 18 (1991).

[9] Magic Island is a peninsula which was filled in on a reef between Ala Moana Beach Park and the Ala Wai Yacht Harbor. The peninsula was originally intended for a luxury hotel, but the state legislature subsequently banned any hotel development on the site.

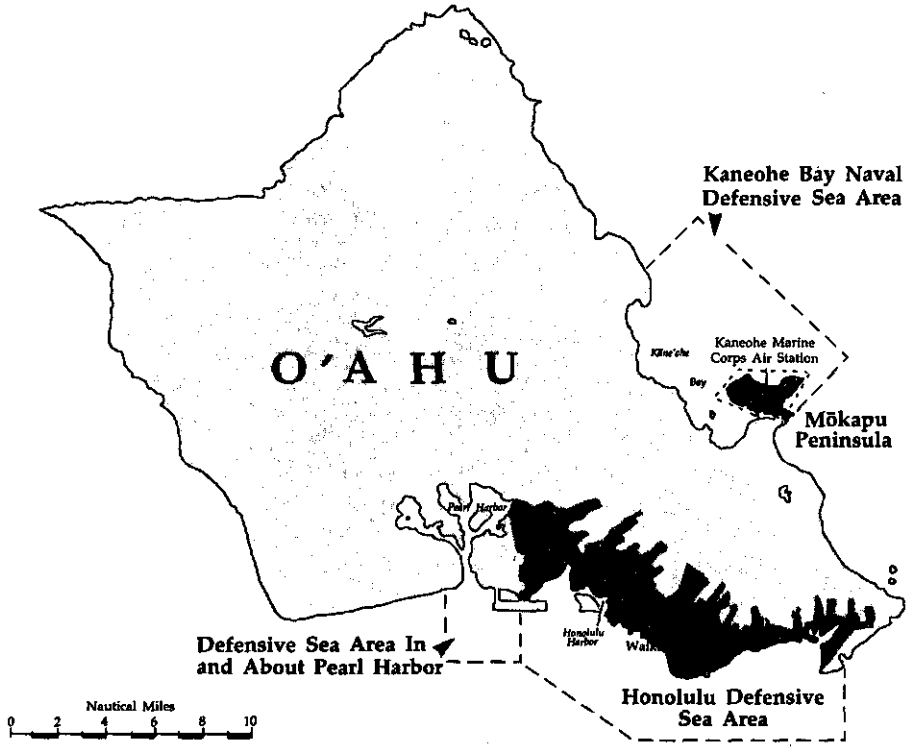
[10] HAW. REV. STAT. § 190D (Supp. 1990). The Hawaii State Board of Land and Natural Resources has already approved one lease and is negotiating another for submerged lands within the Honolulu N.D.S.A. *See infra* notes 60-61 and accompanying text.

[11] HAW. ADMIN. R. § 19-86 (1988).

Defensive Sea Areas Around O'ahu, Hawai'i



Map by Laurel Lynn Iralalecio



In a recent law review article, Marine Corps Major Carl Woods set forth the federal government's basis for asserting ownership over N.D.S.A.s in Hawai'i.[12] Although the article presents an interesting argument, it fails to discuss relevant case law. This comment examines the competing positions of the state and federal government in light of recent decisions by the United States Supreme Court,[13] and the United States Court of Appeals for the Ninth Circuit.[14] The conclusion reached is that although the federal government retains considerable regulatory power within N.D.S.A.s, the State of Hawaii owns the submerged lands.

II. Historical Background

On July 7, 1898, the United States Congress passed a joint resolution providing for the annexation of the Hawaiian Islands.[15] The Republic of Hawaii ceded its sovereignty along with "the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands."[16] Shortly after annexation, Congress passed the Hawaii Organic Act that states:

> [T]he public property ceded and transferred to the United States . . . shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii.[17]

Thus, the United States retained title to all public lands but allowed the government of the Territory of Hawaii to exercise management

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[12] Carl J. Woods, *State and Federal Sovereignty Claims over the Defensive Sea Areas in Hawaii*, 39 Naval L. Rev. 129 (1990).

[13] Utah Div. of State Lands v. United States, 482 U.S. 193 (1987); *see infra* notes 88-95 and accompanying text.

[14] Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1949 (1990); *see infra* notes 96-100 and accompanying text.

[15] Act of July 7, 1898, 30 Stat. 750 (1898).

[16] *Id.*

[17] Act of Apr. 30, 1900, ch. 339, 31 Stat. 141, 159 (1900).

authority.[18] Upon Hawai'i's admission to the Union, title to most of these public lands passed to the newly formed state.[19] The federal government, however, specifically retained title to lands "set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii."[20] The three N.D.S.A.s in Hawai'i were all created by executive orders.[21] Therefore, if the executive orders properly "set aside" these areas, the federal government holds title to the submerged lands.[22] Otherwise, the State of Hawaii obtained title upon its admission into the Union on August 21, 1959.[23]

III. Naval Defensive Sea Areas

N.D.S.A.s are restricted areas within the territorial sea abutting certain coastal military facilities.[24] Congress has specifically authorized the President to establish N.D.S.A.s by executive order.[25] Although the wording of executive orders establishing N.D.S.A.s varies, they typically prohibit vessels from entering a N.D.S.A. without the prior permission of military authorities.[26]

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[18] The Senate report on the Hawaii Statehood Act stated that "[t]he Territory has administered the public lands, except federal reservations, for the United States since annexation, and has collected the revenues and spent them for public purposes." S. Rep. No. 80, 86th Cong., 1st Sess. 2 (1959), *reprinted in* 1959 U.S.C.C.A.N. 1346, 1347.

[19] Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, 5 (1959).

[20] *Id.*

[21] *See infra* note 24.

[22] The U.S. Attorney General interprets the phrase "set aside" to mean "taken for the uses and purposes of the United States." 42 Op. Att'y Gen. 43, 46 (1961).

[23] Proclamation No. 3309, 3 C.F.R. 60 (1959).

[24] Presently, there are eleven N.D.S.A.s: Guantanamo Bay, Cuba (Exec. Order No. 8749, 3 C.F.R. 931 (1938-1943)); Honolulu, Hawaii (Exec. Order No. 8987, 3 C.F.R. 1048 (1938-1943)); Kaneohe Bay, Hawaii (Exec. Order No. 8681, 3 C.F.R. 893 (1938-1943)); Pearl Harbor, Hawaii (Exec. Order No. 8143, 3 C.F.R. 504 (1938-1943)); Johnston Island, Kingman Reef, Midway Island, and Wake Island (Exec. Order No. 8682, 3 C.F.R. 894 (1938-1943)); Kiska Island, and Unalaska Island (Dutch Harbor), Alaska (Exec. Order No. 8680, 3 C.F.R. 892 (1938-1943)); and Kodiak Island, Alaska (Exec. Order No. 8717, 3 C.F.R. 915 (1938-1943)).

[25] *See infra* text accompanying note 32.

[26] For example, Exec. Order No. 8987 states, in part:

A vessel not proceeding under United States' Naval or other United States

The executive orders which establish the N.D.S.A.s place the areas under the control of the Secretary of the Navy. The Secretary of the Navy has delegated the authority to control entry into N.D.S.A.s to the Chief of Naval Operations,[27] who has, in turn, delegated control to local "Entry Control Commanders."[28] The Chief of Naval Operations has suspended entry restrictions in several areas. Restrictions on entry into the Honolulu, Kiska Island, Kodiak Island, and Unalaska Island N.D.S.A.s have been suspended in their entirety.[29] Restrictions on entry into Kaneohe Bay N.D.S.A. have been suspended except for a 500-yard "buffer zone" around the perimeter of the Kaneohe Marine Corps Air Station.[30] The Chief of Naval Operations has reserved the right to reinstate entry restrictions at any time without notice.[31]

All of the executive orders creating N.D.S.A.s were issued pursuant to an express delegation of authority from Congress. On March 4, 1917, Congress amended the criminal code to make it a crime to:

> [K]nowingly, willfully, or wantonly violate any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense . . . .[32]

One month later, President Woodrow Wilson issued Executive Order Number 2584, which created twenty-nine separate N.D.S.A.s throughout the United States and its possessions. President Wilson created two

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authorized supervision shall not enter or navigate the waters of the Honolulu Defensive Sea Area except during daylight, when good visibility conditions prevail, and then only after specific permission has been obtained. Advance arrangements for entry into or navigation through or within the Honolulu Defensive Sea Area must be made, preferably at a United States Naval District Headquarters in advance of sailing, or by radio or visual communication on approaching the seaward limit of the area.

Exec. Order No. 8987, 3 C.F.R. 1048 (1938-1943).

[27] 32 C.F.R. § 761.3(e) (1991).

[28] "Entry Control Commanders" are identified in 32 C.F.R. § 761.9 (1991).

[29] 32 C.F.R. § 761.4(d) (1991).

[30] *Id.*

[31] *Id.*

[32] Act of Mar. 4, 1917, Pub. L. No. 64-391, ch. 180, § 44, 39 Stat. 1168, 1194 (1917), originally codified at 18 U.S.C. § 96 (1917) (similar provision currently codified at 18 U.S.C. § 2152 (1988)).

additional N.D.S.A.s in 1917 and 1918.[33] At the close of World War I in 1919, the President revoked all executive orders which created N.D.S.A.s.[34] President Franklin D. Roosevelt created the N.D.S.A.s which remain in effect today just prior to America's entry into World War II, again relying on Congress' express delegation of authority.[35]

Since the N.D.S.A.s were properly created,[36] the question becomes whether this federal reservation of territory prevented the land from

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[33] Exec. Order No. 2597; Exec. Order No. 2598, *microformed on* Presidential Executive Orders (Trans-Media Pub. Co.).

[34] Exec. Order No. 3027, *microformed on* Presidential Executive Orders (Trans-Media Pub. Co.).

[35] In addition to the eleven N.D.S.A.s which remain in effect, *see supra* note 24, President Roosevelt created numerous other N.D.S.A.s throughout the United States and its possessions. *See, e.g.*, Federal Register Annual Subject Index (1941) (under heading of "Naval Defensive Sea Areas").

[36] There appears to be no question that the process by which the N.D.S.A.s were created is constitutional. Although no specific constitutional provision authorizes the issuance of an executive order, courts have consistently supported this practice. Properly promulgated, executive orders have the force and effect of law. *E.g.*, United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978); Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 234 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976). The authority to issue executive orders may derive either from the Constitution itself, or from express or implied authorization by Congress. *E.g.*, Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). Some courts have held that U.S. CONST. art. II, § 2 grants the President broad powers in the conduct of national defense. *E.g.*, New York Times Co. v. United States, 403 U.S. 713, 727 (1971) (Stewart, J., concurring); United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). Arguably therefore, the Constitution alone authorizes the President unilaterally to create restricted areas in the interest of national defense. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459 (1915) (noting that President has authority to withdraw public lands from private acquisition without special authorization from Congress); Cunningham v. Neagle, 135 U.S. 1 (1890) (holding that President has authority under U.S. CONST. art. II, § 3 to assign U.S. Marshalls to protect judges even though no statute expressly provides for such appointment). *But see* Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952) (holding that President's power to impose economic regulations is limited in the absence of congressional action).

Most courts, however, have concluded that an executive order has the force and effect of law only if promulgated pursuant to congressional authorization. *See, e.g.*, Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164 (4th Cir. 1981). In *Liberty Mutual* the United States Court of Appeals for the Fourth Circuit stated that the possibility that the authorization for an executive order might be found in the "inherent powers" of the President, independent of any statutory source, has been "completely foreclosed

passing to the State of Hawaii upon its admission to the Union. As might be expected, the federal government and the State of Hawaii take different positions.

A. The State View

The Hawaii Attorney General first set forth the state's position in a 1971 memorandum opinion.[37] After examining the wording of the executive orders establishing the Honolulu and Pearl Harbor N.D.S.A.s, the Attorney General concluded that "[n]either Presidential Executive Orders contain any language, express or implied, which would evidence an intent to have the submerged areas covered thereby withdrawn or reserved for the beneficial use of the United States."[38] Citing *Feliciano v. United States,*[39] the State contends that the executive orders merely

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by *Youngstown Sheet and Tube Company v. Sawyer.*" 639 F.2d at 172 n.13 (citing Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579, 587 (1952)); *see also* Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 235 (8th Cir. 1975) (holding that President may not "act as a lawmaker in the absence of a delegation of authority or a mandate from Congress"), *cert. denied*, 424 U.S. 966 (1976); American Fed'n of Gov't Employees v. American Fed'n of Gov't Employees, AFL-CIO, 522 F.2d 486, 491 (3d Cir. 1975) (stating that an executive order not issued under statutory authority "cannot attain the status as [sic] a law of the United States"); Stevens v. Carey, 483 F.2d 188 (7th Cir. 1973).

Since the executive orders were issued pursuant to an express delegation of authority, the only remaining constitutional challenge would be that Congress violated the nondelegation doctrine. Historically the Court has interpreted U.S. CONST. art. I, vesting legislative power in Congress, as imposing constraints on the legislature's power to delegate its law-making functions. The Court has, in the past, struck down broad delegations of power lacking adequate standards or objective guidelines. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). One could argue that Congress exceeded its constitutional authority in granting the President virtual plenary power to restrict access to the nation's navigable waters. However, no court has invalidated a congressional delegation of authority since 1935. To the contrary, courts have found even the most vague delegations of authority to be constitutionally permissible. *E.g.*, Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (holding that statute authorizing the President to impose wage and price controls on grounds of "broad fairness and avoidance of gross inequity" contained sufficient standards). As a result, it is unlikely that 18 U.S.C. § 2152 violates the nondelegation doctrine.

[37] Memorandum from Arthur Murakami, Deputy Attorney General (July 21, 1971) (concerning ownership of submerged lands required for reef runway) [hereinafter 1971 Hawaii Attorney General Opinion] (on file with author).

[38] *Id.* at 2.

[39] 297 F. Supp. 1356 (D.P.R. 1969), *aff'd*, 422 F.2d 943 (1st Cir. 1970), *cert. denied*, 400 U.S. 823 (1970).

"regulate the use of the waters described for purposes of national defense and navigation."[40] The State argues that because the federal government did not reserve the submerged lands, the Admission Act must have conveyed title to the State of Hawaii.[41]

The State further relies on the Submerged Lands Act,[42] which "recognized, confirmed, established, and vested in and assigned to" the State of Hawaii the title to and ownership of the lands beneath navigable waters.[43] Although the Submerged Lands Act retained a federal navigational servitude, this servitude does not include "proprietary rights of ownership or the rights of management, administration, leasing, use, and development of the lands."[44] The Hawaii Attorney General concluded that the State of Hawaii holds fee simple title to lands underlying N.D.S.A.s subject only to a superior federal right to regulate and control the navigable waters for the purposes of commerce, navigation, national defense, and international affairs.[45] A 1976 Hawaii Attorney General memorandum opinion draws a similar conclusion,[46] and the Chairman of the Board of Land and Natural Resources recently reiterated this position.[47]

B. The Federal View

The federal government contends that the United States holds fee simple title to the submerged lands within N.D.S.A.s. In a letter to

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[40] 1971 Hawaii Attorney General Opinion, *supra* note 37, at 3.

[41] Section 5 of the Admission Act states, in part:

> [T]he United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union . . . [except those] lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States . . . .

Act of Mar. 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5 (1959).

[42] 43 U.S.C.A. §§ 1301-1315 (West 1986 & Supp. 1991).

[43] 1971 Hawaii Attorney General Opinion, *supra* note 37, at 4 (quoting 43 U.S.C. § 1311).

[44] *Id.* (quoting 43 U.S.C. § 1314).

[45] *Id.* at 3-4.

[46] Memorandum from Kazuyoshi Akita, Deputy Attorney General to Christopher Cobb, Chairman of the Board of Land and Natural Resources (July 16, 1976) (regarding ownership of submerged lands at Kāne'ohe Bay, O'ahu) (on file with author).

[47] Letter from William Paty, Chairman of the Board of Land and Natural Resources, to Major K.K. Gershaneck, Director of the Marine Corps Joint Public Affairs Office (May 24, 1989) (discussing ownership of submerged lands in the Kaneohe Bay N.D.S.A.) [hereinafter D.L.N.R. Letter] (on file with author).

State Senator Mike McCartney as recently as 1989, a Marine Corps Officer argued that any development in Kāne'ohe Bay must be coordinated and approved by the federal government since the federal government owns all of the submerged lands.[48] The letter was sparked by plans to develop a marina near Heeia Kea pier that would involve extensive filling and dredging of lands within the Kaneohe Bay N.D.S.A.[49] Murray Towill, Deputy Director of the Office of State Planning, responded to the letter, characterizing the Marine Corps' ownership claims as "seriously deficient."[50]

The Marine Corps reiterated its claim in a letter to the Chairman of the Board of Land and Natural Resources.[51] The Marine Corps argued that Executive Order Number 8681 properly "set aside" the submerged lands within the Kaneohe Bay N.D.S.A. under the terms of the Hawaii Admission Act.[52]

In a recent district court case, the United States Attorney for the District of Hawaii also asserted that the federal government owns the lands within N.D.S.A.s. *Collard v. United States*[53] involved a claim against the United States for the death of a swimmer struck by a floating log at North Beach on the Kaneohe Marine Corps Air Station. This beach is within the Kaneohe Bay N.D.S.A. The United States Attorney's Office argued that the United States "is the proprietary owner of the subject beach."[54] Although the court did not decide this issue, it noted that "[t]he Executive Order establishing the Kaneohe Bay Naval Defensive Sea Area, while it extends seaward from the extreme high water mark, does not explicitly take ownership . . . from the state."[55]

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[48] Letter from Major K.K. Gershaneck, Director of the Marine Corps Joint Public Affairs Office, to Mike McCartney, Hawaii State Senator (May 5, 1989) (concerning development in Kāne'ohe Bay) (on file with author).

[49] Janine Tully, *State, Marines Dispute Bay Ownership*, WINDWARD SUN PRESS, Jun. 15-21, 1989, at A1.

[50] Letter from Murray Towill, Deputy Director of the Office of State Planning, to Mike McCartney, Hawaii State Senator (Jun. 6, 1989) (concerning ownership of Kāne'ohe Bay) (on file with author).

[51] Letter from Major K.K. Gershaneck, Director of the Marine Corps Joint Public Affairs Office, to William W. Paty, Chairman of the Board of Land and Natural Resources (May 5, 1989) (concerning ownership of submerged lands within Kaneohe Bay N.D.S.A.) (on file with author).

[52] *Id.*

[53] 691 F. Supp. 256 (D. Haw. 1988).

[54] *Id.* at 258.

[55] *Id.* In denying the federal government's motion for summary judgment, the court held that there were genuine issues of material fact concerning, inter alia, ownership of the area where the accident occurred. *Id.* at 260. The case was settled prior to trial.

IV. The Present Situation

To date, the state and federal positions have not been reconciled. The State appears to be proceeding as if the lands in question were, in fact, state lands. William Paty, Chairman of the Board of Land and Natural Resources, dismissed the federal government's ownership claims in a brief letter to Marine Corps Major K.K. Gershaneck.[56] Mr. Paty assured Major Gershaneck that requests to use submerged lands in Kāne'ohe Bay would be sent to "appropriate federal agencies" for comment before the State made any final decisions.[57] In 1990 the Hawaii State Legislature established the Kaneohe Bay Task Force to develop a master plan concerning regulation of all activities in Kāne'ohe Bay.[58] Although the legislation reserves one of the eleven task force positions for the Commanding Officer of the Kaneohe Marine Corps Air Station, it does not recognize any federal property interests in the Bay.[59]

In addition, the Board of Land and Natural Resources recently approved a forty-year lease of 5.814 acres of submerged land within the Honolulu N.D.S.A.,[60] and is negotiating with a developer to lease an additional 9.72 acres.[61] This is, of course, clear evidence that the State asserts property rights over the areas in question. Despite its ownership assertions, the federal government has not taken any action to officially challenge the State's claims.

V. Analysis of the Competing Claims

Ownership claims to submerged lands are significantly different from claims to uplands. In order to evaluate the competing positions of the state and federal governments, it is first necessary to examine the origin and evolution of state ownership claims to submerged lands.

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[56] D.L.N.R. Letter, *supra* note 47.

[57] *Id.*

[58] Act of June 19, 1990, *reprinted in* 1990 Haw. Sess. Laws 447.

[59] *Id.*

[60] Approved submittal to the Hawaii State Board of Land and Natural Resources, Item number F-14 at meeting held on Jan. 26, 1990. The Board approved the lease to Atlantis Submarine, Hawaii, pending appraisal and establishment of a fee schedule. *Id.*

[61] Rod Smith, *State Looks to Private Sector for Keehi Marina Development*, Pacific Business News, Apr. 29, 1991, at A24. The Hawaii House of Representatives has authorized the Board of Land and Natural Resources and the Department of Transportation to lease up to 300 acres of submerged lands in Keehi Lagoon to private developers. H.R. Con. Res. 386, 14th Leg., 2d Reg. Sess. (1988).

A. State Ownership Claims to Submerged Lands

State ownership claims to submerged lands derive from English common law. At common law, the Crown owned all lands below the high water mark.[62] The Crown could, however, convey title to submerged lands to individuals or corporations by a grant.[63] Regardless of whether the Crown or an individual owned the submerged lands, title was held subject to a public right of navigation and fishing.[64] At the time of the American Revolution, the thirteen colonies succeeded to the interests of the Crown.[65]

The Court set forth the basic rule in 1842 in *Martin v. Waddell*:[66] "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights surrendered by the Constitution to the general Government."[67] Twenty-five years later, in *Mumford v. Wardell*,[68] the Court held that the "[s]ettled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the Constitution to the United States, but were reserved to the several States."[69]

Recent United States Supreme Court decisions confirm this view.[70] In *Phillips Petroleum Co. v. Mississippi*,[71] the Court stated that "[i]t is

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[62] Shively v. Bowlby, 152 U.S. 1, 11 (1893); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 382 (1842).

[63] Shively v. Bowlby, 152 U.S. at 13.

[64] *Id.* at 13; Martin v. Waddell, 41 U.S. (16 Pet.) at 412.

[65] *E.g.*, Shively v. Bowlby, 152 U.S. at 14; Martin v. Waddell, 41 U.S. (16 Pet.) at 412; Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 280 (1831).

[66] 41 U.S. (16 Pet.) 367 (1842).

[67] *Id.* at 410.

[68] 73 U.S. (6 Wall.) 423 (1867).

[69] *Id.* at 436. The Court reached a similar conclusion in *County of St. Clair v. Lovingston*, where it held that "[b]y the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them." 90 U.S. (23 Wall.) 46, 68 (1874).

[70] *E.g.*, Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988); Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). *But see* United States v. Curtiss-Wright, 299 U.S. 304 (1936). *Curtiss-Wright* lends support to the contention that the federal government acquired the Crown's interest in lands beneath navigable waters. In *Curtiss-Wright* the Court stated that "[a]s a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate

the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several States."[72] In *Utah Division of State Lands v. United States*,[73] the Court stated unequivocally that "[w]hen the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown."[74] Accordingly, it is well settled that the original states acquired fee simple title to the submerged lands within their borders at the time of the Revolution.

While the original states can trace their submerged land claims to the English Crown, states admitted to the Union subsequent to the Revolution must rely instead on the "equal footing" doctrine.[75] Although the equal footing doctrine was originally intended only to ensure that new states were not placed in a position of political inferiority, courts have consistently invoked the doctrine in support of state ownership of submerged lands.[76]

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capacity as the United States of America." 299 U.S. at 316. While *Curtiss-Wright* has never been expressly overruled, the Court has rejected this contention, at least as it pertains to ownership of submerged lands. *See infra* notes 72, 74 and accompanying text.

[71] 484 U.S. 469 (1988).

[72] *Id.* at 474 (quoting Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891)).

[73] 482 U.S. 193 (1987).

[74] *Id.* at 196.

[75] *E.g.*, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The term "equal footing" originated in 1787 with an act entitled "An Ordinance for the Government of the Territory of the United States north-west of the river Ohio." This act was passed prior to the ratification of the U.S. Constitution. The First Congress adopted the act in its entirety. Act of Aug. 7, 1789, ch. 8, 1 Stat. 51 (1789). Article V of the ordinance forms the basis of the equal footing clause found in subsequent state organic acts: "[S]uch States shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and State government . . . ." 1 Stat. 53 (1789).

The equal footing concept was introduced in order to assuage the concerns of the various states who were to cede the lands comprising the northwest territories. *See generally* ERNEST R. BARTLEY, THE TIDELANDS OIL CONTROVERSY 43 n.1 (reprint 1979) (1953).

[76] *E.g.*, Utah Div. of State Lands v. United States, 482 U.S. 193, 195-96 (1987) (addressing ownership of lands underlying Utah Lake); Borax Consol., Ltd., v. Los Angeles, 296 U.S. 10, 15-16 (1935) (regarding ownership of tidelands at Mormon Island in Los Angeles Harbor); Mumford v. Wardell, 73 U.S. (6 Wall.) 423, 436

In *Pollard's Lessee v. Hagan*,[77] the United States Supreme Court concluded that the Constitution itself reserved ownership of submerged lands under navigable waters to the states.[78] The Court held that ownership of soils under navigable waters was an essential attribute of state sovereignty. Since the thirteen original states held this attribute, the equal footing doctrine forbids the federal government from denying a new state ownership of its submerged lands.[79] *Pollard's Lessee* has been followed in a long line of cases,[80] leaving no question that states normally acquire title to lands beneath navigable waters within their jurisdiction upon admission to the Union.[81]

B. Defeating a State's Equal Footing Claim to Submerged Lands

In certain circumstances, the federal government can defeat a state's equal footing claim to submerged lands. For example, the federal government has the power to dispose of lands it holds as a territory

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(1867) (concerning ownership of certain tidal flats in San Francisco Bay); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) (dealing with ownership of formerly submerged lands in Alabama). *See generally* BARTLEY, *supra* note 75, at 43-58.

[77] 44 U.S. (3 How.) 212 (1845).

[78] *Id.* at 224.

[79] *Id.* at 229.

[80] *E.g.*, Phillips Petroleum Co., v. Mississippi, 484 U.S. 469, 474 (1987); Utah Div. of State Lands v. United States, 482 at 195-96; Borax Consol., Ltd. v. Los Angeles, 296 U.S. at 15; Port of Seattle v. Oregon & Wash. R. Co., 255 U.S. 56, 63 (1921); United States v. Coronado Beach Co., 255 U.S. 472, 487-88 (1921); Scott v. Lattig, 227 U.S. 229, 242-43 (1913); Hardin v. Shedd, 190 U.S. 508, 519 (1903); United States v. Mission Rock Co., 189 U.S. 391, 404 (1903); Shively v. Bowlby, 152 U.S. 1, 57 (1894); Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 435 (1892); Knight v. United Land Ass'n, 142 U.S. 161, 183 (1891); Cardwell v. American Bridge Co., 113 U.S. 205, 212 (1885); Escanaba & Lake Mich. Transp. Co. v. Chicago, 107 U.S. 678, 688-90 (1882); Barney v. Keokuk, 94 U.S. 324, 338 (1876); Mumford v. Wardell, 73 U.S. (6 Wall.) at 435-36.

[81] Following the discovery of significant petroleum resources in the territorial sea, the federal government challenged state title to these lands. *See generally* BARTLEY, *supra* note 75. In a series of decisions, the United States Supreme Court held that the federal government enjoyed "paramount rights" in the territorial sea which allowed it exclusive control over oil and gas resources. United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); United States v. California, 332 U.S. 19 (1947). Congress responded in 1953 by passing the Submerged Lands Act which expressly recognizes the coastal states' title to the submerged lands out to three nautical miles and quitclaims any federal "proprietary rights of ownership." 43 U.S.C.A. §§ 1301-1315 (West 1986 & Supp. 1991).

under article IV, section 3 of the United States Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[82] In *Shively v. Bowlby*,[83] the Court held that:

> We cannot doubt . . . that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the Territory.[84]

Similarly, in *United States v. Holt Bank*,[85] the Court held that "where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands . . . such rights are not cut off by the subsequent creation of the State, but remain unimpaired."[86]

Thus, the federal government's conveyance of submerged lands to a third party prior to the state's admission into the Union can defeat the state's equal footing claim. The question of whether Congress can also defeat a state's equal footing claim by reserving submerged lands for federal use has never been clearly decided. However, both the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit suggest that Congress has this power.[87]

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[82] U.S. CONST. art. IV, § 3.

[83] 152 U.S. 1 (1893).

[84] *Id.* at 48. *Shively* concerned title to certain submerged lands in the Columbia River in Oregon. Shively obtained title to the lands by act of Congress while Oregon was still a territory; Bowlby obtained title to the lands from the State of Oregon. The Court stated that even though Congress has the power to convey lands it holds as a territory, it may only do so "in some case of international duty or public exigency." *Id.* at 58. The Court held that the Congress' conveyance to Shively did not defeat Oregon's equal footing claim and that Bowlby therefore held the title. *Id.*

[85] 270 U.S. 49 (1925). *Holt* concerned title to lands underneath a lake within an Indian reservation in Minnesota. The Court held that even though Congress had to power to convey the lake bed to the Chippewa Indians, the establishment of the reservation did not defeat Minnesota's equal footing claim to the land. *Id.* at 58-59.

[86] *Id.* at 55.

[87] Utah Div. of State Lands v. United States, 482 U.S. 193 (1987); Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990).

In *Utah Division of State Lands v. United States*,[88] the United States Department of the Interior issued oil and gas leases for lands underlying Utah Lake. Utah brought suit seeking declaratory judgment that Utah owned the lake bed and its natural resources. The federal government claimed that it reserved the lake bed as a reservoir site in 1889 and thus title did not pass to the state upon its 1896 admission into the Union.[89] Utah argued that a state's equal footing claim to submerged land could be defeated only by a conveyance to a third party, not by a mere reservation of land.[90] The Court found it unnecessary to decide this question because the government's actions were not sufficient to reserve the property:

> Congress "early adopted and constantly has adhered" to a policy of holding land under navigable waters "for the ultimate benefit of future States." Congress, therefore, will defeat a future State's entitlement to land under navigable waters only "in exceptional instances," and in light of this policy, whether faced with a reservation or a conveyance, we simply cannot infer that Congress intended to defeat a future State's title to land under navigable waters "unless the intention was definitely declared or otherwise made very plain."[91]

In *Utah Division of State Lands*, the Court set forth a two-part test to determine whether a given federal reservation overcame "the strong presumption against the defeat of state title."[92] Under this test, the United States government must show that: (1) Congress clearly intended to include land under navigable waters within the federal reservation; and (2) Congress affirmatively intended to defeat the future state's title to such land.[93] The Court concluded that the federal government's ownership claim failed under both prongs.[94]

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[88] 482 U.S. 193 (1987).

[89] *Id.* at 200.

[90] *Id.*

[91] *Id.* at 201-02 (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926)) (citations omitted).

[92] *Id.* at 202.

[93] *Id.* The Court has taken a more deferential approach in cases involving title to lands underlying navigable waters within Indian reservations. In general, the Court is much more willing to *infer* congressional intent to defeat the state's title where lands were conveyed pursuant to a Treaty with an Indian Nation. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918). *But see* Montana v. United States, 450 U.S. 544 (1981) (stating that Court would not infer congressional intent to convey river bed to a tribe where fishing was not important to their diet or way of life).

[94] *Utah Div. of State Lands*, 482 U.S. at 203.

A four-Justice dissent argued that not only could Congress defeat a state's equal footing claim by reserving land for the United States during the Territorial period, but that Congress also "plainly and specifically expressed its intent to exercise that power with respect to Utah Lake."[95] The dissent did not dispute the two-part test announced by the majority.

The United States Court of Appeals for the Ninth Circuit faced a similar issue in *Alaska v. Ahtna, Inc.*[96] In 1979 the United States Bureau of Land Management conveyed lands underlying thirty miles of navigable river in Alaska to Ahtna, a native regional corporation. Alaska claimed that the lands were the property of the state and not subject to conveyance by the federal government.[97] Ahtna claimed that a provision of the statehood act which reserved title to "lands or other property . . . the right or title to which *may be held* by any Indians, Eskimos, or Aleuts . . . or held by the United States in trust for said natives"[98] served to defeat the state's equal footing claim. The court held:

> The federal government has the power to convey a Territory's lands underlying navigable waters prior to that Territory becoming a State, thereby defeating the future State's right to the lands. The Government could probably likewise reserve unto itself the same lands prior to statehood. Nevertheless, "[g]iven the [federal government's] longstanding policy of holding land under navigable waters for the ultimate benefit of the States, . . . [the Supreme Court will] not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself."[99]

Analyzing the two-prong test of *Utah Division of State Lands*, the court concluded that since the statehood act mentioned neither the specific river in question nor submerged lands in general, Ahtna's claim failed under the first prong.[100]

In applying the *Utah* test to the present situation, the first question is whether the federal reservation includes the submerged lands.

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[95] *Id.* at 209 (White, J., dissenting).

[96] 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1949 (1990).

[97] *Id.* at 1403.

[98] *Id.* at 1405.

[99] *Id.* at 1406 (quoting Utah Div. of State Lands v. United States, 482 U.S. 193, 197, 201-02 (1987)).

[100] *Id.*

1. Do Naval Defensive Sea Areas Include the Submerged Lands?

The executive orders creating the three Hawai'i N.D.S.A.s do not explicitly reserve the submerged lands. On May 26, 1939, President Roosevelt created the Pearl Harbor N.D.S.A. by Executive Order Number 8143 which states, in part: "*[T]he area of water* in Pearl Harbor, Island of Oahu, Territory of Hawaii, lying between extreme high-water mark and the sea and in and about the entrance channel to said harbor . . . is hereby established as a defensive sea area for purposes of national defense."[101] Executive Orders 8681 and 8987, which establish the Kaneohe Bay and Honolulu N.D.S.A.s, respectively, state that the "territorial waters" within certain described limits are "hereby established and reserved . . . [for] purposes of national defense."[102] There is no reference in any of the executive orders to submerged lands.

In general, the executive orders prohibit private vessels from entering the N.D.S.A.s without prior permission from military authorities. Arguably then, the government's sole interest was in restricting vessel traffic around military facilities. Contemporaneous accounts support this argument. Shortly after President Roosevelt signed Executive Order Number 8143, Admiral Murfin, Commandant of the Fourteenth Naval District, explained that the new restrictions were intended as a "club" to keep aliens away from the naval base.[103] This limited objective does not require federal sovereignty over the submerged lands; therefore, the submerged lands arguably were not included within the reservation.

On the other hand, Major Woods provides three arguments that the submerged lands must have been included within the N.D.S.A.s.[104] First, the concept of bifurcating submerged lands from the superadjacent water column was not officially introduced until Truman's 1945 Proclamation on the Continental Shelf.[105] Thus, President Roosevelt may have simply assumed he was reserving the entire area without specifically referring to the submerged lands.

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[101] Exec. Order No. 8143, 3 C.F.R. 504 (1938-1943) (emphasis added).

[102] Exec. Order No. 8681, 3 C.F.R. 893 (1938-1943); Exec. Order No. 8987, 3 C.F.R. 1048 (1938-1943).

[103] *Ban is Club Against Aliens, Murfin Says*, HONOLULU STAR BULL., June 2, 1939, at 1.

[104] Woods, *supra* note 12, at 141-42.

[105] *Id.* at 141 (referring to Proclamation No. 2667, 3 C.F.R. 67 (1943-1948)). *See generally* JOHN M. ARMSTRONG & PETER C. RYNER, OCEAN MANAGEMENT: A NEW PERSPECTIVE 16-23 (1981).

Major Woods next points out that the executive order establishing the Honolulu N.D.S.A. specifically prohibits persons from "threatening the efficiency of mines"[106] which typically are moored to the sea floor. Arguably, President Roosevelt would not have specifically prohibited persons from interfering with mines moored to the sea floor if the land itself were not included within the N.D.S.A. Major Woods does not explain, however, why the federal government needs to own the submerged lands in order to prevent persons from tampering with or damaging government property. Congress routinely prohibits persons from interfering with government property, regardless of where it is located.[107]

Major Woods' final argument is that the State of Hawaii admits that the submerged lands were included within the N.D.S.A.s.[108] For support, Major Woods points out that the federal government has conducted extensive dredging and obstruction removal in the N.D.S.A.s, as well as built piers, docks, and ramps, all without approval or permission from state officials.[109] However, these activities are consistent with the federal government's powers under the navigational servitude.[110] The federal government clearly has the power to remove

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[106] Woods, *supra* note 12, at 141-42 (quoting Exec. Order No. 8987, 3 C.F.R. 1048 (1938-1943)).

[107] For example, 14 U.S.C. § 84 (1988) makes it a crime to "remove, change the location of, obstruct, wilfully damage, make fast to, or interfere with any aid to navigation." Aids to navigation such as buoys must, of course, be moored to the sea floor. The question of who owns or controls the submerged lands upon which the sinker rests is irrelevant.

[108] Woods, *supra* note 12, at 141-42.

[109] *Id.*

[110] The federal government does not need a proprietary interest in order to use submerged lands. The concept of a dominant federal navigational servitude is well established in U.S. law. In *United States v. Twin City Power Co.*, the United States Supreme Court stated:

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called a "dominant servitude" . . . or a "superior navigation easement."

350 U.S. 222, 224-25 (1956) (citations omitted).

In essence, the navigational servitude allows the federal government to "take" property under navigable waters without paying compensation. The owners may not invoke the Fifth Amendment because the servitude predates, and is superior to, all other private and public rights. *See generally* James L. Huffman, *Avoiding the Takings*

obstructions and dredge channels for the use of military vessels.[111] The government also has the power to build piers for the benefit of navigation in general.[112] The question of building piers for the exclusive

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Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work, 3 J. LAND USE & ENVTL. L. 171 (1987). For example, the federal government may "deepen channels, widen streams, erect lighthouses, build bridges, construct dams, and make similar improvements, without compensating the owners of land subject to the navigational servitude." United States v. 412.715 Acres of Land, 53 F. Supp. 143, 148 (N.D. Cal. 1943).

[111] Courts have held that the navigational servitude gives the federal government the right to dredge channels and remove obstructions for the exclusive benefit of the military. United States v. Commodore Park, 324 U.S. 386 (1945); York Cove Corp. v. United States, 317 F. Supp. 799 (E.D. Va. 1970); Blake v. United States, 181 F. Supp. 584 (E.D. Va. 1960), *aff'd*, 295 F.2d 91 (4th Cir. 1961). *But see* United States v. 412.715 Acres of Land, 53 F. Supp. 143 (N.D. Cal. 1943). The United States sought to confiscate submerged lands in order to build a naval fuel supply depot. The court held that "[i]t does not follow, however, that the Government may assert its power over lands subject to this servitude to construct improvements for the exclusive use of one of its agencies." *Id.* at 148. Arguably, *412.715 Acres of Land* was overruled by *Commodore Park*.

In *Commodore Park*, the Navy, under the authority of Congress, dredged a navigable waterway to make it suitable for seaplanes and deposited the fill in an adjacent navigable waterway. Depositing the fill in the adjacent waterway rendered it non-navigable. The Court held that riparian owners did not have a cause of action because the dredging and filling was "done by the United States in the interest of improvement of navigation." 324 U.S. at 390.

In *York Cove Corp. v. United States*, the federal government dredged the York River to build a naval weapons station. The dredging destroyed valuable oyster beds in the river. The district court held that the United States was acting under its dominant navigation servitude and was not required to compensate holders of the oyster leases. 317 F. Supp. at 806. The court stated that "where the Government's action is of some benefit to navigation and commerce, the fact that it is also for the benefit of the Navy's shore facilities is immaterial." *Id.* Most of the dredged areas were within restricted zones and therefore could only be used by military vessels. *Id.* at 802.

A similar issue arose in Blake v. United States, 181 F. Supp. 584 (E.D. Va. 1960), *aff'd*, 295 F.2d 91 (4th Cir. 1961). The Navy removed stakes and buoys marking oyster beds in a naval anchorage in the York River, rendering the beds worthless. The Navy removed the markers in order to allow naval vessels to practice mine sweeping operations. The court held that the Navy was not required to compensate the owners of the beds because the action was related to navigation. *Id.* at 590. The court stated that "[u]ndoubtedly there must be a navigation purpose, but it need not be a commercial navigation purpose." *Id.*

[112] Scranton v. Wheeler, 179 U.S. 141 (1900). In *Scranton* the Court held that the owner of submerged lands was not entitled to compensation when the federal government built a pier on his lands. It is not clear exactly what the pier was used for,

use of the military is not as well settled, but there is considerable support for this proposition.[113] Thus, the federal government's use of submerged lands for projects benefitting navigation and national defense is not inconsistent with state ownership.

Major Woods also argues that Hawai'i officially recognized the federal government's ownership claims in 1976 when the State Department of Transportation asked for, and received, a federal quitclaim conveying the federal interest in certain submerged lands within the Honolulu and Pearl Harbor N.D.S.A.s.[114] The State later filled this

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although the Court stated it was constructed "for the purpose . . . of improving navigation." *Id.* at 141. The Court held that "the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce." *Id.* at 160-61.

[113] In United States v. Maine, 420 U.S. 515 (1975), the Court stated that "'the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense' and . . . 'it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea.'" *Id.* at 522-23 (quoting from the Report of the Special Master at 23). The Court made no distinction between Congress' national defense powers and Congress' powers over commerce. If the navigational servitude encompasses building piers for commerce, it should therefore encompass building piers for national defense.

The decisions on this point, however, are not conclusive. In United States v. 422,978 Square Feet of Land, 445 F.2d 1180 (9th Cir. 1971), the court held that the State of California was not entitled to compensation where the federal government built a wharf facility for a naval shipyard on its submerged lands because the facility was "intended as in [sic] aid to navigation and commerce." *Id.* at 1187. The precedential value of this decision is questionable as the court alternatively held that the State was not entitled to compensation because it failed to bring an action within six years of the date the federal government took possession of the land. *Id.*

Congress is apparently not willing to rely on the federal government's power to take submerged lands solely for military structures. In 1974 Congress passed a submerged lands act for Guam, the Virgin Islands, and American Samoa. 48 U.S.C. § 1705 (1988). The Navy lobbied for, and received, a specific exception for submerged lands under an ammunition pier which was under construction in Sella Bay, Guam. S. REP. No. 93-1152, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5464, 5465. Congress apparently believed that Guam could interfere with the project if it obtained ownership of the submerged lands.

[114] Woods, *supra* note 12, at 141-42, referring to Quitclaim Deed from the United States of America to the State of Hawaii No. 77-20545, recorded at 12062:247 (Nov. 29, 1976) at the Hawaii State Bureau of Conveyances. The quitclaim deed included the following property description of "Area 6": "Being a portion of the United States 'Territorial Waters,' and the submerged lands subjacent thereto, including the portions

land to create the reef runway at Honolulu International Airport. Arguably, since the federal government drafted this document at the behest of the State Department of Transportation, it evidences a State acknowledgement that the federal government owns the submerged lands within the N.D.S.A.s.

A quitclaim, however, merely conveys whatever interest the grantor has in the property; it does not imply that the grantor holds title.[115] This point is exemplified by the United States' earlier acceptance of a quitclaim from the Territory of Hawaii covering most of these same submerged lands.[116] Major Woods argues that the State's acceptance of a federal quitclaim evidences an acknowledgement of federal ownership, but it is hard to distinguish that situation from the federal government's acceptance of the Territory's earlier deed covering much of the same property.

Major Woods also points to a 1943 letter from the Territorial Attorney General to the Territorial Governor discussing the need to formally extinguish certain fishing rights in Pearl Harbor.[117] In advising the Governor that such an action was not necessary, the Territorial Attorney General noted:

> The sea fisheries recognized by Hawaiian law are merely fishing rights, the ownership of the submerged land being in the United States of

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reclaimed therein, as described in Presidential Executive Order No. 8987 dated December 20, 1941 as a Defensive Sea Area . . . ." *Id.* at 248. The deed described "Area 7" as "[b]eing a portion of the United States 'Territorial Waters,' and the submerged lands subjacent thereto described as a Defensive Sea Area in Presidential Executive Orders No. 8143 dated May 26, 1939 and No. 8987 dated December 20, 1941, situated in Mamala Bay and Keehi Lagoon . . . ." *Id.* at 250.

[115] *E.g.*, United States v. Speidel, 562 F.2d 1129, 1132 (8th Cir. 1977).

[116] Act of July 18, 1958, Pub. L. No. 85-534, 72 Stat. 379 (1958). This act authorized the Governor of the Territory of Hawaii to "convey without reimbursement to the United States all of the right, title, and interest which the Territory may have in and to those portions of the Halawa and Moanalua fisheries, and the submerged lands subjacent thereto." 72 Stat. 382. These conveyances were dated August 21, 1959, and are recorded at 3674:171 and 3674:181 at the Hawaii State Bureau of Conveyances. These conveyances were executed only hours before Statehood. It is not clear why Congress deemed it necessary for the Territory to quitclaim these lands; the United States owned all submerged lands prior to Statehood. *See infra* text accompanying notes 119-120. Perhaps Congress wished to avoid any potential problems concerning *konohiki* rights. *Konohiki* rights are traditional Hawaiian land or fishing rights under the control of the *konohiki*, or headman of a land division. *See generally* RICHARD H. KOSAKI, KONOHIKI FISHING RIGHTS (1954).

[117] Woods, *supra* note 12, at 138 (referring to Letter from Garner Anthony to the Hon. Ingram M. Stainback (Nov. 19, 1943) (on file with author)).

> America. If any executive order were to be issued in this instance it would be for the purpose of constituting the sea area a part of the Pearl Harbor naval reservation; such an executive order . . . would only repeat what already has been accomplished by Executive Order 8143 of the President.[118]

Major Woods seized on the Attorney General's recognition that the United States owned the submerged land as evidence that the executive order creating the Pearl Harbor N.D.S.A. reserved the submerged lands for the United States. However, this letter stands for exactly the *opposite* proposition. As discussed previously, the joint resolution providing for the annexation of the Hawaiian Islands ceded "the absolute fee and ownership of . . . all Crown lands" to the United States.[119] This land was not returned to Hawaii until Statehood in 1959.[120] It is beyond question that the United States owned *all* of the submerged lands in 1943, both inside and outside of N.D.S.A.s. Thus, the letter merely states that Executive Order Number 8143 had the effect of constituting the "*sea area* a part of the . . . naval reservation."[121] This is precisely the State of Hawaii's contention.

The State contends that N.D.S.A.s encompass only the water column.[122] Although the Hawaii Attorney General did not discuss it in either the 1971 or the 1976 opinions,[123] the most convincing evidence that the submerged lands were not included within the N.D.S.A.s is in the military's report to the President pursuant to section 5(e) of the Hawaii Admission Act.[124] Section 5(e) states:

> Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.[125]

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[118] *Id.*

[119] *See supra* notes 15-16 and accompanying text.

[120] *See supra* notes 19-20 and accompanying text.

[121] Woods, *supra* note 12, at 138 (emphasis added).

[122] *See supra* text accompanying note 40.

[123] *See supra* notes 37 and 46.

[124] U.S. DEPARTMENT OF DEFENSE, REPORT ON STUDY OF MILITARY REAL PROPERTY, STATE OF HAWAII (1960) [hereinafter MILITARY LANDS REPORT].

[125] Act of Mar. 18, 1959, Pub. L. No. 86-3, § 5(e), 73 Stat. 4, 6 (1959).

The report identified 85,323 acres of land in Hawai'i under military control.[126] This total includes both purchased land and Territorial lands "taken for the uses and purposes of the United States" pursuant to the Hawaii Organic Act.[127] The report, which contains no reference to N.D.S.A.s, includes a map that purports to show all military land holdings on the island of O'ahu.[128] No submerged lands were identified as being under federal ownership. This is strong evidence that military officials at the time of Hawaii's admission to the Union did not consider the submerged lands under N.D.S.A.s to be United States' property. Moreover, even if the submerged lands were included within the reservations, the military never justified its continued retention of the lands, as Congress required.[129]

A 1963 Senate Report also fails to list N.D.S.A.s as having been "set aside for Federal use when Hawaii became a State."[130] The report contains a table describing all land owned or controlled by the federal government on each of the major Hawaiian Islands. The table specifically lists "acreage acquired through the setting aside of lands ceded by the Republic of Hawaii."[131] There is no mention of either submerged lands or N.D.S.A.s.

Furthermore, in *Utah Division of State Lands v. United States*,[132] both the majority and the dissent focused heavily on whether the federal government *needed* to reserve the submerged lands in order to accomplish its objectives.[133] Under this standard, the N.D.S.A.s do not include the submerged lands. The N.D.S.A.s were designed to restrict access around certain coastal facilities of military significance.[134] However, the

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[126] MILITARY LANDS REPORT, *supra* note 124, at 4.

[127] Act of Apr. 30, 1900, § 91, 31 Stat. 141, 159 (1900).

[128] MILITARY LANDS REPORT, *supra* note 124, exhibit IV.

[129] *See supra* text accompanying note 125.

[130] S. REP. NO. 675, 88th Cong., 1st Sess. 1 (1963), *reprinted in* 1963 U.S.C.C.A.N. 1362, 1362.

[131] *Id.*, *reprinted in* 1963 U.S.C.C.A.N. at 1371.

[132] 482 U.S. 193 (1987). *See supra* notes 88-95 and accompanying text.

[133] *Id.* at 202, 216-17. The majority argued that Congress did not need to retain title to the lake bed in order to use the lake as a reservoir since the navigational servitude would allow it to "still control, develop, and use the waters for its own purposes." *Id.* at 202. The dissent argued that the federal government needed to retain title because the U.S. Geological Survey intended to maintain the normal water level below the natural shore line. If the State held title to the lake bed it could permit development on the newly emerged lands and destroy the lake's value for flood control. *Id.* at 216-17.

[134] *See supra* text accompanying note 103.

federal government may restrict access to navigable waters even without owning or controlling the underlying lands.[135] Congress had this power both before and after the defensive areas were created. By authorizing the President to create specific restricted areas and creating criminal sanctions for transgressors, Congress merely codified this general power and gave it "teeth."

Since ownership of the submerged lands was not necessary to accomplish the government's objectives, they arguably were not included within the reservation. But even assuming they were, the federal government faces an additional hurdle under the second prong of *Utah Division of State Lands*. It must show that Congress affirmatively intended to defeat the future state's title to such land.[136]

2. *Did Congress Intend to Defeat Hawaii's Equal Footing Claim?*

When Congress conveys lands under navigable waters to a private party, it must necessarily intend to defeat the future state's claim to that land.[137] However, when Congress reserves land for a particular

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[135] *E.g.*, Feliciano v. United States, 297 F. Supp. 1356 (D.P.R. 1969), *aff'd*, 422 F.2d 943 (1st Cir. 1970), *cert. denied*, 400 U.S. 823 (1970). In *Feliciano*, the plaintiffs charged that a naval defensive sea area (N.D.S.A.) around the island of Culebra, Puerto Rico violated their constitutional right of access to the island. 297 F. Supp. at 1357. The court held that Congress had the power to regulate navigable waters in the interest of national defense and commerce and that N.D.S.A.s were a "congressionally authorized regulation of navigable waters." *Id.* at 1360. *See also* Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979), *aff'd in part, vacated in part*, 643 F.2d 835 (1st Cir. 1981). In *Barcelo* the defendants challenged the Navy's authority to restrict navigable waters surrounding a military target range but not within a N.D.S.A. *Id.* at 700-01. The court held that Congress could constitutionally restrict access to navigable waters "[i]n the interest of the national defense." *Id.* at 700 (quoting 33 U.S.C. § 3).

But see Jackson v. United States, 103 F. Supp. 1019 (Ct. Cl. 1952). In *Jackson* the United States Court of Claims held that a fisherman displaced by the federal government's creation of a restricted area surrounding the Aberdeen Proving Ground was entitled to compensation. *Id.* at 1020. (A later court, referring to this decision, noted that "[t]he opinion does not precisely state the purpose for which the Government enlarged its restricted area, but it is reasonable to assume that it was for target purposes." Blake v. United States, 181 F. Supp. 584, 590 (E.D. Va. 1960), *aff'd*, 295 F.2d 91 (4th Cir. 1961)). In *Jackson* the court held that "[w]hile the Government may, to protect and improve navigability, forbid the private use of navigable waters, it may not do so for some other purpose not related to commerce." 103 F. Supp. at 1020.

[136] 482 U.S. at 202. *See supra* text accompanying note 93.

[137] *Id.*

purpose, it might not intend to defeat the state's claim.[138] "[T]he strong presumption is against finding an intent to defeat the State's title."[139] Therefore, the mere act of reservation itself is not sufficient evidence of congressional intent to retain title to the lands.[140] In *Utah Division of State Lands*, the United States Supreme Court held that Congress may have intended to reserve a lake as a reservoir but let the State obtain title to the lands under the reservoir.[141] In *Montana v. United States*,[142] the Court stated that Congress might have intended to retain lands as an Indian Reservation yet allow the State to take title to the bed of a navigable river within the Reservation.[143]

Because no court has ever found sufficient evidence of a congressional intent to defeat a state's claim to submerged lands based on a federal reservation of territory, it is difficult to predict what evidence would suffice. Since Major Woods did not address *Utah Division of State Lands,* it is unknown what arguments the federal government could advance along this line.

As discussed previously,[144] in 1917 Congress amended the criminal code to authorize the President to establish N.D.S.A.s. This amendment was contained in a military appropriations act and no legislative history exists concerning this specific provision.

It is doubtful Congress intended this provision to have such disparate results depending on the political status of the locale. For example, in 1941 President Roosevelt created thirty-one separate N.D.S.A.s throughout the United States and its possessions.[145] Those established within an existing state clearly had no effect on that state's title to the submerged lands. Conversely, the federal government now argues that because some of the N.D.S.A.s were established within Hawai'i, which fortuitously held only Territorial status at the time, the result should be different. The logic of this result is elusive.

As further evidence that Congress did not intend to defeat Hawaii's equal footing claim, a 1963 Senate report concerning federal property

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[138] *Id.*

[139] *Id.* at 201.

[140] *Id.* at 202.

[141] *Id.*

[142] 450 U.S. 544 (1981).

[143] *Id.* at 556-57.

[144] *See supra* note 32 and accompanying text.

[145] *See, e.g.*, Federal Register Annual Subject Index (1941) (under heading of "Naval Defensive Sea Areas").

interests in Hawai'i fails to list N.D.S.A.s as "acreage acquired through the setting aside of lands ceded by the Republic of Hawaii."[146] In fact, N.D.S.A.s are not included under any category of federal lands. Had Congress intended to defeat Hawaii's equal footing claim, one would expect it to at least recognize these areas as federal property.

The federal government's ownership claims fail under both prongs of the Court's test in *Utah State Division of Lands*.[147] The federal government can produce no evidence that N.D.S.A.s include the submerged lands and no evidence that Congress intended to defeat Hawaii's equal footing claims to the land. As such, title to the lands underlying N.D.S.A.s vested with the State upon Hawaii's admission to the Union.

VI. The Effect of State Ownership on Federal Activities

Major Woods proposes three rationales for asserting federal sovereignty over N.D.S.A.s. First, these areas give local military officials the power to restrict access into and around sensitive coastal facilities, including Honolulu Harbor, during times of "potential danger that do not rise to the level of a national emergency."[148] Second, federal sovereignty would allow the military to exclude vessels from N.D.S.A.s during training exercises.[149] Third, state sovereignty would allow Hawaii to exert greater control over the federal government via the Coastal Zone Management Act (CZMA).[150]

None of these arguments is compelling. First, even if the state owns the submerged lands, the federal government retains the power to exclude persons and vessels from navigable waters; and second, most federal activities are subject to the same CZMA consistency standards whether or not they occur on federal lands.[151]

A. The Power to Exclude Vessels From Naval Defensive Sea Areas

Major Woods argues that federal sovereignty over N.D.S.A.s would improve the federal government's ability to exclude vessels. This,

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[146] S. Rep. No. 675, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 1362.

[147] *See supra* text accompanying note 93.

[148] Woods, *supra* note 12, at 133.

[149] *Id.* at 134.

[150] *Id.* at 133-34.

[151] *See infra* notes 167-70 and accompanying text.

however, is not the case. Even without owning the submerged lands, Congress retains plenary power to restrict access to navigable waters for national interests.[152] Congress, in turn, has authorized the President to establish N.D.S.A.s in the interest of national security.[153] The only court to specifically consider this issue held that the President may establish N.D.S.A.s at any time, even in peacetime.[154] Once an area is established, local "Entry Control Commanders" exercise authority over access.[155] Access may be restricted for any reason related to national defense, including military training.[156]

Even outside of established N.D.S.A.s, the federal government has broad authority to restrict access to navigable waters. For example, the Secretary of the Army may restrict navigable waters "to prevent injuries from target practice."[157] The Coast Guard may "establish[] water or waterfront safety zones, or other measures for limited, controlled, or conditional access and activity when necessary for the protection of any vessel, structure, waters, or shore area."[158]

A subtle difference exists, however, between state and federal ownership. If the federal government owns N.D.S.A.s "*in toto*," as Major Woods claims,[159] the military could restrict access at any time for any reason. If the state owns these areas, any restrictions must be founded on a congressional delegation of authority.[160] Since Congress has broadly delegated the authority to restrict navigable waterways, this is not a significant burden for the military. In summary, federal sovereignty does nothing to enhance the military's ability to restrict access to navigable waters for bona fide national defense purposes.

B. Federal Consistency

An alternative rationale the military advances for exerting a claim of federal ownership of submerged lands in N.D.S.A.s concerns the

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[152] Feliciano v. United States, 297 F. Supp. 1356 (D.P.R. 1969), *aff'd*, 422 F.2d 943 (1st Cir. 1970), *cert. denied*, 400 U.S. 823 (1970); Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979), *aff'd in part, vacated in part*, 643 F.2d 835 (1st Cir. 1981). *See supra* note 135.

[153] *See supra* text accompanying note 32.

[154] *Feliciano*, 297 F. Supp. at 1359.

[155] *See supra* note 28 and accompanying text..

[156] *Feliciano*, 297 F. Supp. at 1365-66.

[157] 33 U.S.C. § 3 (1988).

[158] *Id.* § 1225(2)(C) (1988).

[159] Woods, *supra* note 12, at 142.

[160] *See supra* note 135.

CZMA.[161] Major Woods argues that federal activities within N.D.S.A.s are subject to reduced state control if the submerged lands are federal, as opposed to state, property.[162] In light of recent amendments to the CZMA,[163] however, the issue of ownership is not a significant consideration.

The CZMA establishes a complex system of federal-state interaction for the management of the nation's coastal resources. Under the CZMA, Congress encourages coastal states to develop comprehensive management programs for their coastal zones.[164] In exchange, Congress provides financial assistance[165] and allows the states to exert some degree of control over federal activities that affect the states' coastal zones.[166]

Once the Secretary of Commerce approves the state's management program, federal agencies must comply with the CZMA consistency provisions.[167] The CZMA identifies four classes of activities that require consistency and assigns requirements for each class.[168] Several of these consistency provisions contain "escape clauses." For example, if a federal court issues a final judgment, decree, or order that a specific federal agency activity does not comply with the consistency provisions,

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[161] 16 U.S.C.A §§ 1451-1464 (West 1985 & Supp. 1991).

[162] Woods, *supra* note 12, at 131-34.

[163] Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990) (codified at 16 U.S.C. §§ 1451-1464 (West 1985 & Supp. 1991).

[164] 16 U.S.C.A. § 1453(1) (West Supp. 1991) defines the "coastal zone" as:

> the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends . . . to the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301-1315) . . . . The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise. Excluded from the coastal zone are lands the use of which is by law subject to the discretion of or which is held in trust by the Federal Government, its officers or agents.

Id.

[165] 16 U.S.C.A. § 1455 (West 1985 & Supp. 1991).

[166] *Id.* § 1456.

[167] *Id.*

[168] *Id.* § 1456(c). *See generally* Richard L. Kuersteiner et al., *Protecting our Coastal Interests: A Policy Proposal for Coordinating Coastal Zone Management, National Defense, and the Federal Supremacy Doctrine*, 8 ENVTL. AFFAIRS 705, 717 (1980).

the President may exempt that activity "if the President determines that the activity is in the paramount interest of the United States."[169] In other situations the Secretary of Commerce may waive compliance if the "activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security."[170]

Military officials argue that activities within N.D.S.A.s are exempt from the consistency provisions because of the statutory exemption for federal property.[171] The CZMA states that "[e]xcluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents."[172] The United States Attorney General interpreted this exclusion to apply to all federally owned land, regardless of jurisdictional status.[173] The exception, however, would not apply to a N.D.S.A. if the state owns the submerged lands. Therefore, if the federal government has no property interest in the N.D.S.A.s, the areas are within the "coastal zone" and federal activities are subject to the consistency provisions.

Even if the federal government owns N.D.S.A.s, activities within these "federal enclaves" are not necessarily exempt from the consistency provisions. Prior to the 1990 amendments to the CZMA, any activities "directly affecting" the coastal zone had to be consistent, whether or not they occurred on federal lands.[174] The United States Supreme Court concluded that this provision was specifically intended to encompass activities on "federal parks, military installations, Indian reservations, and other federal lands that would lie within the coastal zone but for the fact of federal ownership."[175] In the 1990 amendments, Congress specifically sought to broaden the scope of the CZMA by

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[169] *Id.* § 1456(c)(1)(B).

[170] *Id.* § 1456(c)(3)(A) (West Supp. 1991).

[171] Woods, *supra* note 12, at 133-34.

[172] *Id.* § 1453(1) (West Supp. 1991).

[173] Kuersteiner et al., *supra* note 168, at 717 n.48 (referring to Letter from Antonin Scalia, Assistant Attorney General, to William C. Brewer, Jr., General Council to National Oceanic and Atmospheric Administration (Aug. 20, 1976)).

[174] Coastal Zone Management Act of 1972, Pub. L. No. 92-583, § 307(c)(1), 86 Stat. 1280, 1285 (1972) (amended 1990).

[175] Secretary of the Interior v. California, 464 U.S. 312, 323 (1984) (holding that "the intent [of the directly affecting language] was to reach at least some activities conducted in those federal enclaves excluded from the . . . definition of the 'coastal zone'").

eliminating the "directly affecting" provision.[176] Currently, any activity that merely "affects any land or water use or natural resource of the coastal zone" is subject to consistency review, regardless of where it occurs.[177] Thus, even fewer activities within federally owned enclaves will be exempted from the consistency provisions. Major Woods contends that federal ownership would allow the military to undertake projects "such as channel dredging or reclamation of submerged lands . . . unfettered by a state review or approval process."[178] Even if this were true prior to the 1990 CZMA amendments, major projects such as this will not escape the new consistency requirements regardless of federal ownership.

In summary, federal ownership of N.D.S.A.s would not allow the military to escape the CZMA consistency provisions. Only activities which have absolutely no spill-over effects would be exempt. Under state ownership, all federal activities within these areas would have to be "consistent to the maximum extent practicable with the enforceable policies of approved State management programs."[179] In many situations, either the President or the Secretary of Commerce may waive compliance with the consistency provisions in the interest of national security. Accordingly, the only benefit of ownership for the federal government would be reduced state intervention in minor activities. Since, as a general proposition, the less impact a given activity has on the coastal zone, the fewer the burdens imposed by the CZMA, this is not a significant advantage.

VII. Settling the Dispute: The Quiet Title Act

The present controversy could be settled in one of two ways. First, the federal government could quitclaim any interest in the lands other than the federal navigational servitude. Second, the State could bring suit in federal court seeking a declaratory judgment that it owned the lands in question. There is, arguably, a third option of perpetuating the status quo where both the state and federal governments assert ownership rights. Because of the nature of submerged lands in Hawai'i,

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[176] H.R. Rep. No. 964, 101st Cong., 2d Sess. 970 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2675.

[177] 16 U.S.C.A. § 1456(c)(1)(A) (West Supp. 1991).

[178] Woods, *supra* note 12, at 134.

[179] 16 U.S.C.A. § 1456(c)(1)(A) (West Supp. 1991).

the question of legal title has been, in the past, largely moot.[180] It is doubtful, however, that the status quo will suffice for the future, particularly since the State has already begun leasing portions of the lands in question.[181] Unless the federal government voluntarily grants a quitclaim, the only way Hawaii can quiet title is by suing the United States in federal court.

Hawaii, like any other entity, is barred by federal sovereign immunity from suing the United States absent an express waiver of immunity by Congress.[182] Under the Quiet Title Act the United States waived its sovereign immunity with respect to real estate title disputes.[183] This act provides the exclusive means of challenging the United States' interest in real property.[184] In general, actions under the Quiet Title Act must be brought within twelve years of the date of accrual.[185] This twelve year statute of limitation does not apply to states except where the dispute concerns "defense facilities":

> No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.[186]

If the Secretary of the Navy determines that these lands are being used or are required by the United States, the State of Hawaii is barred

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[180] The question of title has not, however, been moot in those coastal states with offshore mineral resources such as oil and gas. Through the 1940s and 1950s there were intense legal and political battles between several of these states and the federal government concerning the right to issue offshore oil and gas leases. *See, e.g.*, United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947). *See generally* Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401, 407-13 (1984); BARTLEY, *supra* note 75.

[181] *See supra* notes 60-61 and accompanying text.

[182] Hawaii v. United States, 676 F. Supp. 1024, 1032 (D. Haw. 1988).

[183] 28 U.S.C.A. § 2409a (West 1978 & Supp. 1991).

[184] Block v. North Dakota, 461 U.S. 273, 286 (1983).

[185] 28 U.S.C.A. § 2409a(g) (West Supp. 1991).

[186] *Id.* § 2409a(h).

from bringing suit if it "knew" of the claims for more than twelve years. The Quiet Title Act states:

> Notice for the purposes of the accrual of an action brought by a State under this section shall be—
> (1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or
> (2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.[187]

As discussed previously, the United States' actions in establishing N.D.S.A.s and undertaking projects for the benefit of navigation are consistent with state ownership.[188] The mere establishment or use of these areas does not, therefore, qualify as "open and notorious" use. The question of whether the United States officially notified the state of its ownership claims more than twelve years ago is, however, more difficult. The existence of one uncontroverted instance of notice suffices to trigger the statute of limitations.[189]

In 1972 the State of Hawaii submitted a request for a quitclaim deed to 31.515 acres of land at the Keehi Beach Naval Recreation Facility to be used for the expansion of Honolulu Airport.[190] The Navy interjected that the request should include all submerged lands within the ultimate airport boundary since the United States held title to these lands.[191] The Federal Aviation Administration, while recognizing that Hawaii disputed the Navy's ownership claims, suggested that the state amend its quitclaim request to include all submerged lands required for the airport in order to secure federal funding under the Airport and Airway Development Act of 1970.[192] Shortly thereafter, the State

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[187] *Id.* § 2409a(k).

[188] *See supra* notes 109-13 and accompanying text.

[189] Nevada v. United States, 731 F.2d 633, 635 (9th Cir. 1984); Hawaii v. United States, 676 F. Supp. 1024, 1033 (D.C. Haw. 1988).

[190] Letter from Fujio Matsuda, Director of the Hawaii State Dept. of Transportation, to Herman Bliss, Chief of the Federal Aviation Administration Pacific Region Airports Division (Jan. 20, 1972) (on file with author).

[191] Letter from Roy Markon, Acting Assistant Commander for Real Property Management, Naval Facilities Engineering Command, to Jack Webb, Director of the Federal Aviation Administration Pacific Region (Sept. 5, 1972) (on file with author).

[192] Letter from Herman Bliss, Chief of the Federal Aviation Administration Pacific Region Airports Division, to Owen Miyamoto, Chief of the Airports Division, Hawaii State Dept. of Transportation (Oct. 4, 1972) (on file with author). At the time,

amended its request to include the entire area required for construction of the reef runway, circulation channels, borrow areas, and clear zones.[193] The State was apparently concerned about the possibility of a title dispute jeopardizing federal funding for the airport expansion.[194]

The question then becomes whether the Navy's ownership claims were "sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands."[195] The federal government could argue that the 1971 Hawaii Attorney General opinion and the 1972 quitclaim request evidence the State's actual knowledge of the federal government's claims. Hawaii, on the other hand, could argue that the Navy only claimed ownership of those lands within the ultimate airport boundary, not lands within the entire Honolulu and Pearl Harbor N.D.S.A.s. Although it is difficult to predict how a court would rule, the State may have waited too long to press its ownership claims in these areas.

The situation in Kāne'ohe Bay, however, is different. Although the basis for the federal government's ownership claims is similar in all of the N.D.S.A.s, it appears that the federal government has not specifically asserted an ownership interest in Kāne'ohe Bay until very recently.[196] In 1989 a Marine Corps Officer sent a letter to State

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Congress forbade federal funding for any airport development project unless a state, a state agency, or a political subdivision thereof held "good title . . . to the landing area of the airport or the site thereof." Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 16(c)(1), 84 Stat. 219, 227 (1970) (amended 1973). Congress amended this section in 1973 to permit development on property owned by the United States. Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, § 4, 87 Stat. 88, 89 (1973) (repealed 1982).

[193] Letter from Fujio Matsuda, Director of the Hawaii State Dept. of Transportation, to Herman Bliss, Chief of the Federal Aviation Administration Pacific Region Airports Division (Oct. 10, 1972) (on file with author).

[194] Draft letter from Edward Hirata, Director of the Hawaii State Dept. of Transportation, to Elliot Enoki, Assistant U.S. Attorney (Jan. 6, 1988) (concerning submerged lands in Keehi Lagoon) (on file with author).

[195] 28 U.S.C.A. § 2409a(k) (West 1978 & Supp. 1991).

[196] There apparently was some discussion between the military and the state concerning ownership of Kāne'ohe Bay prior to 1989, but there does not seem to have been any communications sufficient to begin the statute of limitations. The 1976 Hawaii Attorney General opinion, *see supra* note 46, discusses the ownership of submerged lands in Kāne'ohe Bay, but it is not clear what prompted the Board of Land and Natural Resources to request the opinion. The issue of federal ownership of Kāne'ohe Bay also appears in internal military correspondence as early as 1971, but there is no evidence that this information was communicated to the state. *See* Woods, *supra* note 12, at 139 n.48 (discussing a 1971 memorandum of law drafted by Counsel for the Naval Facilities Engineering Command).

Senator Mike McCartney advising that "'ownership' of all submerged lands within the [Kaneohe Bay N.D.S.A.] rests with the Federal, not State, Government."[197] This letter is probably sufficient to begin the statute of limitations. The State, therefore, has until 2001 to bring suit to quiet title to the submerged lands within Kāne'ohe Bay. A successful suit in Kāne'ohe Bay would put considerable political pressure on the federal government to relinquish ownership claims in the remaining N.D.S.A.s.

VIII. Conclusion

Both the State of Hawaii and the federal government claim ownership of submerged lands underlying naval defensive sea areas. The United States Supreme Court, however, has made it very difficult for the federal government "to overcome the strong presumption against the defeat of state title."[198] The federal government must show that the submerged lands were specifically set aside for the use of the United States and must show that Congress affirmatively intended to defeat the future state's claim to the land.

Congress rarely operates with such clear manifestations of intent, and the present case is no exception. Congress may have intended any number of things when it authorized the President to establish N.D.S.A.s, but there is no evidence that it intended to defeat Hawaii's equal footing claims to the submerged lands. As such, the federal government cannot meet the Court's standard. Title to these submerged lands must have vested with the state upon its admission to the Union.

This conclusion, however, does not mean that the federal government "loses." Under Congress' power to regulate navigable waters, the United States retains almost the same power it would hold if title were vested with the federal government. No one has ever argued that these lands contain rich mineral deposits. The military's sole interest appears to be control of these areas in the interest of national defense. Their ability to do so continues unimpaired by a recognition of state ownership. The Navy may retain its N.D.S.A.s without owning the submerged lands.

Although Hawaii could bring suit to quiet title, a better solution is for the federal government to quitclaim these submerged lands, as its

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[197] *See supra* note 48 and accompanying text.

[198] Utah Div. of State Lands v. United States, 482 U.S. 193, 202 (1987).

arguments are weak, both legally and politically. Any official action to assert ownership of these lands could invite increased congressional scrutiny of the N.D.S.A.s in Hawai'i. For example, the military might be called upon to justify its continued retention of these areas since all N.D.S.A.s within the contiguous forty-eight states were abolished by 1947.

Congress might even choose to reexamine the entire N.D.S.A. concept in light of recent developments in international law. Ironically, even though the earliest defensive sea areas were designed to "gain a very high degree of control over foreign vessels in areas of the marginal sea that were sensitive from a national security perspective,"[199] the United States has stated that it will no longer categorically exclude foreign vessels from any portion of the territorial sea.[200] The right of innocent passage includes the right to transit N.D.S.A.s.[201] Thus, the United States is free to exclude United States vessels, but not foreign

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[199] Woods, *supra* note 12, at 129-30.

[200] Section 3 of the 1982 Law of the Sea Convention guarantees to all vessels the right of passage through the territorial seas of any nation. United Nations Convention of the Law of the Sea, U.N. Doc. A/Conf. 62/122, *reprinted in* 21 I.L.M. 1261 (1982). Although the United States has not signed or ratified this Convention, it has stated that the Convention generally reflects customary international law and is binding on all nations. *E.g.*, President's Statement on United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983), *reprinted in* 22 I.L.M. 464 (1983).

In 1989, following a confrontation between U.S. and Soviet military vessels in the Black Sea, U.S. Secretary of State Baker and Soviet Foreign Minister Shevardnaze issued a "Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage." 28 I.L.M. 1444 (1989). The statement declared, in part, that "[a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required." *Id.* at 1446. Since the regulations governing naval defensive sea areas require both prior notification and authorization, these regulations cannot be enforced against a foreign vessel engaged in innocent passage.

A recent change to the Navy's instruction governing administration of naval defensive sea areas recognizes this right of innocent passage. Paragraph I(A) of OPNAVINST 5500.11E states: "The controls prescribed in this instruction requiring entry authorization do not pertain to foreign flag ships exercising their right of innocent passage under international law. The U.S. recognizes the right of innocent passage (without prior notice) for ships of all nations." *Id.*

[201] For example, the Greenpeace vessel Rainbow Warrior recently transited through the naval defensive sea area surrounding Johnston Island without prior notification or approval from military officials. Military officials at Johnston Island did not interfere with the vessel's passage. Interview with Peter Willcox, Master of the Rainbow Warrior, in Honolulu, Haw. (July 13, 1990).

vessels. Congress might not have intended this peculiar result when it authorized the President to establish N.D.S.A.s. Reopening this issue might leave the military in a worse position than it is now.[202]

The State, on the other hand, should recognize the military's legitimate interests in the vicinity of sensitive coastal installations. Any development plans or regulatory schemes impacting N.D.S.A.s should be submitted to military officials for review. The federal government could easily codify this requirement by incorporating it into the existing federal permit system.[203] This approach would avoid needless state-federal confrontation and protect the interests of all parties.

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[202] For an example of the potential pitfalls in this regard, see Feliciano v. United States, 297 F. Supp. 1356 (D.P.R. 1969), *aff'd*, 422 F.2d 943 (1st Cir. 1970), *cert. denied*, 400 U.S. 823 (1970). The defendants claimed that a naval defensive sea area around the island of Culebra, Puerto Rico, violated their constitutional right of access to the island. 297 F. Supp. at 1357. A later court, referring to this decision, noted that "[t]he Navy won [*Feliciano*] but lost the political war that ensued, which culminated in the cessation in 1975 of all weapons training activities in Culebra Island." Barcelo v. Brown, 478 F. Supp. 646, 694 (1979), *aff'd in part, vacated in part*, 643 F.2d 835 (1st Cir. 1981).

[203] For example, the U.S. Army Corps of Engineers' permit system is designed to protect federal interests in the navigable waters. *See, e.g.*, 33 C.F.R. § 320 (1991). Although most of the focus is on preserving the navigational capacity of waterways, the Corps has broad discretion to consider other factors in the "public interest." United States v. Alaska, No. 118, 1992 U.S. LEXIS 2548, at *23 (Apr. 21, 1992).

Residential Use of Hawai'i's Conservation District

I. Introduction

The scarcest commodity in Hawai'i is land. Of the 6425 square miles which comprise the islands, much is unusable mountain, lava,

or gully.[1] Only 1.6% of Hawai'i's land area is in residential use.[2] While the demand for buildable homesites increases, ninety-five percent of the land remains classified for agricultural or conservation use.[3] Conservation lands are part of the Conservation District which is composed of lands classified as such by the State of Hawaii's Land Use Commission.[4] The Conservation District includes watershed, floodplain, parklands, wilderness, beaches, wildlife reserves, scenic and historic sites, forest reserves, and open space areas.[5]

Residential use of land located in the Conservation District has become an issue of intense public interest.[6] On one side are those who think lands in the Conservation District should not be developed at all, and on the other are those who think development is reasonable and necessary.[7] Part I of this paper examines the legal basis for residential use in the Conservation Districts at the statutory and regulatory level. Part II examines the history of the statutes and administrative rules to ascertain the reasons for residential use policy.

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[1] *Natural Resources*, PAC. BUS. NEWS, May 1989, at 71, *available in* LEXIS, Nexis Library, archive file.

[2] *Id.*

[3] DEPARTMENT OF BUSINESS AND ECONOMIC DEVELOPMENT, THE STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT 176 (1989) [hereinafter STATE OF HAWAII DATA BOOK].

[4] The Land Use Commission classifies land and sets the boundaries between districts under the land use law. HAW. REV. STAT. § 205-2 (Supp. 1991).

[5] *Id.*

[6] THE AUDITOR, STATE OF HAWAII, REVIEW OF THE REGULATION OF RESIDENTIAL CONSTRUCTION IN THE CONSERVATION DISTRICT: A REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF HAWAII 1 (Jan. 1991) [hereinafter AUDITOR].

[7] The Hawaii Constitution offers little clarification because it simultaneously provides for both the utilization and the protection of Hawai'i's conservation lands. Article XI, Conservation, Control and Development of Resources, states:

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

HAW. CONST. art. XI, § 1. The prodevelopment component of the constitutional provision to "promote the development and utilization of these resources in a manner consistent with their conservation," *id.*, differs from the language of the statute "to allow and encourage the highest economic use thereof consonant with requirements for the conservation and maintenance of the purity of the water supplies . . . ." HAW. REV. STAT. § 183-41(c)(1) (1985).

Part III of the paper examines the application of the rules to two cases where residential use permits have generated controversy. The proposed Fazendin house on Mount 'Olomana has, perhaps, received the most public attention and has inspired legislative action and gubernatorial veto.[8] Similarly, the Wacor Corporation's proposal for a house in Lanikai is instructive because it illuminates problems with the rules and administrative procedures governing residential use in the Conservation District.[9]

In response to public dissatisfaction with certain residential permits, the 1990 Legislature requested the Auditor of the State of Hawaii to review the regulation of residential construction in the Conservation District.[10] The Auditor's report recommended changes in the statutes and rules. Part IV of this paper examines the Auditor's recommendations, legislative proposals, and other informal recommendations for changes in the residential use policy of the Conservation District. Finally, the conclusion delineates those proposals that could achieve a residential use policy most responsive to public needs.

II. Legal Basis for Residential Use Of Conservation Land

A. General Framework

In 1961, Hawai'i undertook statewide zoning with the passage of Act 187, the Land Use Law.[11] The law assigned all land in Hawai'i one of three classifications: urban, agricultural or conservation. Later, the legislature added the rural classification.[12] Lands classified as conservation account for forty-seven percent of the total land area. Agriculture comprises another forty-seven percent while urban and rural account for five percent and one percent, respectively.[13] The Land Use Commission classifies land and sets the boundaries between districts.[14]

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[8] *See infra* notes 161-64 and accompanying text.

[9] *See infra* notes 206-21 and accompanying text.

[10] Auditor, *supra* note 6, at 1.

[11] Act 187, 1st Leg., Reg. Sess. (1961), 1991 Haw. Sess. Laws 299 (codified at Haw. Rev. Stat. ch. 205 (1985)).

[12] David L. Callies, Regulating Pradise: Land Use Controls in Hawaii 7 (1984).

[13] State of Hawaii Data Book, *supra* note 3, at 176.

[14] Haw. Rev. Stat. § 205-2 (1985); Auditor, *supra* note 6, at 3.

Once land is included in the Conservation District its use is governed by the Department of Land and Natural Resources (Department or D.L.N.R.), a state agency.[15] Under Act 187, the land that comprised the forest and water reserve zones pursuant to Hawaii Revised Statutes section 183-41 became the Conservation District.[16] In 1965 the D.L.N.R. planning office estimated that thirty-three percent of the Conservation District was privately held,[17] but today there are no official estimates of how much Conservation District land is in private ownership.[18]

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[15] HAW. REV. STAT. § 205-5(a) (1985). The county zoning ordinances regulate land use in the urban, rural, and some of the agricultural districts, while state law directly regulates land use in the Conservation District. CALLIES, *supra* note 12, at 9.

[16] HAW REV. STAT. § 205-2(4). The Land Use Law defines the Conservation District as follows:

> Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept.

Id. § 205-2(e) (Supp. 1991).

[17] ECKBO, DEAN, AUSTIN & WILLIAMS, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW PREPARED FOR THE STATE OF HAWAII LAND USE COMMISSION 84 (1969) [hereinafter ECKBO].

[18] While the D.L.N.R. does not release official figures on how much of the Conservation District is privately held, some information can be gleaned from the *State of Hawaii Data Book*. For example, 327,845 acres of the Conservation District are private forest land while 840,540 acres are "state owned and privately owned lands under surrender agreement." STATE OF HAWAII DATA BOOK, *supra* note 3, at 513. This data is incomplete since it deals only with 1,168,385 acres of forest land. The State Department of Finance estimates the total Conservation District at 1,955,082 acres. *Id.* at 178. Furthermore, there is no compiled information on the number of parcels or the percentage of parcels privately held within any Conservation District subzone. The writers of the State Functional Plan 1991 for Conservation Lands noted this problem: "Current methods of information retrieval and analysis of conservation lands are not as efficient as they would be if put into a computer data base program." THE HAWAII STATE PLAN, CONSERVATION LANDS STATE FUNCTIONAL PLAN 9 (1991). The State Functional Plan further notes that a concise inventory of land to be managed is essential to any management program. *Id.* Thus, management decisions made by the D.L.N.R. on whether residential use is appropriate for a given parcel must be made in the absence of an efficient information retrieval system.

The D.L.N.R. determines the uses of the Conservation Districts by creating subzones and establishing permitted uses within those subzones.[19] When establishing permitted uses in the subzones, the statute directs the D.L.N.R. to give full consideration to available data "so as to allow and encourage the highest economic use thereof" consistent with the conservation goals of the statute.[20] The Department must adopt regulations governing land use which "will not be detrimental to the conservation of necessary forest growth and conservation and development of water resources adequate for present and future needs and the conservation and preservation of open space areas for public use and enjoyment."[21] The Department's regulations have the force and effect of law.[22]

The forest and water reserve zones statute, *Hawaii Revised Statutes* section 183-41, specifically mentions residential use twice.[23] It is permitted as a nonconforming use in any subzone so long as the use was established or intended by July 1, 1957.[24] If it is not detrimental to good conservation practices, residential use is also a use which may be permitted in certain subzones.[25]

In contrast, the Land Use Law, *Hawaii Revised Statutes* chapter 205, does not specifically mention residential use of the Conservation District. The Land Use Law provides for the Conservation District to include areas necessary for "other related activities; and other permitted uses not detrimental to a multiple use conservation concept."[26] Until 1978, the D.L.N.R. regulations defined "multiple use" as "utilizing a specified parcel of land for more than one activity or use, whenever permitted by law, such uses being both harmonious and compatible."[27] Although the D.L.N.R. regulations dropped the definition of multiple use, the D.L.N.R. has consistently permitted some residential use under a multiple use rationale.[28]

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[19] HAW. REV. STAT. § 26-15 (1985).

[20] *Id.* § 183-41(c)(1).

[21] *Id.* § 183-41(c)(3).

[22] *Id.* § 183-41(c)(2).

[23] *Id.* § 183-41(b), (c)(3).

[24] *Id.* § 183-41(b).

[25] *Id.*

[26] *Id.* § 205-2(4)(e) (Supp. 1991).

[27] D.L.N.R. Reg. 4 § 1(A)(15) (1964).

[28] No official records of the number of single family dwellings in the Conservation District exist. An informal count of D.L.N.R. file entries for applications for new

Responsibility for controlling use within the nearly two-million-acre[29] Conservation District is vested in the Board of the Department of Land and Natural Resources (known as the Land Board, the B.L.N.R., or the Board.)[30] The Board itself is composed of six members, one from each district and two who serve at large. The Governor appoints members for four-year terms with the advice and consent of the state Senate.[31] The Board members serve without compensation except for the chairman, who is a fulltime employee.[32] The most controversial aspect of the Conservation District land management is the permitting process conducted by the Board.[33] The Board makes its decisions based on department regulations or rules promulgated according to law.[34] The rules describe the permitting process which gives the Board wide discretion to allow residential use.[35]

Procedures for contesting Board decisions are set out in the D.L.N.R. Rules of Practice and Procedure.[36] If an applicant for residential use believes that he or she has been unfairly denied a permit, the applicant may petition for a contested case hearing.[37] If the application is denied at the contested case hearing, the applicant may appeal to the circuit court pursuant to the Hawaii Administrative Procedure Act.[38]

B. The Subzones

Hawaii Revised Statutes section 183-41 authorizes the D.L.N.R. to establish subzones and to specify the land uses in those subzones. The uses may include "farming, flower gardening, operation of nurseries

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residential construction shows that about 10 single family dwellings were approved by the Board each year from 1967 to 1977. The Auditor cited 10 applications a year from 1985 to 1989. AUDITOR, *supra* note 6, at 2.

[29] STATE OF HAWAII DATA BOOK, *supra* note 3, at 176.

[30] CALLIES, *supra* note 12, at 9. The precise count of acreage in the Conservation District varies from year to year. In 1990 the Land Use Commission estimates placed 1,960,976 acres in the Conservation District. STATE OF HAWAII DATA BOOK, *supra* note 3, at 176.

[31] HAW. REV. STAT. §§ 26-15, 26-34 (1985).

[32] *Id.* § 26-15.

[33] CALLIES, *supra* note 12, at 9.

[34] HAW. ADMIN. R., tit. 13, ch. 2 (1981).

[35] HAW. ADMIN. R. §§ 13-2-19 to 13-2-25.

[36] *Id.* §§ 13-1-2 to 13-1-42.

[37] *Id.*. § 13-1-28. Other interested parties may also have a right to contest Board decisions. *See infra* notes 90-98 and accompanying text.

[38] HAW. ADMIN. R. § 13-1-31(i) (1981).

and orchards . . . or residential use."[39] Currently the regulations provide for four major subzone classifications: protective, limited, resource, and general.[40] Further, each subzone designation describes "permitted uses" for that subzone.[41] The protective subzone classification is the most restrictive. Its objective is to protect watersheds, wildlife sanctuaries, and significant archaeological and geological features.[42] The protective subzone permits research, education, and recreation, activities that require no facilities. It also permits forest management and government use where the public benefit outweighs any impact on the conservation district.[43] The limited subzone is used where natural conditions suggest constraints on human activities, for example, a slope of forty percent or more, volcanic activity, or susceptibility to flooding.[44] The limited subzone permits what is permitted in the protective subzone plus flood control projects and harvesting of timber.[45]

The objective of the resource subzone classification is to allow sustained use of land suitable for growing timber or suitable for future parksites.[46] The resource subzone allows the same uses as do the protective and limited subzones plus aquaculture, artificial reefs, and commercial fishing.[47] The least restrictive classification is the general subzone. The objective of the general subzone is to "designate open space where specific conservation uses may not be defined but where urban use would be premature."[48] The general subzone permits all of the uses of the other three subzones plus development of water collection, storage, and transmission facilities.[49]

In addition, there are the special subzone classifications created to encompass specific projects on conservation land including a college, a nursing home, convalescent hospital, and various educational parks.[50] None of the subzones list residential use as a "permitted use." Under

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[39] HAW. REV. STAT. § 183-41(c)(3) (1985).
[40] HAW. ADMIN. R. §§ 13-2-11 to 13-2-14 (1981).
[41] *Id.* §§ 13-2-11 to 13-2-15.
[42] *Id.* § 13-2-11.
[43] *Id.* § 13-2-11(c)(1-8).
[44] *Id.* § 13-2-12.
[45] *Id.* § 13-2-12(c)(1-4).
[46] *Id.* § 13-2-13.
[47] *Id.* § 13-2-13(c)(1-4).
[48] *Id.* § 13-2-14.
[49] *Id.* § 13-2-14(c)(1-2).
[50] *Id.* § 13-2-15.

the present system of subzones, residential use, when it occurs, is either discretionary or nonconforming.

C. Administrative Regulations

The regulations or rules governing the Conservation District are found in title 13, chapter 2 of Hawaii Administrative Rules. The Board promulgates the rules after public hearings and submits them to the Governor for approval.[51] Once approved, the rules have the force of law.[52] In addition to creating the subzones, the rules set forth procedures for making a Conservation District Conditional Use Application (C.D.U.A.).[53] All uses not specifically permitted in the rules are conditional uses and require a C.D.U.A.[54] Within guidelines the Board exercises wide discretion to deny or approve a C.D.U.A.[55] The rules also allow the Board to approve applications which deviate from the guidelines so long as the deviation does not result in "any significant adverse effects to the environment" or "conflict with the objective of the subzone."[56]

In addition to C.D.U.A. procedures delineated in the rules, the forest and water reserve zones statute imposes a time limit for Board action. *Hawaii Revised Statutes* section 183-41 requires the Board to render a decision within 180 days.[57] If the Board does not give notice, hold a hearing, and render a decision within the 180-day period, the owner may automatically put his land to the use requested.[58] Much of the controversy surrounding land use in the Conservation District focuses on the C.D.U.A. process.[59]

D. Nonconforming Use

The Board approves C.D.U.A.s for residences under two categories: nonconforming use and conditional use. The statute recognizes two

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[51] HAW. REV. STAT. § 91-3 (1985).

[52] *Id.* § 183-2 (1985).

[53] HAW. ADMIN. R. §§ 13-2-19 to 13-2-25 (1981).

[54] *Id.* § 13-2-19(a).

[55] *Id.* § 13-2-21.

[56] *Id.* § 13-2-21(c)(1-4).

[57] HAW. REV. STAT. § 183-41(a) (1985); HAW. ADMIN. R. § 13-2-20 (1990).

[58] HAW. REV. STAT. § 183-41(a); HAW. ADMIN. R. § 13-2-20(a) (1990). The Board may, at the applicant's request, approve an extension of 90 days for the preparation of an environmental impact statement or to process a petition for a contested case hearing. *See* AUDITOR, *supra* note 6, at 13.

[59] CALLIES, *supra* note 12, at 9.

types of nonconforming use: existing and prospective. Existing nonconforming use is any use that was underway when the law was passed.[60] Prospective nonconforming use applies to any parcel of not more than ten acres upon which real property tax was being paid on January 31, 1957, and which was held and intended for residential use.[61] Neither of these statutory nonconforming uses has a closing date or time limit; presumably, once established, nonconforming status continues indefinitely.[62]

The rules expand upon *Hawaii Revised Statutes* section 183-41(b), defining three types of nonconforming use. First, the rules define existing nonconforming use as a right to continue a use established by October 1, 1964, or a use established prior to the parcel's inclusion in the Conservation District.[63] This provision gives landowners seven years longer to establish the nonconforming use than does section 183-41(b). The rules also allow uses established prior to inclusion in the Conservation District. Theoretically, a use would be established whenever it predated the inclusion of the parcel in the Conservation District. Thus, if the Land Use Commission includes new land in the Conservation District, new nonconforming uses could be created.

Next, the rules define prospective nonconforming use. Substantially like the statutory prospective nonconforming use, it includes land that was "held and intended" for residential or farming use on January 31, 1957.[64] As a practical matter, it is difficult to prove that a parcel

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[60] HAW. REV. STAT. § 183-41(b) (1985).

[61] *Id.*

[62] The definition of nonconforming use in § 183-41(b) does not provide for any closing off or end point to nonconforming use. It is beyond the scope of this paper to discuss whether the landowner of a parcel qualifying for such residential nonconforming use may claim a vested right to build that residence. For a discussion of vested rights, see David L. Callies, *Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAW. L. REV. 167, 168-83 (1979).

[63] HAW. ADMIN. R. § 13-2-1 (1990).

[64] *Id.* The statute declares nonconforming any parcel of ten acres or less "contained within the boundaries of the forest reserve which, as of January 31, 1957, was subject to real property taxes and upon which the taxes were being paid, and which was held and intended for residential or farming use." HAW. REV. STAT. § 183-41(b) (1985). The rules, on the other hand, omit "contained within the boundaries of the forest reserve." HAW. ADMIN. R. § 13-2-1(2) (1990). Since the Conservation District encompasses not only the pre-1957 forest reserves, but also coastline, parklands, and other sensitive areas assigned by the Land Use Commission, the elimination of this phrase from the D.L.N.R. rules allows parcels to receive the nonconforming designation

was, or was not, "held or intended for residential use." A landowner who can prove nonconforming status has a statutory right to build a residence regardless of the subzone.[65] The Board gives nonconforming status to any parcel of not more than ten acres upon which property tax was being paid on the requisite date.[66] The rules limit prospective nonconforming use to one residential dwelling or one farm with one residential dwelling.[67]

The rules lastly define the single family residential use of *kuleana* land.[68] *Kuleana* land refers to land granted to native tenants in fee simple during Hawai'i's Great *Mahele*.[69] The D.L.N.R. added *kuleana* nonconforming use to the rules in 1990. The *kuleana* rule allows parcels to qualify for nonconforming status which otherwise would not, provided the landowner can prove the parcel was a *kuleana* of the Great *Mahele*.[70] The D.L.N.R. added *kuleana* nonconforming use in response to the belief that the legislature's original intention was to include *kuleana* land in nonconforming use.[71] Depending on how the Board applies the *kuleana* rule, many parcels could qualify for new residential construction.[72]

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without having been part of the original forest reserves. On at least one occasion, the Board conferred nonconforming status to a parcel that was not part of the original forest reserves. AUDITOR, *supra* note 6, at 19, 23. Since nonconforming designation allows a residence in even the most restrictive subzones, opponents of residential use have been frustrated by this loophole in the nonconforming designation.

[65] HAW. REV. STAT. § 183-41(b) (1985). Interview with Staff Planner, Hawaii State Department of Land and Natural Resources, in Honolulu, Haw. (Apr. 22, 1991).

[66] *Id.*

[67] HAW. ADMIN. R. § 13-2-1 (1990).

[68] *Id.* § 13-2-1 (1990).

[69] *Id.* § 13-2-1. The Great *Mahele* was a "division of lands which occurred in 1848, when King Kamehameha III and more than 240 of the highest chiefs of the Hawaiian kingdom met and reached an agreement determining their respective individual interests in the different lands within the Islands." JOHN REILLY, THE LANGUAGE OF REAL ESTATE IN HAWAII 152 (1975). The *Mahele* or division was made into three parts and gave the chiefs the right to present their claims to the Land Commission and receive their awards. In 1850, the Legislature authorized the Land Commission to award to native tenants fee simple title covering the land which they actually occupied and had improved. *Id.*

[70] Interview with Staff Planner, *supra* note 65.

[71] Letter from William Paty, Chairperson, Hawaii State Board of Land and Natural Resources (B.L.N.R.), to Newton Sue, Hawaii State Acting Legislative Auditor (Dec. 21, 1990) (available at D.L.N.R.) (regarding Auditor's review of residential construction in the Conservation District).

[72] There appears to be no compiled data on how many *kuleana* parcels exist within the Conservation District.

In the case of a nonconforming use of an existing building, the rules prohibit the enlargement of that building beyond the size established by October 1, 1964.[73] Critics point out that the legislature established existing nonconforming use as of July 1, 1957, yet the administrative rules allow a nonconforming use of a building as established by October 1, 1964, seven years later. The framers of the statute anticipated this delay when they included the language "or at the time any regulation adopted under authority of this part takes effect."[74] This seven-year window represents the period of time after Act 234 was passed and before the regulations were promulgated. To require the public to abide by a regulatory framework before that framework existed would probably have been unworkable.

Through the C.D.U.A. process, the Board attaches conditions to the permit for nonconforming use to ensure that the proposed residence will "be compatible with the locality and surrounding areas" and that the "buildings . . . shall harmonize with the physical and environmental aspects of the subject areas" as well as numerous other requirements.[75] The rules do not allow the Board to attach a time limit to the nonconforming use.[76] At present, no official data compilation exists regarding the number of parcels potentially qualifying for, or currently in, nonconforming use.[77] It cannot be predicted, therefore, how many parcels would be affected by changes in the law of nonconforming use.

E. Conditional Use

Residences may also be approved as a "conditional use."[78] The D.L.N.R. rules define "conditional use" as "a use, other than a permitted use, including subdivision, which may be allowed by the Board under certain conditions as set forth in this chapter and as determined by the Board."[79] The guidelines which the Board applies for conditional use are often subjective.[80] For example, the Board must

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[73] HAW. ADMIN R. § 13-2-1 (1981).

[74] HAW. REV. STAT. § 183-41(b) (Supp. 1988).

[75] HAW. ADMIN. R. § 13-2-21(a)(1-15) (1981).

[76] HAW. REV. STAT. § 183-41(b) (Supp. 1988).

[77] This data may become available when the Office of State Planning completes its Geographic Information System data base. Interview with Joni Dobbs, The Nature Conservancy, Honolulu, Haw. (Apr. 5, 1991).

[78] AUDITOR, *supra* note 6, at 10.

[79] HAW. ADMIN. R. § 13-2-1 (1990).

[80] AUDITOR, *supra* note 6, at 17.

decide if a proposed residence will be "compatible with the locality and surrounding areas" and "appropriate to the physical conditions and capabilities" of the land.[81] The Board must also subjectively decide whether the proposed buildings and structures "harmonize" with the environment and whether they preserve or improve upon natural beauty.[82] In addition, the Board may decide to deviate from the standards, conditions, and guidelines.[83] When the Board deviates, it must make a satisfactory written justification for doing so.[84] In practice, the Board approves conditional use for residential dwellings in the general and resource subzones and denies them in the limited and protective subzones.[85]

Critics challenge the legality of the conditional use designation; however, the Hawaii Supreme Court established its legality beyond doubt.[86] In *Stop H-3 Association v. Hawaii Department of Transportation*, the Board approved as a "conditional use" a C.D.U.A. for the H-3 freeway to pass through the protective subzone.[87] The court upheld the authority of the Board to approve and issue conditional use permits.[88] The court found no merit to the argument that the C.D.U.A. was invalid because conditional use exceeded statutory authority.[89] Since the *Stop H-3* decision, there is no question about the Board's authority to issue conditional use permits under the present statutory scheme.

F. Contested Case

In the event that an applicant or other interested party wishes to challenge Board decisions or actions, she may pursue the contested case procedure.[90] A contested case, as described in Chapter 91 *Hawaii Revised Statutes*, the Hawaii Administrative Procedure Act, is a pro-

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[81] HAW. ADMIN. R. § 13-2-21(a)(2),(3) (1990).

[82] *Id.* § 13-2-21(c).

[83] *Id.*

[84] *Id.*

[85] AUDITOR, *supra* note 6, at 9-10.

[86] *Id.* at 10.

[87] 68 Haw. 155, 158, 706 P.2d 446, 449 (1985).

[88] *Id.*; AUDITOR, *supra* note 6, at 10.

[89] 68 Haw. at 162, 706 P.2d at 451.

[90] HAW. REV. STAT. §§ 91-1, 91-9 (1985). "Party" is defined as "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party . . . ." *Id.* § 91-1(3). The D.L.N.R. rules further specify who may be admitted as a party. HAW. ADMIN. R. § 13-1-21 (1985).

ceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.[91] In addition to following the procedures in Chapter 91, persons wishing to contest Board decisions must follow the contested case procedures described in the D.L.N.R. rules.[92] Subchapter 5 of the D.L.N.R. rules augments the basic contested case procedures found in Chapter 91, *Hawaii Revised Statutes*.[93] Subchapter 5 of the D.L.N.R. rules requires that an interested party request a contested case hearing "by the close of the public hearing (if one is required) or the Board meeting at which the matter is scheduled for disposition (if no hearing is required)."[94] In addition, the person requesting the contested case must file a written petition with the Board not later than ten days after the close of the public hearing or the Board meeting, whichever is applicable.[95] The Board then decides whether a contested case is warranted.[96] If so, the Board may hear the contested case, or it may appoint a special hearing officer.[97] The purpose of the contested case is to "provide the Board an opportunity to establish an adequate formal record for judicial review of its decision and order."[98] Subchapter 5 also provides for prehearing conferences, exchange of exhibits, a verbatim record of the evidence presented at hearings, and the cross-examination of witnesses.[99] An aggrieved party may appeal the contested case for judicial review under *Hawaii Revised Statutes* section 91-14(a).

In addition to the contested case procedure, a party dissatisfied with the Board's decision may "resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided

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[91] HAW. ADMIN. R. § 13-1-2 (1982).

[92] *Id.* § 13-1-28 to 13-1-42; *see* Simpson v. Dept. of Land and Natural Resources, 8 Haw. App. 16, 24, 791 P.2d 1267, 1273 (1990).

[93] HAW. REV. STAT. §§ 91-1 to 91-14 (1985).

[94] HAW. ADMIN. R. § 13-21-29(a) (1982).

[95] *Id.* The Board may waive the time for making the oral request or written petition. *Id.* In a recent case, the Hawaii Intermediate Court of Appeals held that the "minimum requirements of fairness" dictated that the Board order a contested case hearing for an applicant although the applicant had not requested the contested case before the close of the pubic hearing or board meeting at which the issue was to be decided. *Simpson*, 8 Haw. App. at 27, 791 P.2d at 1274.

[96] HAW. ADMIN. R. § 13-1-30 (1982).

[97] *Id.* § 13-1-32(d).

[98] *Simpson*, 8 Haw. App. at 24, 791 P.2d at 1273.

[99] HAW. ADMIN. R. §§ 13-1-28 to 13-1-42 (1982).

by law."[100] The aggrieved party wishing a de novo review in the courts may be precluded from court by the doctrine of primary jurisdiction.[101] The doctrine of primary jurisdiction applies "when a court and an agency have concurrent original jurisdiction to decide issues which have been placed within the special competence of an administrative agency".[102] Although the Hawaii Supreme Court has not decided whether a party may bring an original action in the circuit court under section 91-14(a), it has said that the doctrine of primary jurisdiction would suspend the judicial process until the administrative agency makes its determination.

In *Hawaii Blind Vendors v. Department of Human Services*,[103] the court found that persons aggrieved with an agency decision were not time-barred from an agency hearing although they had failed to request a contested case within the agency time limits.[104] The court stated, "Before a right to relief is barred because of the failure to seek administrative full and fair hearing, the agency process ought to be of such nature as to impress fully upon the litigant the opportunity or recourse it supplies and the consequences of failure to seek such recourse."[105] Because of the uncertainty of the law in this area, the most prudent course for a party dissatisfied with a Board decision is to pursue both the contested case procedure and original court action.

G. Summary

In summary, the legal framework governing residential use in the Conservation District is extensive. The Land Use Law of 1961 incorporated the already established forest and water reserve zone law[106] and assigned the task of administering the Conservation District to the D.L.N.R. The Board of the D.L.N.R. promulgates administrative rules which define the subzones and specify the permitted uses. Residential use is allowed as a nonconforming use and as a conditional use. The Board controls the permitting of residences through the

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[100] HAW. REV. STAT. § 91-14(a) (1985).

[101] Hawaii Blind Vendors Ass'n v. Dep't of Human Servs., 71 Haw. 367, 371, 791 P.2d 1261, 1264 (1990).

[102] *Id.*

[103] 71 Haw. 367, 791 P.2d 1261 (1990).

[104] *Id.* at 374, 791 P.2d at 1265.

[105] *Id.* at 374, 791 P.2d at 1264.

[106] *See supra* notes 11-15 and accompanying text.

C.D.U.A. procedure, and aggrieved parties may challenge the Board's decisions through the contested case procedure.

III. Legislative Intent of Laws Governing the Conservation District

A. History of the Statute

In 1957, the Legislature passed the forest and water reserve zone law, Act 234, which governs land use in the Conservation District.[107] The Board of Commissioners of Agriculture and Forestry continued to administer the forest reserves through 1958.[108] In its annual report the Board of Commissioners stated that the objective of the newly-passed Act was "the readjustment of land use in order to secure the best economic development and utilization of such lands and the encouragement of multiple land uses within the forest reserves."[109] Multiple land use included "agriculture and/or mountain homes, resorts or mountain homes, [and] house lots."[110] This language in the annual report is important because it represents the administering agency's understanding of the legislative intent behind Act 234. In 1959, the Legislature redistributed administrative functions and gave responsibility for wielding the regulatory powers over the forest reserve to the Department of Land and Natural Resources.[111]

Act 234 represented a major shift in land policy.[112] Prior to its passage, landowners could withdraw their land at will from the forest reserve and put it to use.[113] Under Act 234, however, a new set of

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[107] Act 234, 29th Leg. Reg. Sess. (1957), *reprinted in* 1957 Haw. Sess. Laws 299, (codified at Haw. Rev. Stat. ch. 183 (1985)); Roger C. Evans, *Hawaii's Conservation District: Its Evolution, Status and Future* 1 (Jan. 1991) (unpublished manuscript, on file with D.L.N.R.).

[108] *Id.*

[109] 1958 Haw. Bd. of Agric. and Forestry Ann. Rep. 122.

[110] *Id.*

[111] Act 1 § 21, 1st Leg., Sp. Sess. (1959), *reprinted in* 1959 Haw. Sess. L. 61; Act 132 §§ 22, 23, 1st Leg., Reg. Sess. (1961), *reprinted in* 1961 Haw. Sess. Laws 175.

[112] Sen. Stand. Comm. Rep. No. 740, 28th Leg., Reg. Sess., *reprinted in* 1956 Haw. Sen. J. 641.

[113] *Id.* By including their land in the forest reserve, landowners escaped liability for property taxes. George Cooper & Gavan Daws, Land and Power in Hawaii 36 (1990).

regulations governed land in the forest reserves, and owners could no longer withdraw their lands at will. The Governor feared that the new restrictions placed on landowners might be adjudged a taking under the Constitution, requiring landowner compensation.[114] To allay these fears and to soothe landowners, the Legislature included the prospective nonconforming use.[115] The Legislature also included the provision that the Board must act on a proposed use within 180 days, or else the proposed use would be automatically approved.[116]

In 1969, the Legislature amended the forest and water reserve zone law to include the preservation of open space as an objective.[117] "The department shall also give full consideration to the preservation of open spaces . . . so as to maintain, improve, protect, limit the future use of, or otherwise conserve open spaces and areas for public use and enjoyment."[118] As part of the same legislative package, the Legislature amended the land use law to specify that the Conservation Districts include areas necessary for "preserving scenic and historic areas . . . open spaces . . . and other permitted uses not detrimental to a multiple use conservation concept."[119] Since the passage of these amendments, the preservation of open space for scenic integrity has become a major consideration in D.L.N.R. practice.[120] Community objections to proposed residential uses frequently mention sight lines or views of the mountains or ocean that would be altered by the construction of a building on a ridge, beach, or other open space.[121]

B. History of the Regulations

In order to understand the forest and water reserve zone law, it is useful to trace the changes in the administrative rules promulgated by

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[114] Memo to Governor King from Martin Anderson (May 20, 1957) (on file with Hawaii State Archives).

[115] Letter from the Attorney General Office to Governor King (May 31, 1957) (on file with Hawaii State Archives) (regarding passage of Act 234).

[116] SEN. STAND. COMM. REP. No. 740, 28th Leg., Reg. Sess., *reprinted in* 1956 HAW. SEN. J. 642.

[117] An Act Relating to the Preservation of Open Space in Hawaii, Act 182, 5th Leg., Reg. Sess., 1969 Haw. Sess. Laws. 328, (codified at HAW. REV. STAT. § 183-41(c)(1) (1985)).

[118] *Id.* at 329 (codified at HAW. REV. STAT. §205-2(4) (1985)).

[119] *Id.*

[120] Patricia Tummons, *Showdown on Mount 'Olomana*, ENVIRONMENT HAWAI'I, Sept. 1990, at 4 [hereinafter Tummons, *Showdown*].

[121] Interview with Donna Wong, Member of Save Mount Olomana Association, in Honolulu, Haw. (Feb. 22, 1991).

the D.L.N.R. The first version of D.L.N.R. rules, Regulation No. 4, differed markedly from today's regulations found in title 13, chapter 2 of Hawaii Administrative Rules. The original Regulation No. 4 divided the Conservation District into only two subzones: General Use and Restricted Watershed.[122] The Restricted Watershed subzone was limited to "water and forestry resources development," transmission facilities, and government activities.[123] The General Use subzone encompassed the balance of the Conservation District.

Under the 1964 rules, "permitted uses" for the General Use subzone were similar to urban uses.[124] They included "cabins, residences, recreational-type trailers, and accessory buildings of a non-commercial nature."[125] In addition, the rules permitted "resort and related residences; hotels and restaurants; guest and resort ranches . . ." and other recreation facilities of a commercial nature.[126] Although the rules permitted extensive residential development, section C of the regulations required use be "compatible with the locality and surrounding areas and appropriate to the physical conditions and capabilities of the specific parcel" and that it preserve or improve "natural beauty, open space characteristics."[127] Moreover, the rules required residences and other buildings to "harmonize with the physical and environmental conditions."[128] Since the 1964 rules specifically permitted commercial and private residences, there was no need for a discretionary "conditional use" category. Under the 1964 rules, if a landowner wanted to put his land to a non-permitted use, residential or otherwise, he had to put his request in the form of a proposed regulation and pass through the public hearing process.[129] From 1964 to 1968 the public perception was that some of the uses put through the public hearing process actually circumvented regulations and did not comport with the intent of the Conservation District.[130] The Land Use Commission cited as possible abuses the Hawaii Loa College development and the Waialae-Iki subdivision of 26 acres of conservation land for a housing tract.[131]

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[122] ECKBO, *supra* note 17, at 86.
[123] D.L.N.R. Reg. 4 § 2(B)(2) (1964) (on file at D.L.N.R.).
[124] ECKBO, *supra* note 17, at 87.
[125] D.L.N.R. Reg. 4 § 2(B)(1)(b) (1964).
[126] *Id.* § 2(B)(1)(c).
[127] *Id.* § 2(C)(1), (2).
[128] *Id.* § 2(C)(3).
[129] *Id.* § 5(c).
[130] ECKBO, *supra* note 17, at 87.
[131] *Id.* at 87.

Public dissatisfaction with the management of Conservation District lands increased until 1976, when the Senate Committee on Ecology, Environment, and Recreation held hearings on needed revisions for Regulation No. 4.[132] The Environmental Center at the University of Hawaii offered written testimony:

> In the period since the adoption of Regulation 4 and its amendment, significant changes have occurred in the criteria for evaluation of land use and land use decision-making. Increasing weight is being given to social or public values beyond the monetary values identified with financial analyses. Increasing concerns are being expressed for the quality of life, environmental impact, endangered species, coastal zone, open space, etc. and the meeting of these public needs and desires . . . . Yet no recognition of these changes has been incorporated into the regulation which establishes the guidelines for the administration and management of that portion (45 percent) of Hawaii's lands which should most accommodate these public concerns and needs.[133]

The Senate prodded the D.L.N.R. by passing Resolution No. 12 on January 28, 1976, requiring revisions to D.L.N.R. rules.[134] In response, the D.L.N.R. proposed a new Regulation No. 4 which became law March 23, 1978. The 1978 version of Regulation No. 4 redesigned land use administration and decision making in the D.L.N.R. It disposed of General Use and Restricted Watershed classifications and created the familiar four-tier subzone system in use today.[135] In addition, the new Regulation No. 4 dropped most of the "permitted uses" in the old regulation.[136] Residences were no longer specifically permit-

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[132] Environmental Center, Statement for Senate Committees on Ecology, Environment and Recreation and on Economic Development (Mar. 15, 1976) (on file at the Hawaii State Archives).

[133] *Id.*

[134] *See* S. Res. 12, 8th Leg., Reg. Sess. (1976) (enacted) (on file at Hawaii State Archives).

[135] *Id.* For a description of the four-tier subzone system see *supra* notes 39-50 and accompanying text.

[136] Roger Evans, Administrator, D.L.N.R., explained that when a use is specifically permitted, its approval becomes a ministerial act, no discretion is involved. In other words, so long as a use technically fits within a permitted use, the Board cannot deny it. For example, if "parks" were listed as a permitted use, then a landowner who applied for private park use could not be denied such use. Examples of private parks on O'ahu include well-known tourist attractions such as Waimea Falls Park and Paradise Park. Removing residential use from the list of permitted uses was intended to enhance control over residential use in the Conservation District. Interview with Roger Evans, Administrator, Hawaii State Department of Land and Natural Resources, in Honolulu, Haw., (Nov. 20, 1991).

ted. Instead, the new Regulation No. 4 created conditional use as "a use, other than a permitted use, including subdivision, which may be allowed by the Board under certain conditions as set forth in this Regulation and as determined by the Board."[137] The new rules made approvals for residential use entirely discretionary.[138] Since their passage, all residential use, unless it is nonconforming, must be approved as a conditional use. Inappropriate residential use was not singled out by the reformers of Regulation No. 4 as an area of misuse. Thus, the disappearance of residential use from the list of "permitted uses" probably had more to do with the desire to restructure the regulation in general than with a specific desire to curtail residential use.[139] Although the new Regulation No. 4 signified a tightening of policy, the Board has continued to approve residences at the rate of about ten a year since adoption.[140]

The 1964 Regulation No. 4 had eight conditions applicable to residential use in the general subzone.[141] The first, and arguably the

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[137] D.L.N.R. Reg. 4 § 1(A)(6) (1978). Examples of non-residential uses which the Board has approved under conditional use include transmission facilities, television satellite dishes, utility lines, telescopes, university dormitories, the Natural Energy Lab, sewer lines, and water lines. Interview with Roger Evans, Administrator, Hawaii State Department of Land and Natural Resources, in Honolulu, Haw. (Nov. 20, 1991).

[138] Since the new rules no longer listed residential use as a permitted use, residential use, if allowed, was discretionary.

[139] SEN. STAND. COMM. REP. No. 686, 8th Leg., Reg. Sess. *reprinted in* 1976 HAW. SEN. J. 1191.

[140] AUDITOR, *supra*, note 6, at 2, (reporting 10 approved applications for residential use for the years 1985 to 1989). Personal observation of D.L.N.R. file entries corroborated this approximate rate for years not included in Auditor's Report.

[141] D.L.N.R. Reg. 4 § 2(C)(1-8) (1964). Regulation No. 4 provided that:

(1) The use shall be compatible with the locality and surrounding areas, and appropriate to the physical conditions and capabilities of the specific parcel and/or parcels of lands.

(2) The existing physical and environmental aspects of the subject area, such as natural beauty, open space characteristics, etc., shall be preserved or improved, whichever is applicable; and where disturbed, upon termination of a use, shall be restored to a suitable condition.

(3) Buildings, structures and facilities shall harmonize with the physical and environmental conditions of (2) above.

(4) Use of the area shall conform with the program of the appropriate Soil and Water Conservation District and in accordance with technical guides on file in each field (work unit) office of the United States Department of Agriculture Soil Conservation Service.

most important, condition required that use be "compatible with the locality and surrounding areas, and appropriate to the physical conditions and capabilities of the specific parcel and/or parcels of lands."[142] This condition, still existing in the rules today, provides the Board with language to use as a basis to reject many, if not most, of the applications for residential use.[143] Other conditions in 1964 Regulation No. 4 required that buildings harmonize with their surroundings and that the natural beauty and open space characteristics be preserved.[144]

The 1978 revision of Regulation No. 4 maintained all of the 1964 conditions but added seven new ones.[145] The new conditions, numbered

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(5) When provided and/or required, supply and sanitation facilities must have the approval of the Department of Health, and the Board of Water Supply where applicable.

(6) When provided and/or required, boat harbors, docks and similar facilities must have the approval of the Department of Transportation.

(7) The construction, alteration, moving, demolition and repair of any building or other improvement on lands within the Conservation District shall be subject to the building codes of the respective counties in which the lands are located; provided that prior to the commencement of any construction, alteration or repair of any building or other improvement three (3) copies each of the final location map, plans and specifications shall be submitted to the Chairman, or in his absence. . . .

(8) Provisions for access, parking, drainage, fire protection, safety, signs, lighting, and changes in the landscape must have the approval of the Chairman or his authorized representative.

Id.

[142] *Id.* § 2(C)(1).

[143] D.L.N.R. Administrator Roger C. Evans commented that he thought the Board and the staff, perhaps, should have more carefully applied the "compatibility" language of the Conditions to recent applications for residential use. Interview with Roger C. Evans, Administrator, Hawaii State Department of Land and Natural Resources, in Honolulu, Haw. (Sept. 24, 1991).

[144] D.L.N.R. Reg. 4 § 2(C)(1-8) (1964).

[145] *Id.* § 6(A) (1978). The 1978 Regulation No. 4 added the following seven conditions, which are paraphrased:

(9) Applicant must reduce potential nuisance, harm or hazard.

(10) Obstruction of roads, trails and pathways shall be minimized.

(11) Access roads shall be limited to two lanes.

(12) Overloading of offsite roads and facilities shall be minimized.

(13) Clearing shall require prior approval of Chairman.

(14) Cleared areas shall be revegetated within 30 days.

(15) Any construction is to be initiated within one year of approval of the use and completed within three years.

Id.

9 through 15, pertained to reducing nuisance, providing adequate access, revegetating cleared areas, etc. Condition number 15 has become very important to landowners seeking to build residences in the Conservation District. Condition 15 requires that "any work or construction to be done on the land shall be initiated within one year of the approval of the use, and, all work and construction must be completed within three years . . . ."[146] Prior to the imposition of this condition, the Board issued open-ended permits.[147] The one-year time limit makes it difficult, though not impossible, for a landowner to acquire a permit and then resell the property with the permit intact. Thus, condition 15 dampens speculation in Conservation District homesites.

In response to "specific concerns held by various segments of the community," the D.L.N.R. included four guidelines in the 1978 Regulation No. 4.[148] The guidelines required that all applications be reviewed in such a manner that the objective of the subzone be given primary consideration, that applications for subdivision address their relationship to the City and County General Plan, and that all applications meet with the purpose and intent of the Conservation District.[149] Because the wording of the standards, conditions, and guidelines is highly subjective, the meaning depends on the viewpoint of the Board

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[146] *Id.* § 6(A)(15).

[147] For example, C.D.U.A. 1030, approved on July 24, 1978, for the Hurst property in Lanikai has no termination date. Thirteen years have passed and no construction has begun, yet the current holders of the permit contend that it is still valid. *See* Petition for Declaratory Ruling and Appeal from Action of the Chairman of the Board of Land and Natural Resources, Dec. 29, 1989 (available in file OA-1030 at D.L.N.R. office).

[148] D.L.N.R. Reg. 4, introduction (Mar. 23, 1978) (on file at the Hawaii State Archives).

[149] *Id.* § 6(B)(1-4) (1978). The pertinent part of the section reads as follows:

(1) All applications shall be reviewed in such a manner that the objective of the subzone(s) is given primary consideration.

(2) All applications shall be reviewed such that any physical hazard, as determined by the Department shall be alleviated by the applicant when required by the Board.

(3) All applications for subdivision shall address their relationship with the City and County General Plan.

(4) All applications must meet the purpose and intent of the State's Conservation District.

Id.

member applying them.[150] Their effectiveness as a limiting device on Board discretion has not been clearly demonstrated.

To summarize, by removing many of the permitted uses and instituting "conditional use," the D.L.N.R. gave the Board greater control over the Conservation District. The Board's broad discretion, however, is limited by the four-tier subzone system, the standards, conditions, and guidelines in the Department's Regulation No. 4. In 1981, the State replaced Regulation No. 4 with Hawaii Administrative Rules title 13, chapter 2. There were no substantial changes in the rules, but rather the action represented the State's effort to conform all administrative regulation into the same format.[151]

IV. The Application of the Rules to Specific Cases

The Board has processed over 2,500 Conservation District Use Applications of all types since 1964.[152] As a routine matter, it has denied many applications for residential use and approved many others, including residences on Mount Tantalus and Hanalei Bay.[153] On August 23, 1991, the Board voted to acquire two properties where applications for residential uses had been hotly contested. One was the Fazendin property on Mount 'Olomana; the other was the Wacor Corporation property on Ka'iwa Ridge in Lanikai.[154] An analysis of

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[150] Auditor, *supra* note 6, at 17. The Legislative Auditor notes:

> The conditions for building and the guidelines for reviewing applications are often vague and subjective. For example, it is hard to determine whether certain controversial residences violate the vague condition that uses must be "compatible with the locality and surrounding areas." It is hard to decide whether a proposed single-family residence, especially a large one, violates the subjective condition that natural beauty and open space be preserved or improved upon.

Id.

[151] Roger C. Evans, Hawaii's Conservation District: Its Evolution, Status and Future, Department of Land and Natural Resources State of Hawaii 7 (Jan. 1991) (unpublished manuscript on file at D.L.N.R. office).

[152] *See* looseleaf notebook of C.D.U.A. file titles, numbered consecutively (on file at D.L.N.R. Office of Conservation and Environmental Affairs).

[153] Interview with Dean Uchida, Oahu District Land Agent, Hawaii State Department of Land and Natural Resources, in Honolulu, Haw., (Apr. 29, 1991).

[154] Although both of the properties treated in this discussion are located on the island of O'ahu, similar controversies exist regarding properties on other islands, e.g., the lots in the Ha'ena Hui in Hanalei Bay, Kauai, and the Liem property at Hawea Point, Maui. *See* Patricia Tummons, *A Maui Castle is Just a House—like Pyramids are Tombstones!*, Environment Hawai'i, Sept. 1990, at 7.

these two controversial cases illuminates Board practice and highlights areas of difficulty. The history of the Fazendin C.D.U.A. illustrates the application of the rules for nonconforming use, the desirability of size and height restrictions, and the effectiveness of community opposition. The history of the Wacor C.D.U.A. illustrates the Board's use of Condition 15, requiring that construction begin within one year, and the Board's struggle to respond to competing community and landowner interests.

To understand the Board's actions in these two cases, it is useful to go back to January 23, 1981, when the Board clarified its position on residential use by issuing a statement of its practice. The Board summarized its position that one house would be approved in the Conservation District under the following circumstances:

> (1) That each case be treated on its individual merits in accordance with Section Six (6) of Departmental Regulation No. 4 relating to Standards: Land Use Conditions and Guidelines; [and]
> (2) That any landowner taking advantage of this policy place this approval in recordable form, have this made part of the deed instrument . . . .[155]

Elsewhere in the document the Board makes it clear that standard practice is to deny single family residences in the limited subzone.[156]

Today, it is Board practice to approve one house per lot in the general and resource subzones regardless of the size of the lot while denying permit applications for houses in the limited and protective subzones.[157] Any conditions attached to a C.D.U.A. approval must be put in recordable form and made part of the deed instrument.[158] One such condition is that the house be used as a residence, where residence is defined as "a building used or designated and intended to be used as a home or dwelling place for one family."[159] D.L.N.R. staff interpret

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[155] Request to Clarify Policy Regarding Single Family Residence in the Conservation District, Submission by Roger C. Evans, Administrator, Hawaii State Department of Land and Natural Resources, to Susumu Ono, Chairman of the Board, Hawaii State Department of Land and Natural Resources (Jan. 23, 1981) (on file with D.L.N.R.) [hereinafter Clarification].

[156] *Id.* at 1.

[157] AUDITOR, *supra* note 6, at 10. Roger C. Evans, Administrator, explains that the reason for the Board's practice is the criteria for the establishment of each of the subzones. Interview with Roger Evans, *supra* note 136.

[158] Clarification, *supra* note 155, at 1.

[159] HAW. ADMIN. R. § 13-2-1 (1981).

this to mean that a house may not be used as a rental unit; thus the Board denies applications where the proposed residence contains more than one kitchen.[160] This 1981 policy statement continues to be a valid representation of certain principles of Board practice.

A. The Fazendin House on Mount 'Olomana

The use of the Conservation District land on the Mount 'Olomana hillsides has generated intense public interest. As a result of this interest, the legislature decided as a matter of policy that Mount 'Olomana must be preserved.[161] The 1991 Legislature passed a bill directing the Board to take all actions necessary to place all the Conservation District lands on Mount 'Olomana in the protective subzone.[162] Governor Waihee vetoed this bill on the grounds that the Board had already begun the administrative process of protecting Mount 'Olomana.[163] In a separate action, the 1991 Legislature appropriated funds to acquire the Fazendin property on Mount 'Olomana.[164] After the appropriation was in place, the Board voted on August 23, 1991, to acquire the Fazendin property.[165] At this writing, the D.L.N.R. is obtaining an appraisal in preparation for purchasing Fazendin property.[166] The value, and therefore the price the State must pay for the Fazendin's property, will be affected by whether or not Mr. Fazendin had established a right to a permit to a build a residence on his property.

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[160] Telephone Interview with Edward Henry, Planner, Hawaii State Department of Land and Natural Resources (May 2, 1991). Since the mid-1980s, the Board has included the condition that a residence never be rented. The landowner must sign the condition and record a covenant on his deed to that effect. The prohibition against renting becomes a part of the deed and applies to all subsequent owners of the house. *Id.*

[161] Telephone Interview with Hawaii State Representative Cynthia Thielen (Apr. 23, 1991).

[162] *See* H.R. 2107, 16th Leg., Reg. Sess. (1991) (vetoed June 26, 1991).

[163] Governor John Waihee, Statement of Objections to House Bill No. 2107 (June 26, 1991) (on file at the Governor's Office). [hereinafter Waihee]

[164] *See* H.R. 139, Capitol Improvement Projects, Item 8, 16th Leg., Reg. Sess. (1991) (appropriating funds for land acquisition for the Mount 'Olomana Ahiki Equestrian Trial Park). In the final budget, this appropriation was absorbed into Resource Land Acquisitions. *See* Act 296 § IV, B.U.F. 161, item 13, 1991 Haw. Sess. Laws 872.

[165] *See* Minutes of the Board (Aug. 23, 1991) (on file with D.L.N.R. office).

[166] Telephone Interview with Mr. Serikaku, Land Agent, Hawaii State Department of Land and Natural Resources (Oct. 1991).

Mr. Fazendin first applied for a permit to build a house on the ridge line of Mount 'Olomana in 1987.[167] His parcel qualified for nonconforming use, and despite expressions of community concern he easily obtained a permit for a house.[168] The Board imposed the condition that construction begin within one year.[169] Because Fazendin failed to initiate construction within the one-year time period, the Board revoked his permit in September 1988.[170] Fazendin reapplied in October 1988. He proposed a larger house with a free-standing maid's quarters. He also wanted to consolidate his lot with a smaller adjacent parcel.[171] To complicate matters, Fazendin graded his property without a permit and was seeking after-the-fact approval of the grading work.[172] The Board asked Fazendin to clear up the grading violations and pay a fine.[173] Mr. Fazendin did pay the fine although he did not remove his unpermitted driveway.[174] On February 24, 1989, the Board approved Mr. Fazendin's C.D.U.A., subject to a list of twenty-three conditions.[175]

Consistent with Hawaii Administrative Rules section 13-2-20(f), Mr. Fazendin had to submit plans for review, some within sixty days, and some within ninety days. Not only did Mr. Fazendin submit his plans late, but also the plans failed to comply with some of the twenty-three conditions set forth in his C.D.U.A.[176] The D.L.N.R. disapproved his plans on July 23, 1989.[177] The reasons for disapproval enumerated in the Department's letter were the proposed placement of the house on the lot, the three-story style of the house, the maid's quarters as a detached living unit, and the location of the planned stables.[178] The

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[167] *See* C.D.U.A. file 2212 (on file with D.L.N.R. office); *see also* Tummons, *Showdown*, *supra* note 120.

[168] *Id.* at 4.

[169] Submission from Edward Henry, Planner, Hawaii State Department of Land and Natural Resources, to the Board (Aug. 24, 1990) (Doc. No. 8903E) [hereinafter August 24th Submission].

[170] HAW. ADMIN. R. § 13-2-21(a)(15) (1990).

[171] Tummons, *Showdown*, *supra* note 120, at 4.

[172] August 24th Submission, *supra* note 169, at 1.

[173] *Id.*

[174] Tummons, *Showdown*, *supra* note 120, at 4.

[175] August 24th Submission, *supra* note 169, at 1.

[176] *Id.*

[177] *Id.*

[178] Letter from William Paty, Chairman of the Board, Hawaii State Department of Land and Natural Resources, to D. Fazendin (July 23, 1989) (on file with D.L.N.R.) (denying C.D.U.A.).

Board revoked Mr. Fazendin's second C.D.U.A. on February 24, 1990, for failure to initiate construction within one year and failure to have plans approved.[179]

On March 23, 1990, the D.L.N.R. agreed to reconsider Fazendin's application.[180] In the meantime, community opposition to the Fazendin house gathered strength.[181] On April 2, 1990, the Board received three petitions for contested case hearings opposing Mr. Fazendin's residence.[182] However, upon reconsideration, the Board determined that the relevant C.D.U.A. had indeed become null and void on February 24, 1990; thus, the contested case requests were moot.[183]

The intricate history of the Fazendin C.D.U.A. presents several issues of interest. Since the C.D.U.A. was invalidated based on the failure to commence construction within one year, what constitutes "construction"? Was the size of Fazendin's proposed residence instrumental to the Board's decision? Once granted nonconforming status, could Mr. Fazendin's lot lose that status?

1. Plan approval

The requirement that the applicant commence construction within one year as a condition of his permit is contained in section 13-2-21(a)(15) of the rules.[184] The rules also require that prior to the commencement of construction final copies of the location map, plans, and specifications must be submitted to the D.L.N.R. staff for approval.[185] Thus, any construction done without prior plan approval would not qualify as "commencing construction." No matter how

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[179] August 24th Submission, *supra* note 169, at 2.

[180] *See* C.D.U.A. file OA-2212 (on file at D.L.N.R. office). Reconsideration is described in HAW. ADMIN. R. § 13-1-41 (1982).

[181] August 24th Submission, *supra* note 169. Mr. Fazendin's first application passed through the C.D.U.A. process uncontested, while this time three people petitioned for contested case hearings. August 24th submission, *supra* note 169; *see also* SAVE MOUNT 'OLOMANA ASSOCIATION NEWSLETTER, July 1990 (available in D.L.N.R. file C.D.U.A. OA-1030). In addition, the Save Mount 'Olomana Association first began publishing its newsletter in July 1990. *Id.*

[182] *See* August 24th Submission, *supra* note 169, at 2. On April 2, 1990, three parties petitioned for a contested case proceeding. They were Karen Kiefer, Jack and Georgia Hitchcock, and Honolulu City Councilman John Henry Felix. *Id.*

[183] August 24th Submission, *supra* note 169, at 2.

[184] HAW. ADMIN. R. § 13-2-21(a)(15) (1990).

[185] *Id.* § 13-2-21(a)(7).

much physical construction occurred, without plan approval it would not qualify as "commencing construction" under the rules.

Mr. Fazendin's revised plans included a free-standing maid's quarters. Possibly, Mr. Fazendin's plans exceeded an unwritten size limitation.[186] The D.L.N.R. rules define single family residence in section 13-2-1 as a "dwelling place for one family."[187] The Board specifically disapproved the maid's quarters as a detached and independent living unit.[188] Apparently the Board found that the maid's quarters exceeded the definition of single family residence.[189] The Board also objected to the placement of the house on the ridge as opposed to lower on the lot. Sections 13-2-21(a)(1-3) require that use be compatible with the locality, that it preserve natural beauty and open space characteristics, and that it harmonize with the physical environment. The Board, however, did not specifically cite these conditions and guidelines.[190]

Instead, the Board objected to the fact that the proposed house would be three stories on the basis of visual impact. Mr. Fazendin's original plans, which passed without too much objection, had been for a smaller home; the second set of plans seems to have proposed an unacceptable increase in size. Had Mr. Fazendin reduced the size of his house and eliminated the free standing maid's quarters, it is possible he would have received approval. Although there are no limitations on the size of permissible dwellings in the rules, the Board can use other aspects of the rules to limit the size of proposed residences.[191]

2. *Nonconforming status*

The next issue presented by the Board's action on the Fazendin C.D.U.A. is whether, once established, nonconforming status may be removed by the Board. The statute says, "Neither this part nor any regulation enacted under this part shall prohibit" the continuation of

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[186] Presently there is no size limitation on residential construction in the Conservation District. The Legislative Auditor and others propose adding size limitations for residential construction. *See infra* notes 270-76 and accompanying text.

[187] HAW. ADMIN. R. § 13-2-1 (1990).

[188] August 24th Submission, *supra* note 169, at 4.

[189] The D.L.N.R. did not object to the proposed 5000-square-foot size of the house. Tummons, *Showdown*, *supra* note 120, at 4.

[190] *See* August 24th Submission, *supra* note 169, at 4.

[191] See *infra* notes 270-76 and accompanying text for further discussion of size limitations on residences and discussion of the Auditor's recommendations.

lawful nonconforming use.[192] Although it is possible to argue that this sentence applies only to existing nonconforming use, and not the prospective nonconforming use, both definitions are contained in a single paragraph. Once land qualifies for nonconforming use, that use may not be prohibited by the regulations or taken away by the Board.[193]

In *Stop H-3 Association v. State*, the Hawaii Supreme Court made it clear that "[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred."[194] In addition, the court said actions of an agency cannot subvert the intent of the statute: "[s]imilarly, application of an otherwise valid regulation in such a way as to achieve a statutorily impermissible end cannot be sanctioned by allowing the administrative body's action to stand."[195] The D.L.N.R. may not take away what the statute confers.

3. Lot Consolidation

The next question is whether Mr. Fazendin's request that the Board allow the consolidation of his lot with the adjacent parcel destroyed his non-conforming status. D.L.N.R. staff originally thought that Fazendin's nonconforming status would not be affected, because consolidation would not result in any possibility of increased density of use.[196] However, if the Board strictly applied the statutory nonconforming language, Mr. Fazendin's consolidated lots would no longer be a lot of record contained within the forest reserve as of January 31, 1957.

The Board, taking a middle course, allowed the consolidation but dropped the nonconforming status, approving the C.D.U.A. as a "conditional use" in the general subzone.[197] After Mr. Fazendin encountered opposition to his C.D.U.A., he could arguably change his application back to his original lot to reestablish his nonconforming status. This strategy would require Mr. Fazendin to remove the un-

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[192] HAW. REV. STAT. § 183-41(b) (1988).

[193] Stop H-3 Ass'n v. State, 68 Haw. 155, 160, 706 P.2d 446, 451 (1985) (holding that an administrative agency may only exercise its power within the framework of the statute).

[194] *Id.* at 160, 706 P.2d at 451.

[195] *Id.* (citing Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. 1981)).

[196] August 24th Submission, *supra* note 169, at 4.

[197] *See* C.D.U.A. OA-2212 (available at D.L.N.R. office).

permitted driveway and house pad he built astride his two consolidated lots. Since the Board has now voted to acquire the Fazendin property, the question remains whether Mr. Fazendin had a right to build on his lot or whether his nonconforming status was permanently extinguished by the Board-approved consolidation. The valuation of Mr. Fazendin's lot may differ widely depending on how this issue is resolved.

It should be noted that Mr. Fazendin had the opportunity to request a contested case before the close of any public hearing or board meeting at which his C.D.U.A. was scheduled for disposition.[198] Mr. Fazendin did not effectively request a contested case on any of these occasions.[199] After the Board voted to acquire his property, Mr. Fazendin petitioned for a contested case.[200] On advice from the Attorney General, the Board denied the request, stating that the circuit court was the proper forum to contest the Board's decision to acquire the Fazendin property.[201] It seems probable the case will reach the courts either as an original action or as part of an eminent domain proceeding.

The Board designated Mount 'Olomana a "Significant Geological and Unique Area on Oahu" on January 25, 1991.[202] This was the

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[198] HAW. ADMIN. R. § 13-1-29(a) (1982).

[199] No contested case materials in the name of Mr. or Mrs. Fazendin appear in the Fazendin C.D.U.A. OA-2212 file. Thus, if Mr. Fazendin requested a contested case his request did not result in a file entry and therefore was ineffective. *See* C.D.U.A OA-2212 (file available at D.L.N.R.).

[200] *Id.*

[201] Letter from William Paty, Chairperson, Board of Land and Natural Resources, to David E. Fazendin (Feb. 25, 1992) (denying petition for contested case hearing).

[202] *See* Submission from Roger C. Evans, Administrator, Hawaii State Department of Land and Natural Resources to William Paty, Chairman of the Board, Hawaii State Department of Land and Natural Resources (Jan. 25, 1991) (Doc. No. 9449E) (on file with D.L.N.R. office). Roger Evans, Administrator, D.L.N.R., explained by written submission to the Board that lands are placed in a specified subzone according to criteria set forth in the Administrative Rules. Mount 'Olomana did not meet the criteria for inclusion in the protective subzone which protects valuable resources such as significant historic, archaeological, geological, and volcanological features and other unique areas. Mr. Evans, however, advised the Board that it had the power to designate Mount 'Olomana a significant geological and unique area. The Board on its own motion so designated Mount 'Olomana, thus qualifying it for inclusion within the Protective Subzone after a public hearing on a formal map amendment. *Id.*

Mr. Evans noted that the community compared Mount 'Olomana to Diamond Head. He noted that the federal government had designated Diamond Head a historic monument, while Mount 'Olomana, prior to the Board's action, had not been the subject of any designation by any agency. *Id.*

first step toward placing all of the Conservation District land on Mount 'Olomana into the protective subzone.[203] Next, the D.L.N.R. held a public hearing on October 9, 1991, to implement a map amendment to change Mount 'Olomana from the general to protective subzone.[204] Whether the reclassification of Mr. Fazendin's property from the general to the protective subzone will change the value of his property for eminent domain purposes is a question possibly involving vested rights and regulatory taking. A landowner has a vested right if he is entitled to proceed with the development of his property despite a newly enacted land use regulation, which if applied to him, would prevent the development.[205] It is unclear whether Mr. Fazendin has permanently lost his nonconforming status or whether it may be reinstated. A discussion of when his rights may have vested is beyond the scope of this paper but will undoubtedly be of importance to the resolution of the property rights on Mount 'Olomana.

B. The Wacor House at Lanikai

Another case of current interest involves an application to build a house on Ka'iwa Ridge in Lanikai, O'ahu.[206] The history of the case is complicated because the Board revoked the permit only to reinstate it a number of times. The permit for the Wacor property has no closing date.[207] The previous owner, the late Mr. Noel, submitted the original application on February 10, 1978, just one month before the 1978 amended version of Regulation No. 4 was approved.[208] Mr. Hurst, Wacor Corporation's principal owner, pointed out that under the old Regulation No. 4 there was no standard condition requiring holders

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[203] *See* Waihee, *supra* note 163.

[204] *See* Notice of Public Hearing on Amendment and Compilation of HAW. ADMIN. R. tit. 13, ch. 2 Regarding Conservation Districts, Item No. 3, D.L.N.R. (Oct. 9, 1991) (on file at D.L.N.R. office).

[205] David L. Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAW. L. REV. 168, (1979).

[206] Patricia Tummons, *Ka'iwa Ridge is Spared as Board Defines Construction*, ENVIRONMENT HAWAI'I, Feb. 1991, at 7.

[207] *See* C.D.U.A. No. 1030 (on file with D.L.N.R. office).

[208] Submission from Edward Henry, Planner, Hawaii State Department of Land and Natural Resources, to the Board. (Jan. 25, 1991) (Doc. No. 9611E, overview of Wacor C.D.U.A.) (available at D.L.N.R. office) [hereinafter January 25th Submission].

of permits to commence construction within the one-year time period.[209] When Mr. Noel's estate sold the property to Wacor Corporation, the issue was the continued validity of C.D.U.A. No. 1030. Mr. Hurst purchased the property in reliance on a letter from the D.L.N.R. assuring him that C.D.U.A. No. 1030 was still effective so long as he built the house according to the originally approved plans.[210] The D.L.N.R., in turn, relied on the Attorney General's office which said the permit had no time limit and that the D.L.N.R. could not impose any time limit.[211]

After Wacor purchased the property, the D.L.N.R. attempted to impose the one-year time limit in a round-about way. The D.L.N.R. required Mr. Hurst to execute a security instrument that functioned as a bond to pay for any erosion damage caused by grading.[212] The security instrument imposed for the first time the requirement that construction begin within one year.[213] Mr. Hurst asserts that he was unaware that the security instrument imposed a condition on the effectiveness of C.D.U.A. No. 1030 and that the D.L.N.R. failed to point out or inform him of the significance of the restrictive clause in the security instrument.[214]

Assuming that the security instrument did impose a one-year time limit on C.D.U.A. No. 1030, the permit would have been valid until December 29, 1989.[215] However, on September 29, 1989, Mr. Paty, the Chairman of the Board, wrote a letter to Daniel Orodenker, a

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[209] Petition from Declaratory Ruling and Appeal from Action of the Chairman of the Board of Land and Natural Resources (Dec. 29, 1989) (available in C.D.U.A. OA-1030 file at D.L.N.R. office). *See supra* notes 124-31 and accompanying text.

[210] *Id.*

[211] *Id.*

[212] January 25th Submission, *supra* note 208, at 3.

[213] *Id.* It is customary practice for the D.L.N.R. to require landowners to post bond to pay for the repair of any erosion damage that occurs incidental to grading. *Id.*

[214] *See* Petition Requesting a Contested Case Hearing on January 25, 1991, Decision of the Board of Land and Natural Resources Voiding Conservation District Use Permit C.D.U.A. 1030 at Kailua, Kai'wa Ridge, O'ahu Tax Map Key No. 1-4-2-2-17, paras. 21-25 (Jan. 25, 1991) (available in C.D.U.A. OA-1030 file at D.L.N.R. office) [hereinafter January 25th Petition].

[215] January 25th Submission, *supra* note 208, at 10. Whether it is possible that a security instrument, the purpose of which was to provide for payment in the event that grading caused damage, could validly impose a condition precedent on the underlying C.D.U.A. is a legal issue beyond the scope of this discussion.

community leader in Lanikai, canceling C.D.U.A. No. 1030.[216] The D.L.N.R. did not inform Mr. Hurst, the owner of the property, of the cancellation of his C.D.U.A.[217] Unaware of Mr. Paty's action, Mr. Hurst proceeded with plans to obtain a county grading permit.[218] The county had notice of the D.L.N.R.'s cancellation of C.D.U.A. No. 1030 and refused to issue a grading permit.[219] Thus, D.L.N.R. action prevented Mr. Hurst from commencing construction before December 1989. Paradoxically, Mr. Hurst's C.D.U.A. may have been in effect even while the county was denying him a permit because the Attorney General's office affirmed the validity of the permit in May of 1990.[220] It seems unjust that the D.L.N.R. could cancel C.D.U.A. 1030 for failure to commence construction when it was the D.L.N.R. itself that prevented commencement of construction.

Possibly members of the Lanikai Community Association who opposed the permit influenced the Board by calling attention to the expired one-year time limit in the security instrument.[221] Upon further review by the Attorney General, on January 25, 1991, the Board canceled for the second time C.D.U.A. No. 1030.[222] Mr. Hurst sought relief under the contested case procedure, pursuant to Hawaii Administrative Rules section 13-2-28 and *Hawaii Revised Statutes* chapter 91.[223]

The Board denied Mr. Hurst's request for a contested case despite the opinion of the assigned Deputy Attorney General and the D.L.N.R. staff that the written petition for the contested case was filed in a timely manner.[224] The Board strictly applied the departmental rule that

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[216] Petition from Declaratory Ruling and Appeal from Action of the Chairman of the Board of Land and Natural Resources (Dec. 29, 1989) (available in C.D.U.A. OA-1030 file at D.L.N.R. office).

[217] January 25th Petition, *supra* note 214, at 10.

[218] Petition Requesting Contested Case Hearing on January 25, 1991 Decision of the Board Voiding Conservation District Use Permit C.D.U.A. 1030 at 11 (Feb. 4, 1991) (available at D.L.N.R. office) [hereinafter Contested Case Petition of February 4th].

[219] *Id.*

[220] Tummons, *supra* note 206, at 7.

[221] *Id.*

[222] Telephone Interview with Dennis King, Attorney for Wacor Corporation/Mr. Hurst (Feb. 2, 1991).

[223] *Id.*

[224] Submission from Edward Henry, Planner, Hawaii State Department of Land and Natural Resources, to the Board (Apr. 26, 1991) (Doc. No. 0506E on Wacor's request for Contested Case hearing) (on file with D.L.N.R. office) [hereinafter April 26th Submission].

requires "an oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the board meeting at which the matter is scheduled for disposition (if no public hearing is required)."[225] Neither Mr. Hurst nor his counsel made an oral or written request for a contested case hearing at the decision making meeting of January 25, 1991, although counsel for Mr. Hurst did petition for a contested case within eleven days of the Board meeting. As provided in the rules, Wacor moved for Board reconsideration, reasoning that petitioner lacked sufficient time at the end of the Board hearing on January 25, 1991, to make a knowing and intelligent decision and that petitioner filed a petition requesting a contested case hearing on February 6, 1991.[226] With so many unanswered questions in the history of C.D.U.A. No. 1030, it might have served a useful purpose for the Board either to waive the time restrictions or to order a contested case procedure on its own motion. This would have created a suitable record with findings of fact and conclusions of law as a basis for its decision and for future judicial review.[227]

On August 23, 1991, the Board voted to acquire the Wacor property.[228] Although neither Mr. Hurst nor his counsel were present at the meeting, counsel for Mr. Hurst again requested a contested case hearing within ten days of the meeting.[229] The valuation of Wacor's property will be affected by whether Wacor had established a right to build under C.D.U.A. No. 1030. The Division of Land Management, which handles acquisitions for the D.L.N.R., has referred the matter to the office of the Attorney General for an opinion.[230] The Board will

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[225] Letter from William Paty, Chairman of the Board, Hawaii State Department of Land and Natural Resources, to Mr. Dennis King, attorney for Wacor, Inc. (May 16, 1991) (Doc. No. 0714E) (available at D.L.N.R. office).

[226] Petitioner's Motion for Reconsideration of Denial of Petition Requesting Contested Case Hearing (June 18, 1991) (on file with D.L.N.R. file No. CDUA-1030). Counsel for Wacor further argued that Rule § 13-1-29 violates constitutional due process since it does not afford the parties sufficient time to obtain prior notice for a fair hearing on the matter. *Id.*

[227] *See* HAW. ADMIN. R. § 13-1-29 (1982).

[228] *See* Minutes of the Board of Land and Natural Resources (Aug. 23, 1991) (on file with D.L.N.R. office) [hereinafter Minutes of August 23rd].

[229] Telephone Interview with Mr. Serikaku, Land Acquisition, Hawaii State Department of Labor and Natural Resources, (Oct. 21, 1991).

[230] *Id.*

ultimately decide whether to grant Wacor a contested case hearing.[231] Whether it does so or not, it seems likely that Wacor will appeal the matter to the courts for a full trial of the issues.

The complex history of C.D.U.A. No. 1030 presents the question of whether Mr. Hurst has been treated with fundamental fairness by the D.L.N.R. The Hawaii Administrative Procedure Act states that the court may reverse the agency if the substantial rights of the petitioners have been prejudiced because the administrative findings, conclusions, decisions, or orders that are "arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[232] Furthermore, in *Town v. Land Use Commission* the Hawaii Supreme Court stated that an interested party should "not be placed in a state of limbo."[233] Mr. Town sought to oppose the reclassification of property adjacent to his property.[234] The Land Use Commission allowed the proponent of the reclassification to delay the vote on the issue until Mr. Town was unable to be present, depriving him of his right to present evidence in opposition to the reclassification.[235] Mr. Town prevailed, the court holding that the Land Use Commission committed prejudicial error.[236]

Mr. Hurst's rights have been put in limbo by the D.L.N.R.'s vacillating position on his C.D.U.A. permit. In addition to *Town v. Land Use Commission*, legislative intent to protect the individual landowner in the face of agency power exists.[237] The legislature intended to protect the landowner from undue delay when it included the requirement that the Board act within 180 days or else the landowner could automatically put his land to the requested use.[238] Now that the

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[231] The presiding officer or the Board may deny applications to be a party. HAW. ADMIN. R. § 13-1-31(b) (1985). The presiding officer may be the chairman or his representative. *Id.* § 13-1-2. If the Board denies a contested case proceeding, it is still within the power of the court to remand the case to the agency for a contested case proceeding. HAW. REV. STAT. § 91-14(g) (1985).

[232] HAW. REV. STAT. § 91-14(g)(6) (Supp. 1988).

[233] 55 Haw. 538, 544, 524 P.2d 84, 88 (1974).

[234] *Id.* at 539, 524 P.2d at 86.

[235] *Id.* at 545, 524 P.2d at 91.

[236] *Id.* at 545, 524 P.2d at 92.

[237] SEN. STAND. COM. REP. No. 740, 28th Leg., Reg. Sess. (1956), *reprinted in* 1956 HAW. SEN. J. 642.

[238] *See supra* notes 114-16 and accompanying text. In the Wacor case, the staff determined that the 180-day rule did not apply to proceedings after the Board voided the original C.D.U.A. *See* April 26th Submission, *supra* note 224, at 1.

Wacor property has been scheduled for acquisition, the D.L.N.R. will get an independent appraisal and make an offer to the landowner based on that appraisal. If the landowner does not accept the offer, then the D.L.N.R. will resort to the eminent domain procedures set forth in *Hawaii Revised Statutes* chapter 101. Under the eminent domain procedures, the circuit courts would finally evaluate Wacor Corporation's rights under C.D.U.A. No. 1030.

V. Proposals For Change

Widespread dissatisfaction with residential policies in the Conservation District have led to a variety of proposals for change. This section discusses some of those proposals, including measures introduced in the legislature and changes suggested by the Legislative Auditor's 1991 Report. Finally, the discussion will focus on ideas introduced informally by legislators, members of the D.L.N.R. staff, and other informed members of the community.

A. Legislative Proposals

In 1991, the legislature attempted to control land use in the Conservation District by proposing amendments to the statute, directing the D.L.N.R. to change their regulations, and appropriating funds for direct acquisition.[239] The attempt to direct the D.L.N.R. to put Mount 'Olomana in the protective subzone met with gubernatorial veto.[240] The attempts to amend the statute were unsuccessful; only the action for direct acquisition succeeded.[241] As long as the public is willing to pay, the outright acquisition of Conservation District property is the most direct way for the government to control land use. However, the public treasury is not limitless. Direct acquisition will solve isolated problems that have captured public attention, but to address the broader, less publicized problems, the government will have to control land use through regulation.[242]

In 1991, State Senator Hagino introduced Senate Bill 810 which would have repealed the prospective definition of nonconforming use

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[239] *See infra* notes 240, 250, 256 and accompanying text; *see also supra* note 163.

[240] *See* Waihee, *supra* note 163.

[241] *See* Minutes, *supra* note 228.

[242] Examples of such regulations are county zoning restrictions and Special Management Areas, Haw. Rev. Stat. ch. 205A, created in response to the federal coastal zone management law. Auditor, *supra* note 6, at 13.

and would have phased out some existing nonconforming uses.[243] Although the 1991 Legislature did not pass Senate Bill 810, the Legislature may reconsider the proposal to redefine nonconforming use if it is introduced at some future time because it offers one approach to improving the laws governing the Conservation District. Senate Bill 810 would have made nonconforming use within the Conservation District consistent with nonconforming use as defined in the Land Use Law, *Hawaii Revised Statutes* section 205-8.[244] The Land Use Law defines nonconforming use as existing use that may not be changed or enlarged.[245] In contrast, section 183-41 defines a prospective nonconforming use, which allows new residential use so long as the landowner can prove that the parcel was held and intended for residential use as of July 1, 1957.[246]

While Senator Hagino's bill applies to all Conservation District landowners equally, it may meet with opposition because it does not provide an exception for *kuleana* land.[247] In 1990, after public hearings, the Board, the D.L.N.R. staff, and the governor all agreed that *kuleana* land should enjoy the possibility of qualifying for nonconforming use.[248] If passed, Senate Bill 810 would effectively stop the nonconforming use loophole which has allowed new residential use in the limited and protective subzones.

Another part of Senate Bill 810 proposed to eliminate the provision that unless the D.L.N.R. renders a decision within 180 days after the submission of application, the applicant's submission is deemed approved.[249] Perhaps the proposal was in response to the Auditor's report which cited instances where the Board failed to act within the statutory

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[243] S. 810, 16th Leg., Reg. Sess. (1991). Senator Hagino's proposal is in harmony with the Auditor's recommendations. *See* AUDITOR, *supra* note 6, at 24.

[244] HAW. REV. STAT. § 205-8 (1988). The state also authorizes a definition of nonconforming use at the county level. *Id.* § 46-4(a) (1985). The statute enables the counties to phase out nonconforming uses through amortization. Section 46-4(a) does not apply to the Conservation Districts, which the State administers directly through HAW. REV. STAT. § 183-41, outside the jurisdiction of county zoning ordinances. *Id.*

[245] *Id.* § 205-8 (1988).

[246] For a discussion of nonconforming use see *supra* notes 60-67 and accompanying text.

[247] For a discussion of *kuleana* nonconforming use, see *supra* notes 68-72 and accompanying text.

[248] HAW. ADMIN. R. § 13-2-1 (1990). Amending the rules requires promulgation by the D.L.N.R. staff, public comment, and approval by the Governor.

[249] S. Res. 810 § 1, 16th Leg., Reg. Sess. (1991).

time period, effectively approving the applicant's use.[250] Removing the 180-day time period would thwart the possibility that a grossly incompatible use could be approved by default. Conversely, the intent of the 180-day provision makes the agency more responsive to the public and protects applicants from undue administrative delay.[251] Even with the 180-day provision, applicants have experienced administrative delays of years before receiving permission to build.[252] Removal of the 180-day requirement would give the agency license to increase delays in the application process and is inadvisable.

Twin House and Senate bills proposed a different approach to modifying residential use of the Conservation District. House Bill 107, introduced by Representative Thielen, and Senate Bill 1760, introduced by Senator Koki, proposed the elimination of "conditional use."[253] Under the Koki-Thielen proposal the Board could approve only permitted uses.[254] Furthermore, the Koki-Thielen proposal would have removed the term "residential use" from the permitted uses listed under Section (c)(3).[255] The effect of the Koki-Thielen proposal was to eliminate new residential construction entirely.

The Koki-Thielen proposal swept too broadly by radically reducing the powers of the Board and, perhaps for this reason, failed to pass. By removing the discretionary powers of the Board, the proposal would have necessitated the D.L.N.R. to return to management by a comprehensive list of permitted uses.[256] The theory behind the elimination

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[250] AUDITOR, *supra* note 6, at 24.

[251] *See supra* notes 114-16 and accompanying text.

[252] Both the Fazendin and Hurst cases are examples of long delay prior to an applicant receiving permission to build. The legislature originally wrote the 180-day provision before the institution of contested case hearings and Environmental Impact Statements. The law now provides for a 90-day extension when the law requires an environmental impact statement or when an applicant requests a contested case hearing. HAW. REV. STAT. § 183-41(a) (1985).

[253] H.R. 107, 16th Leg., Reg. Sess.; S. 1760, 16th Leg., Reg. Sess. (1991).

[254] *Id.*

[255] S. 1760, at 4, l. 11, 16th Leg., Reg. Sess. (1991).

[256] *See supra* notes 124-31. One effect of the institution of the discretionary "conditional use" was to eliminate the unwieldy procedure of having a comprehensive list of permitted uses. In practice, not every possible use could be anticipated, thus whenever a new use would be proposed, the rules would have to be amended to allow it. Moreover, under a comprehensive list of permitted uses, the Board would be compelled to approve an inappropriate use so long as it was technically permitted. When the D.L.N.R. adopted 1978 Regulation No. 4, it was thought the greater

of a comprehensive list of permitted uses and the introduction of conditional use was the impossibility of anticipating every possibility and the need for administrative flexibility.[257] Representative Thielen contends that Board approval should be confined to permitted uses only.[258] She explains that the language of *Hawaii Revised Statutes* section (c)(3)[259] provides sufficient flexibility for the Board to approve unforeseen uses, even if conditional use were eliminated entirely.[260] Rather than eliminate administrative flexibility in the regulatory framework, a better choice would be to give more guidance to the discretionary process. The legislature could provide guidance through funding a new comprehensive plan for the Conservation District[261] or through direct legislative statements.

Representative Thielen also introduced a second bill relating to Mount 'Olomana.[262] The Legislature passed the bill, House Bill 2107, on April 26, 1991.[263] It directed the Board to take immediate and necessary action to place all Conservation District lands on Mount 'Olomana in the protective subzone.[264] Governor Waihee vetoed the bill on June 26, 1991, because the Board had already directed its staff to place all Conservation District lands on Mount 'Olomana into the protective subzone and designated Mount 'Olomana as a significant

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flexibility of the discretionary conditional use process would streamline and improve management of the Conservation District. *See* Interview with Roger C. Evans, Administrator, Hawaii State Department of Land and Natural Resources, in Honolulu, Haw. (Apr. 19, 1991).

[257] *Id.* Mr. Evans, who participated in the 1978 revision of Regulation No. 4, commented that as part of his research he studied jurisdictions which had lists of hundreds of permitted uses and found such schemes of land use management unwieldy. *Id.*

[258] Telephone Interview with Cynthia Thielen, Hawaii State Representative (Dec. 2, 1991).

[259] Section (c)(3) provides that the department may specify land uses within any forest and water reserve zone "which may include but are not limited to" permitted uses. HAW. REV. STAT. § 183-41(c)(3) (1988).

[260] Telephone Interview with Cynthia Thielen, *supra* note 258.

[261] The most recent Comprehensive plan for the Conservation District was written in 1977. The 1977 plan was hardly comprehensive; it addressed forestry, water, wildlife, state parks, and aquatic life. It did not mention residential use, nor does it provide guidance to the Board on questions of development in general. *See* D.L.N.R., Conservation District Plan O'ahu (1977).

[262] H.R. 2107, 16th Leg., Reg. Sess. (1991).

[263] *Id.*

[264] *Id.*

geological and unique area.[265] In addition, the Governor stated that it was "bad policy for the Legislature to pass session laws that are, in essence, actually resolutions, but put into the form of a law."[266]

Changing Mount 'Olomana Conservation District lands from general to protective subzone would mean that the Board must apply the most restrictive standards to applications for use.[267] A landowner with nonconforming status would have a right to build regardless of the subzone.[268] Assuming a landowner has a legitimate claim to nonconforming status, the state would still have to acquire the property to prevent residential construction.[269]

B. Auditor's Proposals

The 1990 Legislature requested the State Auditor to review D.L.N.R. regulations and procedures regarding residential use in the Conservation District.[270] Completed in January 1991, the Auditor's report suggests that the Legislature eliminate prospective nonconforming use.[271] Within the Auditor's sample of fourteen residential use applications, the Report reveals the Board had incorrectly conferred nonconforming status on three.[272] The Auditor recommends that the D.L.N.R. rules governing nonconforming use be made consistent with the definition of nonconforming use in the statute.[273] The Auditor points out that D.L.N.R. rules expand the definition of nonconforming to include

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[265] Waihee, *supra* note 163.

[266] *Id.*

[267] *See supra* notes 42-45 and accompanying text.

[268] See discussion of nonconforming status *supra* notes 60-67 and accompanying text.

[269] H.R. 139, 16th Leg., Reg. Sess. (1991) (proposing budget of appropriation $7,000,000 for land acquisition on Mount 'Olomana).

[270] AUDITOR, *supra* note 6, at 1.

[271] *Id.* at 24.

[272] *Id.* at 23. The Auditor asserted:

> In the first case, the office erred by giving nonconforming status to a property that was not included in the conservation district until 1969. Prior to that, the land had been designated agricultural and in 1968 the parcel had also been subdivided from a larger lot. In the second case, the office gave nonconforming status to property that had been enlarged by the purchase in 1967 of a separate plot of 2,229 square feet. In the third case, the office incorrectly granted nonconforming status to a lot in the general subzone that had been formed by consolidating two adjoining properties.

Id.

[273] *Id.* at 16.

lands that may have been included in the Conservation District after January 31, 1957.[274] Under *Stop H-3*, the Hawaii Supreme Court made it clear that the administrative agency may only exercise its rule making authority within the framework of the statute.[275] Thus, a rule is invalid if it permits what the statute prohibits. Likewise, agency actions based on invalid rules are also invalid.[276]

Under the broadened definition of nonconforming use in the rules, the Land Use Commission can include parcels in the Conservation District that may have been intended as residential lots without eliminating the possibility that those lots would receive nonconforming status.[277] If, on the other hand, intended residential uses were made illegal by inclusion of the parcel in the Conservation District, the Land Use Commission might gerrymander Conservation District boundaries to avoid compensating landowners. If the Land Use Commission is to have flexibility to enlarge the Conservation District and maintain contiguous boundaries, the rule allowing nonconforming use of parcels newly included in the district is necessary. On the other hand, in any direct conflict between the statutory definition and the regulatory definition, the statutory definition must prevail.[278] Thus, if tested in the courts, a nonconforming designation contrary to statute arguably would be overturned.

The 1990 rule allowing for prospective nonconforming use of *kuleana* lands presents a potentially significant broadening of nonconforming use.[279] This rule could open up many parcels to residential development which had been excluded because they were larger than ten acres.[280]

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[274] *Id.* at 19.

[275] 68 Haw. 155, 161, 706 P.2d 446, 451 (1985). In Stop H-3 v. Department of Transportation the court stated, "Administrative rules and regulations which exceed the scope of the statutory authority enactment they were devised to implement are invalid and must be struck down." *Id.*; see *supra* notes 194-95 and accompanying text for further discussion of *Stop H-3*.

[276] 68 Haw. at 161, 706 P.2d at 451.

[277] Otherwise, a parcel under residential use, newly included in the Conservation District would have the curious status of being an existing use, but, nonetheless, illegal. Under the statutory definition of "nonconforming," existing nonconforming use must be the continuance of a use established by July 1, 1957. HAW. REV. STAT. § 183-41(b) (1988).

[278] *Stop H-3*, 68 Haw. at 161, 706 P.2d at 451.

[279] *See supra* notes 68-72 and accompanying text.

[280] No figures are available from the *Hawaii Data Book* on how many *kuleana* parcels may qualify under this exception. The D.L.N.R.'s *Department of Land Management Land Commission Award Book* lists the land awards made in the Great *Mahele*. *See* Land Commission Award Book (on file with D.L.N.R. office).

If challenged, the rule may be found to confer nonconforming status contrary to the intent of the statute. If the legislature chooses to eliminate prospective nonconforming use and reduce existing nonconforming use, then the D.L.N.R. rules will have to reflect the legislative changes and the Auditor's recommendations to conform the statute and the rules will have to be reexamined.

Further, the Auditor's report recommends changes in conditional use to ensure that such use is linked to specific size and height restrictions for residential construction.[281] Public criticism has focused not only on the placement of residences in the conservation district but also on the large size of the residences proposed in particular.[282] D.L.N.R. rules state no specific size or height restrictions. The Auditor suggests Conservation District standards for residential use be incorporated into the rules and that they be modeled after county ordinances which provide for minimum lot sizes, requirements for front, side, and rear setbacks, maximum building areas, and maximum heights.[283]

The D.L.N.R. takes the position that due to the wide variance in lot size it may be improper to restrict the square footage of homes since a large home on a large lot would still result in very low density use.[284] The D.L.N.R. refers to recent developments in the law that might interpret size and height restrictions as a regulatory taking.[285] The Auditor suggests that standards for minimum and maximum square footage and height could vary depending on the subzone.[286] Specific rules for residential size and height would ease public controversy while exceptions could be accommodated through a discretionary variance procedure. In addition, the Auditor recommends that the D.L.N.R. take greater care to ensure that environmental assessments comply with the rules of the Department of Health.[287]

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[281] AUDITOR, *supra* note 6, at 24.

[282] *See generally* discussion of the Englestadt house and the Liem house in ENVIRONMENT HAWAI'I, Sept. 1990.

[283] AUDITOR, *supra* note 6, at 24.

[284] Letter from William Paty, Chairman of the Board, Hawaii State Department of Land and Natural Resources, to Newton Sue, Acting Legislative Auditor, State of Hawaii (Dec. 21, 1990), *reprinted in* AUDITOR, REVIEW OF THE REGULATION OF RESIDENTIAL CONSTRUCTION IN THE CONSERVATION DISTRICT A REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF HAWAII (Jan. 1991).

[285] *Id.* The subject of regulatory taking is beyond the scope of this paper.

[286] AUDITOR, *supra* note 6, at 18.

[287] *Id.* at 22. A discussion of Department of Health rules for environmental assessments and environmental impact statements is beyond the scope of this commentary.

C. Informal Proposals

Several ideas for change have been the object of informal discussion. One idea discussed is to remove lands classified in the general subzone from the Conservation District and reassign them to the counties. By definition, the general subzone is open space where urban use would be premature.[288] Some of the land in the general subzone is suitable for urban use but is temporarily banked in the Conservation District. A common assumption made by members of the public is that all conservation land is to be preserved in its undeveloped condition. While true for the more restrictive subzones, such is not the intent of the law for the general and resource subzones. The proposal to transfer all general subzone land suggests that the burden of administering pre-urban land might best be placed on the counties which are better equipped to regulate it. The proposal, however, side-steps the issue of how much residential use is appropriate for general subzone land, merely shifting the responsibility for addressing the issue to county offices.

Representative Thielen hypothesizes that we should redraw the lines of the Conservation District.[289] She states that residents of the State of Hawaii must decide what lands really need to be conserved and prohibit development on them. Representative Thielen asserts that those Conservation District lands which are suitable for development would be best put under county control. Representative Thielen cites the importance of relieving the residential housing shortage and points out that much of the land currently in the general subzone may not be earmarked for long-term conservation. The counties and communities can best decide when land is suitable for subdivision and housing development asserts Representative Thielen.[290]

The measure of public satisfaction with a plan transferring control of some Conservation District land to county control would depend on the counties' ability to balance pressures to provide land for residential development against the need to maintain open space. The owners of Conservation District land reassigned to county control would probably benefit economically, as county councils might be more disposed to allow subdivision and development than the State.

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[288] HAW. ADMIN. R. § 13-2-14 (1981).

[289] Telephone Interview with Cynthia Thielen, Hawaii State Representative (Dec. 3, 1991).

[290] *Id.*

Pat Tummons, who writes and edits a monthly newsletter published in Honolulu entitled *Environment Hawai'i*, has authored several articles on residences in the Conservation District. Ms. Tummons suggests that nonconforming status should have an end point.[291] In harmony with the recommendation of the Legislative Auditor, Ms. Tummons favors limiting the definition of nonconforming use in the Conservation District to eliminate prospective nonconforming use and to parallel the definition of nonconforming use in Hawaii Revised Statutes chapter 205.[292] Ms. Tummons opposes approval of residences that exceed 2000 square feet. She asserts that limiting the size of residences to 2000 square feet would allow reasonable use, while curtailing the building of huge homes which have a greater environmental impact. She also favors eliminating the speculation in the Conservation District housesites.[293] In addition, Ms. Tummons points out that if the Board had more specific standards, conditions, and guidelines, it could reject wholly inappropriate residential applications automatically as beyond the guidelines without resort to the lengthy and expensive contested case procedure.[294] The imposition of more definite standards and conditions, including a 2000-square-foot size limitation, would eliminate some public dissatisfaction with the Board's residential use policy. Concerned members of the public could depend on the Board to stop approving very large, high impact residences.

A member of the D.L.N.R. staff points out that discretionary functions of the Board could be preserved, yet guided, by a comprehensive plan for the Conservation District which addresses the residential use question.[295] The last comprehensive plan for the Conservation District was done in 1977. It addresses parks, forestry, and aquaculture, but not residential use.[296] Presently, the Board must respond to pressures from both the public and the landowners while attempting to follow its legislative mandate. A new master plan for the Conservation

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[291] Telephone Interview with Patricia Tummons, Editor, *Environment Hawai'i*, Oct. 2, 1991.

[292] *Id.*

[293] *Id.* Much of the controversy, though not all, surrounding residential C.D.U.A. applications involves homes of palatial proportion; e.g., the proposed Englestadt house above Lanikai was 32,000 square feet, and the originally proposed Liem house on Hawea Point, Maui, was 40,000 square feet. *See* Patricia Tummons, *For a House in Lanikai, The Fourth Time's the Charm*, ENVIRONMENT HAWAI'I, Sept. 1990, at 1, 6.

[294] Telephone Interview with Tummons, *supra* note 291.

[295] *See supra* note 261 and accompanying text.

[296] *Id.*

District would provide a yardstick by which the public could measure the performance of the D.L.N.R and provide a guide for the D.L.N.R. to use while exercising their considerable discretion.

VI. Conclusion

There is no single vision for the best policy to govern residential construction in the Conservation District. Conflicting views range from zero residential construction to urban style development. The legislature anticipated residential use when it passed the original forest and water reserve zone law in 1957. The first version of the D.L.N.R. rules specifically permitted single family residential and even resort style development. As a result of public disenchantment with perceived overdevelopment, the D.L.N.R. passed new regulations in 1978 that responded to public objections by changing residential use from a permitted use to a discretionary conditional use. This change provided administrative flexibility to deny permits when the proposed construction would be too urban while allowing residential construction on a case-by-case basis.

Many people interested in land use problems perceive continuing abuses in the residential construction permitting process. They believe the Board inappropriately approved new residential construction on Mount 'Olomana, in Lanikai, and in other areas. Perhaps now is the time to change the statutes and rules to address the public's interest in reducing the size and amount of residential construction in the Conservation District. Of the proposals under discussion, the Auditor's recommendation that size and height standards be added to D.L.N.R. rules has merit because it responds to public opinion while maintaining a balance between administrative flexibility and legislative control. The Auditor suggests that standards for size, height, setbacks, density, and maximum buildable area could vary depending on the subzone.[297]

Size and height restrictions need not unduly impinge on administrative discretion. The D.L.N.R. could incorporate these restrictions into the rules under standards, conditions, and guidelines. The Board would then apply the standards along with the other conditions and deviate only when there was reasonable justification to do so. Administrative agencies need flexibility, primarily to meet the challenge of unanticipated uses, but residential use can be anticipated.[298] Standards for size

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[297] *See supra* notes 281-87 and accompanying text.

[298] Auditor, *supra* note 6, at 20.

and height that vary with the subzone would provide fairness and predictability for landowners while curbing excessively large residential construction.

The legislature should reconsider Senator Hagino's proposal to change the definition of nonconforming to eliminate prospective nonconforming use.[299] Prospective nonconforming use is contrary to good conservation practices primarily because it allows residential use in the most restrictive subzones where use should be limited according to the objectives of the subzone. If the legislature wants to eliminate all residential use of the protective and limited subzones, then it should eliminate prospective nonconforming use.

A harder question is whether an exception should be made for *kuleana* parcels. Since *kuleana* parcels in the general and resource subzone would be eligible for conditional use residential permits under present practice, the only effect of retaining nonconforming use for *kuleana* parcels is to allow residential construction in the protective and limited subzones. If the public's interest is to reduce the amount of residential construction in the Conservation District, a logical first step is to preclude all residential construction in the most restrictive subzones. Thus, the elimination of all prospective nonconforming use in those subzones without exception seems most appropriate.[300]

Maintaining the discretion of the Board is the best way to assure that competing interests are balanced on a case by case basis. For that reason, the legislature should not eliminate conditional use. No list of permitted uses, regardless how complete, will work in the absence of discretion. If a new rule must be written for every unforeseeable use, then the process of administering the law and managing the Conservation District will become unwieldy. The discretionary mechanism of the C.D.U.A. process can work, especially if the standards, conditions, and guidelines are vigorously applied.[301] The Board should not be

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[299] *See supra* note 239-46 and accompanying text.

[300] Some advocates for Native Hawaiian rights assert that property rights conferred by the King to native landholders should not be limited by state regulation. One problem with the *kuleana* exception to nonconforming use is that it is not restricted to Native Hawaiian landholders. Thus, the rule may benefit more non-native residents of Hawaii, who have acquired *kuleana* parcels by trade or purchase, than Native Hawaiians. Since there is no data on how many *kuleana* parcels exist in the Conservation District, it is equally unknown how many of those parcels are still in the hands of Native Hawaiian landholders.

[301] *See supra* notes 141-44 and accompanying text.

faulted for failure to act in accord with legislative policy when the legislature has issued no clear policy for residential use of Conservation District lands. To best guide the discretionary function of the Board, the legislature should authorize a comprehensive plan for the Conservation District.

Postscript

On April 3, 1992, as this comment was going to press, the Hawaii State Legislature passed a significant revision of section 183-41 *Hawaii Revised Statutes*.[302] Although the time for Gubernatorial veto has not yet passed, it seems likely the governor will approve the measure because the administration supported Senate Bill 2735.[303]

The purpose of Senate Bill 2735 was to eliminate prospective nonconforming use for Conservation District Land.[304] The Legislature eliminated nonconforming status for parcels of ten acres or less "held or intended for residential use." This change eliminates one legal definition under which the Board had approved new residential development in the limited and protective subzones. The elimination of prospective nonconforming use comports with recommendations of the Legislative Auditor,[305] proposals by State Senator Hagino,[306] suggestions by environmental activists,[307] and the conclusion of this comment.[308]

Senate Bill 2735, however, created a new kind of statutory nonconforming use. In harmony with the *kuleana* nonconforming use found in the administrative rules,[309] the Legislature included this new language in section 183-41(b):

> Any land identified as a kuleana may be put to those uses which were historically, customarily, and actually found on that particular lot including, if applicable, the construction of a single family residence. Any

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[302] S. 2735, An Act Relating to the Conservation District, 16th Leg., Reg. Sess. (1992) (passed Legislature Apr. 13, 1992).

[303] Sen. Stand. Com. Rep. No. 1176, 16th Leg., Reg. Sess. (Apr. 3, 1992) (reporting that the Department of Land and Natural Resources and the Sierra Club both testified in support).

[304] *Id.*

[305] *See supra* note 271 and accompanying text.

[306] *See supra* note 243 and accompanying text.

[307] *See supra* note 291 and accompanying text.

[308] *See supra* note 299 and accompanying text.

[309] *See supra* notes 68-72 and accompanying text.

> structures may be subject to conditions to ensure that they are consistent with the surrounding environment.[310]

This language is problematic because it neither gives a precise definition for *kuleana* nor sets a definite time to establish the historical and customary use. For example, this new section of the statute could be interpreted to mean that any parcel which was *kuleana* in the Great *Mahele*[311] is still *kuleana* today regardless of how many times the parcel has changed hands, whether it has been subdivided, or whether it is still in the ownership of Native Hawaiian landholders. Another unanswered question is whether the D.L.N.R. would allow multiple residences if the landowner established that two or more *kuleanas* had been consolidated. Of course, the D.L.N.R. may promulgate detailed rules to settle these questions, but those rules are not yet in place.

The *kuleana* administrative rule passed in 1990 had significance only for landowners seeking to build residences in the protective and limited subzones. Under present policy, the owner of a *kuleana* parcel would already have the right to build a residence in the general and resource subzones.[312] This new statutory *kuleana* nonconforming use, however, seems to give the *kuleana* landowner an absolute right to build one residence (possibly more) in any subzone, provided the landowner establishes *kuleana* status. In the meantime, *kuleana* nonconforming status will be the new avenue by which landowners may test the law to seek permission to build residences in the most sensitive areas of the Conservation District.[313]

Senate Bill 2735 makes another small change which may have a large effect because it may provide guidance to the Board's discretion. Formerly, the statute directed the Department, when making land use decisions, to give full consideration to all available data on the physical use capabilities of the land "so as to allow and encourage the highest economic use thereof" (limited by the requirements for the conservation of the purity of the water supplies).[314] After Senate Bill 2735, the statute reads "so as to allow the economic use thereof."[315] To allow economic use is a very different concept from encouraging the *highest*

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[310] *See supra* note 302.

[311] *See supra* notes 68-72 and accompanying text.

[312] *See supra* notes 279, 280, 300 and accompanying text.

[313] *See supra* note 300 and accompanying text.

[314] HAW. REV. STAT. 183-41(c)(1) (1985).

[315] *See supra*, note 302.

economic use. The Legislature clearly rejected the concept of highest economic use when they deleted the word "highest." This shift in language may be interpreted by the Board as a mandate to retreat from the maximum development encouraged by the former law.

Because Senate Bill 2735 eliminates the highest economic use concept, the Board now has greater discretion to deny applications for residential development. The new language may even supply a rationale to impose limits on the size of residences. How vigorously the Department will apply this new language remains an open question. The overall effect of Senate Bill 2735 should be to decrease residential construction in the Conservation District.

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Extending Land Reform to Leasehold Condominiums in Hawai'i

I. Introduction

In 1967, the Hawaii State Legislature enacted the Land Reform Act codified as *Hawaii Revised Statutes*, Chapter 516.[1] Chapter 516 allows eligible lessees of long-term leasehold interests in single family residential lots the opportunity to purchase fee simple title through a condemnation procedure involving the landowner and the Housing Finance and Development Corporation (H.F.D.C.).[2] In 1991, several bills were introduced in the Legislature proposing the extension of land reform to lessees of long-term leasehold interests in the land underlying their condominiums.[3] Although none of the land reform proposals passed out of their respective legislative committees for a floor vote, the City and County of Honolulu passed a leasehold conversion law on December 19, 1991.[4]

Mandatory conversion of leasehold interests into fee title through the exercise of the government's power of eminent domain challenges the existing boundaries of protected property and ownership rights. A landowner might consider such proposals as the theft of an important "stick" in the "bundle" of rights collectively referred to as

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[1] Haw. Rev. Stat. ch. 516 (1985).

[2] See *infra* notes 24-38 and accompanying text for a full discussion of Chapter 516's condemnation procedure.

[3] See *infra* notes 39-73 and accompanying text for a discussion of these bills.

[4] Honolulu, Haw., Ordinance No. 91-95 (1990). This controversial bill became law on December 19, 1991, despite Mayor Frank Fasi's refusal to sign the measure. Without a mayoral veto, the bill became law as approved by five of nine Honolulu City Council members. Supporting the leasehold conversion bills were John Henry Felix, Leigh-Wai Doo, Gary Gill, Steve Holmes, and Andy Mirikitani. Opposed were Arnold Morgado, Donna Kim, Rene Mansho, and John DeSoto. Jeanne Mariani & Charles Memminger, *Bishop Sues to Stop Leasehold Reform*, Honolulu Star-Bull., Dec. 19, 1991, at A1.

property rights.[5] Others might view mandatory conversion as necessary to promote the equitable distribution of land, a scarce resource in Hawai'i.

At the heart of the disagreement over the validity of mandatory conversion lies varying conceptions of equity and fairness.

Lessors argue that lessees have profited over the years by taking advantage of low lease rents and spiraling condominium values. Darvin Haupert, a former employee of Hawai'i's largest private landowner, Bishop Estate, explains that the lease agreements entered into by the Estate in the 1960s did not accurately predict the growth of Hawai'i's land values.[6] As a result, the monthly lease rents enjoyed by many lessees have been "ridiculously low" for years.[7] Lessees who sold their condominium units and ground leases have pocketed tens of thousands of dollars of profit, none of which went to the lessor. In the minds of many lessors, lessees have profited by below-market lease rents and now complain that they cannot afford the fair market value of their leased properties.

Bishop Estate Trustee Oswald Stender asserts that the lessees should pay for choices freely made. He says, "They [condo owners] could have bought fee simple . . . but they made the choice to buy leasehold. . . . The landowner has been waiting, and now it's his turn."[8]

Lessees argue that without protection from the legislature, many Hawai'i residents will be forced out of their homes.[9] For example, a Hawaii Kai townhouse purchased in 1964 had a fixed lease rent of $14 per month for the first thirty years.[10] During rent renegotiation,

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[5] The Supreme Court characterized property rights as a "bundle of sticks" in Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

[6] Ellen Paris, *No Bad Guys, Just Victims*, HAW. INVESTOR, May 1991, at 51 [hereinafter *No Bad Guys*]. Kamehameha Schools/Bernice Pauahi Bishop Estate [hereinafter *Bishop Estate*] is a trust organization dedicated to the education of Native Hawaiians through the establishment and support of the Kamehameha Schools. KAMEHAMEHA SCHOOLS BERNICE PAUAHI BISHOP ESTATE, 1989-1990 ANN. REP. TO THE COMMUNITY 4 (1990) [hereinafter BISHOP ESTATE ANN. REP.]. Governed by a Board of Trustees, Bishop Estate's extensive land holdings make it the largest private landowner in the State of Hawaii. *See infra* note 119 and accompanying text. Bishop Estate owns 14.5% of the island of Oahu and 10.5% of the island of Hawai'i. BISHOP ESTATE ANN. REP., *supra*, at 22.

[7] *No Bad Guys*, *supra* note 6, at 51.

[8] *Id.*

[9] *Id.*

[10] *Id.*

Bishop Estate informed the owner that in 1994, the lease rent would increase to its "fair market" value of $1,200 per month.[11] Such increases threaten lessees, especially those on fixed incomes. Not only do the lessees face onerous lease rents, but the rent increases make it more difficult for lessees to sell to potential buyers afraid of pending rent renegotiation. In addition, lessees argue that the lessor has done little or nothing to increase the value of land, yet unfairly exact increasing market rate lease rents from the lessees. As many lessees point out, they are principally responsible for tangible improvements to property. They should not be penalized by "fair market" valuations affected by the influx of foreign investment in the 1980s.

This piece presents, in separate sections following Part II, the most cogent arguments for and against extending land reform to leasehold condominiums. As a prelude to this discussion, Part II compares Chapter 516 with the mandatory conversion bills proposed during 1991. The legal challenges to Chapter 516 culminating in the United States Supreme Court case *Hawaii Housing Authority v. Midkiff*[12] will also be reviewed. Part III analyzes proposals to extend land reform to condominiums and concludes that leasehold conversion constitutes a reasonable means for stabilizing long term housing costs for growing numbers of Hawai'i homeowners. In contrast, Part IV concludes that leasehold conversion will not achieve its stated goals and is an inappropriate device for alleviating Hawai'i's housing problems.

II. LAND REFORM IN HAWAII

A. Chapter 516: Mandatory Conversion for Single Family Dwellings

1. Rationale

Chapter 516 was enacted in 1967 to change the existing pattern of land ownership as it existed in Hawai'i.[13] The legislature found a concentration of land ownership in the hands of a relative few[14] who

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[11] *Id.*

[12] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

[13] HAW. REV. STAT. § 516-83(1) (1985). For a comprehensive discussion of Chapter 516 see James Conalan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 HAW. B. J. 31 (1969).

[14] In 1967, the Hawaii Legislature found that "more than three-fourths of all privately held lands in the State are owned by a few trusts, estates and private persons." H.R. COMM. REP. No. 18, 4th Legis., Reg. Sess. (1967), *reprinted in* 1967 HAW. H.R. J. 859 [hereinafter H.R. COMM. REP. No. 18].

were not selling fee simple titles but instead leasing under long-term leases.[15] This resulted in a shortage of fee simple residential housing and an artificial inflation of residential land values;[16] deprivation of a choice to own or lease land;[17] a coercion of the lessees to accept financially disadvantageous lease terms;[18] a restriction on the lessee to fully enjoy the freedom of the land;[19] and an adverse affect on "the economy of the State and the public interest, health, welfare, security, and happiness of the People of the State."[20]

The Legislature also found that the cost of living in Hawai'i was dramatically increasing and that a significant contributing factor was the increase in both leased and fee simple land costs.[21] Stabilizing land costs would improve the standard of living.[22] Left unchecked, the inflationary cost of living could create a large class of deprived citizens who could "disrupt lawful social behavior and irreparably rend the social fabric" of Hawai'i.[23]

2. *Provisions*

Chapter 516 allows eligible owners[24] of long-term leased interests in residential lots the opportunity to obtain fee simple title to the land.[25] Only lots which are a maximum of two acres,[26] on a development tract not less than five acres,[27] and with a lease of twenty

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[15] HAW. REV. STAT. § 516-83(1) (1985).

[16] *Id.* § 516-83(2).

[17] *Id.* § 516-83(3).

[18] *Id.*

[19] *Id.*

[20] *Id.* § 516-83(4).

[21] *Id.* § 516-83(6).

[22] *Id.*

[23] *Id.* § 516-83(7).

[24] HAW. REV. STAT. § 516-33 sets out the qualifications for purchase which include: . . . (2) bona fide resident of the state or has a bona fide intent to reside in the development tract if successful in purchasing the lot; (3) has legal title to, or pursuant to an agreement of sale an equitable interest in, a residential structure situated on the leased lot applied for; (4) has a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the person will be able to promptly pay the authority for the leased fee interest in the lot; . . . (7) does not own in fee simple lands suitable for residential purposes within the county. *Id.* § 516-33.

[25] *Id.* § 516-21.

[26] *Id.* § 516-1(11).

[27] *Id.* § 516-1(2).

years or more[28] are eligible for conversion. Once the qualifications for conversion are met, the lessees may petition the H.F.D.C.[29] to condemn the property.[30] If the lesser of twenty-five eligible tenants or half of the tenants of lots on the tract file applications, the H.F.D.C. will hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate a public purpose".[31] If the H.F.D.C. finds that the public purpose will be served, it is authorized to use eminent domain proceedings to acquire the lease fee interest in the designated tract.[32]

The price of the converted lot will either be negotiated by the lessor and the lessee or set at an eminent domain trial.[33] In any event, the amount to be paid to the lessor will be not less than the fair market value of the lot.[34] After determining the price, H.F.D.C. may sell the lot to the qualifying tenant; if the tenant cannot afford to purchase the lot, H.F.D.C. may lend up to ninety percent of the purchase price.[35] As an alternative to conversion, Chapter 516 provides safeguards for lessees who continue under long term leases. Among the provisions are free assignability of the leasehold interest by the lessee without the consent of the lessor;[36] rent control;[37] and the reversion to the lessee of any improvements to the lot.[38]

B. Proposed Legislation on Leasehold Conversion for Condominiums

Encouraged by the success of Chapter 516, proponents of mandatory condominium lease-to-fee conversion desire the same opportunities of

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[28] *Id.* § 516-1(5).

[29] *Id.* § 516-21 (Supp. 1989). The duties previously performed by the Hawaii Housing Authority are now performed by the H.F.D.C. *Id.*

[30] *Id.* § 516-22 (1985).

[31] *Id.*

[32] *Id.* § 516-23; *see also id.* § 516-25 (the property interest acquired by the H.F.D.C. is all of the right, title, and interest of the fee owner).

[33] *Id.* § 516-56.

[34] *Id.* § 516-1(14).

[35] *Id.* § 516-34; *see also id.* § 516-35 which allows the H.F.D.C. to restrict the transferability of the lots purchased by state money. For a period of 10 years the purchaser must notify the H.F.D.C. in writing of any intention to transfer the property. *Id.* § 516-35.

[36] *Id.* § 516-63.

[37] *Id.* § 516-66.

[38] *Id.* § 516-70.

fee simple land ownership as single family dwelling owners.[39] In the 1991 legislative session two bills advocating conversion were considered by the legislature: (1) mandatory conversion from lease to fee[40] and (2) choice of voluntary conversion or rent control.[41]

1. Mandatory Conversion Bill

a. Rationale

The Mandatory Conversion Bill cited many of the same findings which led to the enactment of Chapter 516,[42] including a shortage of reasonable housing due to population growth, an increase in demand for residences, and a concentration of land ownership in the hands of a relative few who would rather lease than sell.[43] It is not surprising, therefore, that it was also the only proposed bill which followed Chapter 516 and called for mandatory lease to fee conversion for condominiums.

b. Provisions

In order for units to have qualified for conversion under the Mandatory Conversion Bill, at least half of all the leasehold tenants of the condominium had to apply to buy fee title to the unit.[44] Only developments with twenty or more units were eligible for conversion.[45] Once the proper applications had been submitted, the H.F.D.C. would hold a public hearing to determine whether the acquisition would effectuate a public purpose.[46] Upon approval by the H.F.D.C.,

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[39] "The apartment owners, meanwhile, are fighting for fairness. But the (Land Reform) Act does not apply to condominiums. Apartment owners now want equal treatment. We're asking for nothing more and nothing less, said John T. McCarthy, president of the Hawaii Leaseholders Equity (HALE) Coalition." Vickie Ong, *Debate Rages on Mandatory Land Sale*, HONOLULU ADVERTISER, Feb. 14, 1991, at A-1.

[40] S. 948, 16th Leg., 1st Sess. (1991) [hereinafter Mandatory Conversion Bill].

[41] S. 1255, 16th Leg., 1st Sess. (1991) [hereinafter Compromise Bill]. Also proposed in the 1991 session was a pure rent control bill whose goal was to provide affordable, predictable, and fair automatic rent increases. The bill was limited to owner-occupants and limited rent increases to the cost of living index. H.R. 1982, 16th Leg., 1st Sess. (1991).

[42] *See supra* notes 14-23.

[43] Mandatory Conversion Bill, *supra* note 40, § 1.

[44] *Id.* § 2-21.

[45] *Id.* § 2-1.

[46] *Id.* § 2-21(2).

the parties would begin to negotiate a fair price and if there was no agreement within sixty days, the H.F.D.C. would decide a fair price based on final offers submitted by each of the parties.[47]

After a price had been determined, the H.F.D.C. would commence an eminent domain trial[48] and thereafter obtain the land through involuntary conversion.[49] Within sixty days the tenants who were participating in conversion, along with the association of apartment owners of the condominium property regime, would purchase the defeasible fee interest[50] in the entire condominium.[51] The amount paid by the tenant to the landowner would be fifty percent of the price determined by negotiation or set by the H.F.D.C.[52]

The Mandatory Conversion Bill contained a unique provision to allow the former landowner continued economic interest in the unit, similar to an investment. Upon any subsequent transfer or sale of the unit, the former landowner would be entitled to thirteen percent of the actual price or tax assessment value of the whole unit, whichever was higher.[53] If the former landowner was not paid the thirteen percent, he would be entitled to commence inverse condemnation proceedings to recover the defeasible fee interest in the property.[54]

2. Compromise Bill

a. Rationale

The Compromise Bill gave the lessor the option of leasehold conversion or lease rent control.[55] The bill cited several public purposes

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[47] *Id.* 2-26(b). In addition to a final offer, the parties could also submit any appraisals, documents, and other expert opinions on which their negotiating positions were based. *Id.* § 2-26(c).

[48] *Id.* § 2-27.

[49] *Id.* § 2-46.

[50] Defeasible fee interest is defined as the leased fee interest in the real property appurtenant to a unit or development, which may be regained by the lessor or the lessor's heirs or designees through inverse condemnation action upon the failure of any subsequent seller or transferor of the unit to notify the lessor and to pay the lessor just compensation. *Id.* § 2-1.

[51] *Id.* § 2-22. Also, the association would be responsible to buy all of the lots, not just the lots of the tenants who are interested in conversion. *Id.* § 2-21(b)(1).

[52] *Id.* § 2-26.

[53] *Id.*

[54] *Id.* § 2-36(c). Inverse condemnation is defined as a lawsuit brought by the lessor or the lessor's successors in interest to recover the defeasible fee interest for failure of payment of thirteen per cent of the sale price or tax assessment value of the unit, whichever is higher. *Id.* at § 2-1.

[55] Compromise Bill, *supra* note 41, § 1.

such as freeing the alienability of residential land, broadening the opportunity for ownership of land use for residential purposes, improving the lessee's bargaining power, and eliminating the risks associated with long term leases.[56] The primary goal of the bill was affordable housing and not land ownership.[57]

b. Provisions

For a development to have qualified for possible conversion, at least twenty-five percent of the tenants had to be owner-occupants[58] with a minimum of ten years remaining on the lease term.[59] In addition, at least twenty-five (or more than fifty percent, whichever is less) of the eligible[60] owner-occupants of the apartments had to apply for conversion.[61] After the required applications had been received H.F.D.C. would conduct a hearing to determine if the sale would effectuate the public purpose of the bill.[62] Once the public purpose requirement was satisfied, the parties would negotiate to determine just compensation.[63] If the parties could not agree on a mutual price, each side would submit final offers to each other and to the H.F.D.C.,[64] who would then commence eminent domain

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[56] *Id.*

[57] "Our primary objective is not fee conversion per se, although that's part of it" [Lieutenant Governor Benjamin Cayatano] said. "Our primary objective is affordable shelter. That's where we're coming from." Andy Yamaguchi, *Cayetano Offers Condo-leasehold Compromise Plan*, HONOLULU ADVERTISER, Jan. 25, 1991, at A-3.

[58] Compromise Bill, *supra* note 41, § 2-1. Owner-occupant means an individual in whose name sole or joint legal title is held in a residential condominium unit . . . which simultaneous to the individual's ownership, serves as the individual's principle place of residence for a period of not less than one year immediately prior to application for conversion. *Id.*

[59] *Id.* § 2-21.

[60] *Id.* § 2-28. Qualifications would require that the person (1) had legal title to, or pursuant to an agreement of sale an equitable interest in, a condominium apartment; (2) was an owner-occupant of the condominium apartment; and (3) did not own fee simple lands suitable for residential housing within the county. *Id.*

[61] *Id.* § 2-22.

[62] *Id.*

[63] *Id.* § 30. Compensation was defined as the current market value of the leased fee interest, considering both the market value of the land and the present value of the future rental income stream. *Id.* § 2-83.

[64] *Id.* § 2-30. Along with the final offers the parties could also submit appraisals, other documents, and any other expert opinions on which their negotiating positions were based. *Id.*

proceedings to effect an involuntary conversion of the entire development tract.[65]

Once the H.F.D.C. determined that a development was eligible for conversion, the landowner had the choice of three alternatives: sale of the property, regulated lease rent, or mutual agreement.

i. Sale of the Property

The landowner could sell the property at the negotiated or the H.F.D.C. price.[66] If the tenant subsequently sold his interest in the property within ten years, the former landowner would have been entitled to share in the appreciation of the land.[67] The amount to be shared with the former landowner would decrease twenty percentage points every two years following the purchase of the leased fee interest.[68]

ii. Regulated Lease Rent

The landowner could keep the fee simple interest in the land, but increases in rent would be limited to the increase in the consumer price index.[69] In addition, the tenant would have the option to renew the lease for the life of the building.[70] If the tenant received special rent treatment and within ten years did not remain an owner-occupant of the unit, he would be liable to the original landowner.[71] If the

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[65] *Id.*

[66] *Id.* § 2-83. The compensation to be paid shall be the current market value of the leased fee interest. *Id.*

[67] *Id.* § 2-88.

[68] *Id.* For example, if two years after conversion the tenant sold the property for ten percent more than the purchase price, he would be liable to the original landowner for eight percent of the appreciation.

[69] *Id.* at § 2-32(2)(b). Lease rent could not increase by the greater of either of the following: (1) the initial lease rent paid at the beginning of the lease multiplied by the percentage change in the consumer price index for Honolulu from the effective date of the lease to the renegotiation date; or (2) the adjusted average initial lease rent multiplied by the percentage change in the consumer price index for Honolulu from the effective date of the lease to the renegotiation rate. *Id.*

[70] *Id.* at § 2-32(a)(1)(A).

[71] If the tenant becomes unqualified either because the lessee loses possessory control or because the lessee sells the unit, the lessor shall reimburse the lessor for the difference between what the lease rent would have been had there been no special lease rent treatment and the lease rent actually paid, diminished at a rate of twenty percent for every two years the lessee was a qualifying lessee and received special lease rent treatment. *Id.* at § 2-32(d).

tenant decided not to renew the lease, he would be compensated for any onsite improvements that are appurtenant to the apartments.[72]

iii. Agreement

Both parties could reach a mutually satisfactory agreement.[73]

C. Constitutional Challenge and Resolution: Midkiff v. Hawaiian Housing Authority

Hawai'i's largest private landowner, Bishop Estate, challenged the constitutionality of Chapter 516 in both federal and state court.[74] On December 19, 1979, Federal District Court Judge Samuel P. King upheld the constitutionality of Chapter 516.[75] In 1983, a divided Ninth Circuit Court of Appeals reversed, holding that Chapter 516 constituted an unconstitutional taking of private property.[76] In 1984, the United States Supreme Court definitively settled the question of federal constitutionality by unanimously reversing the judgment of the Court of Appeals to uphold the constitutionality of Chapter 516.[77]

Justice O'Connor reasoned that under the Fifth Amendment government may use its police power to condemn private land through eminent domain so long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose" and just compensation is paid.[78] Since Chapter 516 provides the landowner with compensation,[79] the only issue for resolution was whether the stated objectives of Chapter 516 constituted sufficiently "public" purposes.[80]

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[72] *Id.* at § 2-32(a)(1)(B).

[73] *Id.* § 2-31(2).

[74] For an in-depth analysis of Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), and Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), see Tom Grande & Craig S. Harrison, Note, Midkiff v. Tom: *The Constitutionality of Hawaii's Land Reform Act*, 6 U. HAW. L. REV. 561 (1984).

[75] Midkiff v. Tom, 483 F. Supp. 62, 70 (D. Haw. 1979).

[76] Midkiff v. Tom, 702 F.2d 788, 807 (9th Cir. 1983).

[77] *Midkiff*, 467 U.S. at 245.

[78] *Id.* at 241.

[79] HAW. REV. STAT. § 516-24 (1985).

[80] *Midkiff*, 467 U.S. at 239.

In determining whether the takings authorized by Chapter 516 constituted a valid "public use," the Court relied upon the language in *Berman v. Parker*.[81] In *Berman*, the court stated:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress . . . or the State legislating concerning local affairs . . . . This principal admits of no exception merely because the power of eminent domain is involved.[82]

Thus, legislatures may broadly determine what constitutes a public use.[83] The judiciary may only intervene when a stated public use is "palpably without reasonable foundation."[84]

In *Midkiff*, the Supreme Court unequivocally concluded that the State's goal of eliminating oligopoly justified the use of the power of eminent domain. The Court stated:

> We have no trouble concluding that the Hawaii Act [Chapter 516] is constitutional. . . . The people of Hawaii have attempted . . . to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market, and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic example of a State's police power.[85]

In addition, the Court declared irrelevant the question of whether the law would in fact accomplish its stated objective.[86] The constitutional requirement is satisfied if the legislature "rationally could have believed" that the law would promote its stated objective.[87] The redistribution of fee title to correct market deficiencies attributable to

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[81] 348 U.S. 26 (1954). In *Berman*, the Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945 which provided for the use of the eminent domain power to redevelop slum areas and for the sale of condemned lands to private parties. *Id.*

[82] 348 U.S. at 32 (1954).

[83] *Midkiff*, 467 U.S. at 241.

[84] *Id.*

[85] *Id.* at 241-42.

[86] *Id.* at 242.

[87] *Id.*

oligopoly satisfies the minimum rationality test of the Public Use Clause.[88]

The Hawaii Supreme Court adopted the Supreme Court's minimum rationality standard,[89] upholding Chapter 516 under Article I, Section 20 of the Hawaii Constitution.[90] The Court stated:

> Once the legislature has spoken on the social issue involved, so long as the exercise of the eminent domain power is rationally related to the objective sought, the legislative public use declaration should be upheld unless it is palpably without reasonable foundation. The crucial inquiry is whether the legislature might reasonably consider the use public, and whether it rationally could have believed that application of the sovereign's condemnation powers would accomplish the public use goal.[91]

In addition, the Court held that Chapter 516 did not deprive the landowners of just compensation.[92] As such, Chapter 516 does not effect an impermissible taking of private land.

D. Framework for Conflict

The resolution of Hawai'i's housing crisis will determine no less consequential an issue than determining who will live in the Hawai'i of tomorrow. Landowners are fearful of the further erosion of the right to use and dispose of private property. Lessees worry that unless they are allowed the free choice to own the land under their condominiums, many will have to uproot themselves from their beloved environs and move to the continental United States. The following comments reveal the pros and cons of extending land reform to leasehold condominiums in Hawai'i.

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[88] *Id.* at 243. The Public Use Clause exists as part of the Fifth Amendment and reads, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Note that the Court also dismissed the appellee's Due Process and Contract Clause arguments. 467 U.S. at 243 n.6.

[89] Hawaii Housing Authority v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 897 (1985).

[90] *Id.* "Private property shall not be taken or damaged for public use without just compensation." HAW. CONST. art. I, § 20.

[91] *Lyman*, 68 Haw. at 70-71, 704 P.2d at 897 (citations omitted).

[92] *Id.* at 72-73. Chapter 516 provides for just compensation in an amount equal to the "leased fee interest." HAW. REV. STAT. § 516-1(14) (1985).

III. Land Reform Should Be Extended To Leasehold Condominiums In Hawai'i

A. The Need for Stability

1. The problem

As noted in Part I, the problems facing many lessees arise when lessors insist on raising lease rents to reflect the new "fair market" value of the property during rent renegotiation.[93] For example, occupants of Aiea's Pearl Manor face "renegotiated" rental increases amounting to $268 per month, up from $20 per month,[94] an increase of nearly 1,400%.[95] By contrast, over a twenty year period from 1970-1990, the median family income in Hawai'i increased by only 400%.[96] Lessees unable to pay the renegotiated rent increases are forced to sell their condominiums and move to more "affordable" alternatives, including those out-of-state.

A serious problem arises for lessees desiring to sell their condominiums before the renegotiation period. As State Senator Mike Crozier notes, most purchasers of leasehold interests "did not know what they were getting into."[97] They did not realize that if rent renegotiation failed, they would have to leave their condominiums.[98] According to the H.F.D.C., the typical ground lease for a condominium has a length between fifty-five and seventy-five years.[99] In addition, most leases have a fixed rent period of between twenty-five and thirty-five years.[100] During this period, rents may be fixed at a certain amount

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[93] *See supra* notes 9-11 and accompanying text.

[94] Benjamin Cayetano, *Land Reform: A Social Imperative for Hawaii*, Honolulu Star-Bull. & Advertiser, Feb. 24, 1991, at B1 [hereinafter *A Social Imperative for Hawaii*].

[95] *Id.*

[96] Vickie Ong, *There's No Place Like Home: If You Can Find and Afford It*, Honolulu Advertiser, Feb. 10, 1991, at A6 [hereinafter *There's No Place Like Home*].

[97] *Condominiums: The Politics of Leasehold* (Oceanic Cable television broadcast, Jan. 5, 1992) [hereinafter *Condominiums: The Politics of Leasehold*].

[98] *Id.*

[99] Housing, Finance, and Development Corporation, A Guide to Hawaii's Residential Leasehold Condominiums, Cooperative Housing Corporations, and Planned Unit Developments 6 (1990) [hereinafter H.F.D.C. Guide].

[100] *Id.*

for the first fifteen years, and adjusted to a higher amount for each ten-year period thereafter.[101] As the end of a negotiated period nears, lessees find it more difficult to sell because potential buyers are afraid of uncertain future rents.[102] Lessees also find it difficult to sell their condominiums because buyers find it more difficult to secure financing.[103] Lenders generally prefer that a minimum of five years be left on a fixed rent period before lending to prospective condominium buyers.[104] Thus, just when it appears to the lessee that he or she may be unable to afford the proposed rent increase, the lessee's condominium becomes markedly less saleable.

2. The solution

Mandatory conversion will help stabilize housing costs for owner-occupants of condominiums on leased land.[105] Indeed, this is the outcome desired by the sponsors of the Compromise Bill. The Lieutenant Governor has emphasized that lessees need predictability in their long-term housing costs.[106] The benefits of having the opportunity to buy fee title manifest themselves as increasing equity over time while mortgage payments remain "flat."[107] A buyer in fee title can plan ahead for the eventuality of reaching an age at which his or her income becomes fixed.[108] A lessee, on the other hand, may come to own the condominium in fee over time, but is subject to the highly unstable and potentially explosive growth of the lease rent over the same period.[109]

According to Lieutenant Governor Cayetano, the instability created by the leasehold system constitutes a significant threat to the social well-being of many of Hawai'i's citizens. During the 1990s, 37,000 Hawai'i residents living in 16,000 condominiums and cooperatives

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[101] *Id.*

[102] Jerry Tune, *Leasehold Condo-Unit Sales Turn Sluggish*, HONOLULU STAR-BULL. & ADVERTISER, Jan. 5, 1992, at G1 [hereinafter *Sales Turn Sluggish*].

[103] Jerry Tune, *Leases and Difficulty in Selling*, HONOLULU STAR-BULL. & ADVERTISER, Nov. 1, 1987, at J1.

[104] *Id.*

[105] See *infra* notes 174-95 and accompanying text for opposing view.

[106] *Condominiums: The Politics of Leasehold*, *supra* note 97.

[107] *Id.*

[108] *Id.*

[109] *Id.*; *see supra* notes 94-96 and accompanying text.

will face rent renegotiation.[110] Although a proportion of these residents will face losing their homes because of what the Lieutenant Governor describes as "the inequities of Hawaii's residential leasehold system,[111] mandatory conversion will extend to condominium owners the same rights granted to homeowners under Chapter 516 and will empower those lessees who are able to buy in fee the opportunity to do so.

B. Remedying the Effects of Oligopoly

1. Evidence of oligopoly

According to the drafters of the Compromise Bill, at the time most lessees purchased their units:

> [lessees] had little choice as to whether to purchase fee simple or leasehold property. More units on the market were leasehold than fee and the leasehold units were more affordable. The lessees were thus drawn by economic pressure into a leasehold arrangement in which future lease terms were subject to reopenings which could result in lease rents that could be, as they have turned out to be, unaffordable to the lease owners . . . [t]he ownership of leased fees is unduly concentrated and that this undue concentration distorts rational functioning of the market, in a manner contrary to the public interest.[112]

In the leasehold condominium market, oligopoly manifests itself in the following ways: (1) undue concentration of land ownership by a few and (2) the favorable response by lessees to purchase fee title offered through voluntary conversion.

a. Undue concentration of ownership

The current pattern of residential land ownership in Hawai'i is highly indicative of an oligopolistic concentration of land ownership.[113] According to the State of Hawaii Data Book, 16,734 condominium units, or sixty-two percent of all units, lie on leased land.[114] A high

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[110] *A Social Imperative for Hawaii*, *supra* note 94, at B1.

[111] *Id.*

[112] Compromise Bill, *supra* note 41, §§ 1(b)(10), (11).

[113] See *infra* notes 180-85 and accompanying text for opposing viewpoint.

[114] DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, 1990 STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT 532 [hereinafter 1990 DATA BOOK].

concentration of land ownership occurs in this market. According to a report prepared by the Office of the Lieutenant Governor, ten percent of all lessors controlled land under fifty-three percent of all leasehold condominiums in Hawai'i.[115] Moreover, thirty percent of all lessors control the land under nearly three-quarters of all leasehold condominiums in the State.[116] In terms of acreage, ten percent of all lessors control sixty-six percent of the land under leasehold condominiums.[117] In addition, a 1987 study conducted by the Legislative Reference Bureau revealed that thirty-nine of the largest lessors controlled fifty-six percent of the land beneath leasehold condominiums.[118] The largest landowner, Bishop Estate, owned the land under nearly 11,000 units comprising 18.5% of the entire leasehold condominium market.[119] In the City and County of Honolulu, the ownership pattern reflected a similar degree of concentration. Of 17,882 landowners in both lease and fee, sixty private landowners, 0.34% of all landowners, controlled the land under more than fifty percent of all condominiums on Oahu.[120]

In terms of the entire residential land market, the Hawaii Supreme Court noted that as of 1975, twenty-two private landowners owned over seventy-two percent of all residential land on Oahu.[121] These statistics are indicative of a high degree of concentration of ownership among a few landowners. Opponents of land reform also face an uphill battle in proving that a legislative belief that oligopoly exists and distorts the market was without palpably reasonable foundation.

b. No opportunity to buy in fee

Most of the lessees facing rent renegotiation had no meaningful opportunity to buy the land under their condominiums.[122] Between

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[115] OFFICE OF THE LIEUTENANT GOVERNOR, CURRENT STATUS OF FEE-SIMPLE AND LEASEHOLD CONDOMINIUMS AND COOPERATIVES IN THE STATE OF HAWAII: A SUMMARY OF THE RESEARCH FINDINGS FROM THE OFFICE OF THE LIEUTENANT GOVERNOR fig. 10 (Feb. 1991) [hereinafter LIEUTENANT GOVERNOR'S REPORT].

[116] *Id.*

[117] *Id.*

[118] COLLEEN C. SAKAI, OWNERSHIP PATTERNS OF LAND BENEATH HAWAII'S CONDOMINIUMS AND COOPERATIVE HOUSING PROJECTS 16 (1987) [hereinafter OWNERSHIP PATTERNS].

[119] *Id.*

[120] *Id.* at 21-22.

[121] *Lyman*, 68 Haw. at 63 n.4, 704 P.2d at 893 n.4.

[122] See *infra* notes 196-201 and accompanying text for opposing viewpoint regarding the adequacy of voluntary conversion.

1960 and 1963, over ninety-five percent of all condominiums offered for sale in Hawai'i were built on leasehold land.[123] For the next twenty-one years until 1984, at least seventy percent of all condominiums offered for sale were built on leasehold land.[124]

Does this suggest that leasehold was the overwhelming choice of land tenure for Hawai'i's condominium buyers? No. In 1987, over sixty percent of all condominium units offered for sale in Hawai'i were built on leasehold land.[125] However, according to a 1987 study conducted by SMS Research and Marketing Services, Inc., two-thirds of leasehold condominium owners surveyed indicated that they were interested in buying the fee interest in the land under their condominiums.[126] The market clearly did not reflect the demand for fee simple ownership.

More recently, ninety-two percent of the lessees who were offered a fee interest from Bishop Estate chose to buy the land under their condominiums.[127] This statistic reveals the willingness of lessees to purchase their land in fee simple, given the opportunity.

Historically, the opportunity to purchase in fee simple has existed for only a small fraction of Hawai'i condominium buyers. Peter Savio, sales agent for Bishop Estate, admitted during a meeting with offerees of Kahala Towers and the Mauna Luan, "If you own your property its value will quickly appreciate because the demand for fee-simple lands far exceeds existing supplies in Hawaii."[128] Without mandatory conversion, many lessees will never have the opportunity to buy the land under their condominiums.

If the results of Chapter 516 are any indication, mandatory conversion for leasehold condominiums would be a resounding success. Since the early 1970s, 26,000 lease-to-fee conversions for single-family homeowners have taken place pursuant to Chapter 516.[129]

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[123] LIEUTENANT GOVERNOR'S REPORT, *supra* note 115, fig. 7.

[124] *Id.*

[125] *Id.*

[126] Jerry Tune, *Most Condo Owners Want to Buy Land*, HONOLULU STAR-BULL. & ADVERTISER, Jan. 18, 1987, at D1 (933 owners were surveyed).

[127] Andy Yamaguchi, *92% of Condo Owners Will Accept Fee Offers*, HONOLULU STAR-BULL., Nov. 6, 1991, at A2 [hereinafter *92% of Condo Owners*]. Offers were given to 2302 owners at Kokea Gardens, Pauahi Gardens, Scenic Towers, Kahala Towers, Plaza Hawaii Kai, Mt. Terrace, Haiku Hale, Pearl One, Lele Pono, Mauna Luan, and the Highlander. *Id.*

[128] Richard Sale, *Leaseholders are Urged to Buy*, HONOLULU STAR-BULL. & ADVERTISER, Aug. 11, 1991, at A3.

[129] *Sales Turn Sluggish*, *supra* note 102, at G1.

2. Abolishing the leasehold system

A number of commentators suggest taking mandatory conversion one step further by abolishing the leasehold system for residential land. According to James Mak, Chairman of the University of Hawaii Economics Department, "In a competitive market . . . leasehold properties would be driven out of the market because they are so clearly inferior to fee-simple. But, Hawaii does not have a competitive market . . . because of such factors as the limits on land availability."[130] Professor Mak concludes that, "in the long-run, the clear solution is the abolition of the leasehold system."[131] Robert Hall, President of the Hawaii Merchants Service Association agrees, stating, "A positive view of the leasehold system from the perspective of Hawaiian society as a whole must include that of abolishing Hawaii's leasehold system . . . ."[132] Bank of Hawaii economist, Paul Brewbaker, concurs: "It really gets down to the question of whether the leasehold system as it exists is a viable form of land tenure. . . . My own impression is that . . . it is just not [viable]."[133] These comments seem somewhat prophetic since the introduction of a bill by State Representative Annette Amaral which proposes a ban on new residential development on leasehold land after January 1993.[134]

Whether leasehold as a form of land tenure should be abolished is open to continued debate. It is clear, however, that proposals to abolish the leasehold system are directly related to the severity of the social problems currently experienced by lessees. Mandatory conversion from lease-to-fee interests is a less drastic alternative to the complete abolition of the leasehold system for residential land.

C. Constitutionality

Reflecting upon the success of Chapter 516 in both federal and state court, a mandatory conversion law for condominiums must at

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[130] Ilene Aleshire, *Latest Debate Here: Should Leasehold be Ended?*, HONOLULU STAR-BULL. & ADVERTISER, Oct. 20, 1991, at B1 [hereinafter *Latest Debate*].

[131] *Id.*

[132] Robert Hall, *Leasehold System Enriches Landowner*, HONOLULU STAR-BULL. & ADVERTISER, Sept. 8, 1991, at G1.

[133] *Latest Debate*, *supra* note 130, at B1.

[134] Floyd Takeuchi, *Housing Problems Top Democrats' Agenda*, HONOLULU STAR-BULL., Jan. 18, 1992, at A1, A4.

least: (1) identify a proper public purpose; (2) provide a rational basis for the legislative belief in the law's ability to promote that public purpose; and (3) provide just compensation.[135] Among the stated purposes of Chapter 516, the Legislature found that:

> (1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;
> (2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land . . .
> (3) The people of Hawaii have been deprived of a choice to own . . . 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;
> (4) The acquisition of land in fee simple . . . by people who are lessees under long-term leases of such land and on which such land their homes are situated . . . will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;
> (5) The 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.[136]

Both the United States Supreme Court and the Hawaii Supreme Court concluded that the rationale behind Chapter 516 satisfied constitutional requirements.[137]

By comparison, the Compromise Bill presents a rationale for extending land reform to leasehold condominiums, which is very similar to the language above. The bill states:

> (1) This chapter serves the following public purposes: freeing the alienability of residential land; broadening opportunities for ownership of land used for housing purposes; improving the relatively weak

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[135] *Midkiff*, 467 U.S. 229, 239-45 (1984); *see also supra* text accompanying notes 77-87.

[136] These findings are summarized from HAW. REV. STAT. § 516-83 (1985).

[137] *Midkiff*, 467 U.S. 229, 241-42 (1984); *Lyman*, 68 Haw. 55, 71, 704 P.2d 888, 902 (1985).

> bargaining power of owner-occupants of leasehold multiple-family units in relationship to the bargaining power of the lessors of land under such housing units; eliminating to the extent practicable risks inherent in long-term residential leases as they have been negotiated in the past; extending the reach of the policies identified in and furthered by chapter 516;
> (2) Leasehold multiple-family unit owners in Hawaii, when they were purchasing their units, had little choice as to whether to purchase fee simple or leasehold property. . . . It is a purpose of this chapter to alleviate in as fair and balanced a manner as possible this economic oppression of home owners by permitting them, through the state's power of eminent domain, exercised on their behalf and for the public good, to acquire the leased fee title to the land beneath their homes. . . .
> (3) The legislature specifically finds that the ownership of leased fees is unduly concentrated and that this undue concentration distorts rational functioning of the market in a manner contrary to the public interest.
> (4) The 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 the people of Hawaii.[138]

Based on the similarities between the stated purposes of Chapter 516 and the Compromise Bill, the holdings in both *Midkiff*[139] and *Lyman*[140] suggest that the Compromise Bill would pass constitutional muster. Any challenge to a properly crafted mandatory conversion bill would have to rely on grounds other than those dismissed in both *Midkiff* and *Lyman*.[141]

D. Revising the Concept of Property

Under current law there is no legally enforceable mechanism to effect the mandatory lease-to-fee conversion of land under leasehold condominiums. Without legislation, the courts may feel uneasy about taking a progressive posture to remedy what the language of the Compromise Bill describes as "unequal bargaining power" between

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[138] These findings are summarized from Compromise Bill, *supra* note 40, § 1(a), (b)(1)-(17).

[139] 467 U.S. 229 (1984).

[140] 68 Haw. 55, 704 P.2d 888 (1985).

[141] Note that the appellee's Due Process and Contract Clause claims were dismissed in *Midkiff*. 467 U.S. at 243 n.6.

lessees and lessors.[142] Barring judicial and legislative action, however, significant numbers of Hawai'i residents will be adversely affected by the leasehold system as it exists today.

Law Professor Joseph William Singer suggests that the doctrinal rationale for reevaluating property rights already exists.[143] Professor Singer notes that property rights have been weakened by courts and legislatures throughout American history with a redistributive intent to increase the public welfare.[144] This has resulted in the recognition of unequal bargaining power between parties.[145] Readjustments have been justified based on what he identifies as the reliance interest in property which is central to the relationship between those parties.[146] The rules of adverse possession, prescriptive easements, public rights of access to private property, tenants' rights, equitable division of property on divorce, and welfare rights are examples of this recognition of reliance and unequal bargaining power between parties.[147]

Recognizing some sort of reliance interest in property for lessees, as well as the unequal bargaining power between lessors and lessees, might enable the courts to protect the lessee absent legislation. Without specific legislation, many courts may feel hesitant about nullifying surrender clauses or granting other relief to lessees. But without aid from the judiciary and the legislature, lessees will continue to face difficult choices, including leaving the state.

E. Concluding Remarks

> *Private property being individualism, and its abolition being socialism, the two are correlative and must yield to each other just as rapidly as experience and necessity dictate. Civilization is a growth both ways—an intensification of private property in certain ways, an abolition of it in others.*[148]

Land is power in Hawai'i.[149] Most issues of consequence in Hawai'i, including homelessness, foreign investment, environmental protection,

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[142] *See supra* note 136 and accompanying text.

[143] Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 622-23 (1988).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] HENRY D. LLOYD, MAN, THE SOCIAL CREATOR 50 (1910).

[149] *See generally* GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII (1985). This thesis advanced by George Cooper and Gavan Daws identifies property ownership as the foundation for the exercise of economic, political, and social control over the people of Hawai'i. *Id.*

affordable housing, tourism, water rights, Native Hawaiian rights, and mass transit are directly or tangentially related to the control of scarce land. For this reason, Hawai'i's current debate over extending land reform to leasehold condominiums portends important changes in the way property rights are perceived and protected in Hawai'i.

Mandatory lease-to-fee conversion is a viable solution designed to increase the stability of housing costs for thousands of Hawai'i's condominium owners living at the mercy of lessors. Mandatory conversion is also designed to give condominium buyers the opportunity to buy fee simple land—an opportunity previously denied to many buyers as a result of the market distortions caused by oligopoly. Recognizing that private property rights are not sacrosanct will be the first step towards achieving equitable solutions to the problems faced by many lessees. Support for judicial and legislative public welfare reform, at the expense of some of the "sticks" in the bundle of property rights, can be found in the words of Professor Morris Cohen, who writes:

> A government which limits the right of large land-holders limits the rights of property and yet may promote real freedom. Property owners, like other individuals, are members of a community and must subordinate their ambition to the larger whole of which they are a part. They may find their compensation in spiritually identifying their good with that of the larger life.[150]

Property rights should give way, as they have historically, when their protection threatens the fundamental well-being of society.

There are no compelling reasons for refusing to extend land reform to leasehold condominiums. As a practical matter, condominium owners may not possess the clout that homeowners did in the 1960s. As multiple-family residences become an increasingly popular choice for Hawai'i residents, however, that may change in the future. Without the benefit of Chapter 516, thousands of Hawai'i homeowners would have faced the same choices condominium owners now face. It is time to extend land reform to condominiums.

IV. Mandatory Condominium Conversion Is Not The Answer

The Sixteenth Legislature was deeply divided on the controversial issue of mandatory condominium leasehold reform, with some rep-

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[150] Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 19 (1927).

resentatives vowing never to accept mandatory conversion.[151] The results were predictable; the Mandatory Conversion Bill failed to pass through the State House of Representatives. Whatever the reasons for the majority of lawmakers in rejecting mandatory conversion, it reflects sound nonaction by the Legislature. Simply put, mandatory conversion is not a reasonable method of dealing with Hawai'i's many housing problems.

The deficiencies in mandatory conversion can be broken down into the following: (1) Chapter 516 has failed to solve the housing ills it was designed to cure; (2) the goals identified by the previous condominium bills are not satisfactorily solved by mandatory conversion; (3) voluntary conversion is the most equitable solution for the landowner and the lessee; and (4) notwithstanding the unprecedented deference given to the Legislature by *Midkiff*,[152] it is not certain that mandatory condominium conversion would pass the rational basis test.

A. The Failure of Chapter 516

The effectiveness of a mandatory conversion bill can be measured by the success, or lack thereof, of Chapter 516.[153] In the twenty-four years since inception there have been approximately 12,550[154] single-family dwelling conversions under Chapter 516. Since many of the goals of Chapter 516 are similar to the condominium conversion bills,[155] the ability of Chapter 516 to achieve its goals is a good indication of the ultimate success of mandatory condominium conversion.

At the time of the enactment of Chapter 516, Hawai'i faced a growing housing crisis. The selling price for new homes was almost sixty percent more than the national average and existing homes were selling for more than ninety percent over the nationwide figure.[156]

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[151] HONOLULU ADVERTISER, Feb. 24, 1991, at A-33. "Frankly, there are people on both committees [House Consumer Protection and House Housing] who will not support mandatory conversion in any way, shape, or form." *Id.* (quoting interview with Consumer Protection Chairwoman Mazie Hirano).

[152] 467 U.S. 229 (1984).

[153] See *supra* note 129 and accompanying text for opposing view.

[154] H.F.D.C., FISCAL YEAR 1990 ANN. REP. 19 (1990).

[155] *See supra* notes 13-23, 42, 55-57.

[156] Edward Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?*, 8 HAW. B. J. 5, 5 (1971) [hereinafter *The Antitrust Laws*].

Rents were dramatically increasing and the vacancy rates were extremely low.[157] The legislature believed that residential leasing contributed to the shortage of fee simple housing and created an artificial inflation in land values.[158] Therefore, Chapter 516 was enacted to force large landowners to sell rather than lease their residential property.[159] Despite the numerous conversions under Chapter 516, the housing problems that existed in 1967 are still with us today. From 1980 to 1990 the median family income increased 75%, from $23,554 in 1980 to $41,200 in 1990, but the median price of a single family home jumped 147%, from $143,500 to $355,000.[160] In 1991, the City of Honolulu had the highest rental rates in the nation[161] and the vacancy rate in Hawai'i is an extraordinarily low 1.5%.[162] The percentage of family income for rent has increased from 24.4% in 1980 to 29.5% in 1990.[163] Also, there are over 8000 homeless people in Hawai'i, which is several times more than a few years ago.[164]

Chapter 516 does not solve Hawai'i's housing problems because it does not address the real problem: increasing the total number of houses on the market. High housing costs can be directly linked to the lack of supply of housing in the State.[165] As in any market, if the supply increases the prices will decrease to reflect the change in market conditions. Chapter 516 does not increase the overall number of houses because it does not break away land that could be developed from the larger landowners; all it effectively does is change the ownership of the existing developments.[166] In 1967 the state and federal government and the seventy-two largest private landowners held 95.5% of the land in Hawai'i, leaving only 4.5% of the remaining land for the remainder of the population.[167] In 1991, less

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

[158] HAW. REV. STAT. § 516-83(2) (1985).

[159] *See supra* notes 14-15.

[160] *There's No Place Like Home*, *supra* note 96, at A8.

[161] Ray Daysog, *Rental Search Stuns Oahu Couple*, HONOLULU ADVERTISER, Sept. 8, 1991, at G1.

[162] *There's No Place Like Home*, *supra* note 96, at A8.

[163] Ray Daysog, *Island Rental Vice Getting Tighter*, HONOLULU ADVERTISER, Sept. 9, 1991, at A1.

[164] Louise Catteral, *How Do We House the Homeless*, HONOLULU ADVERTISER, Sept. 2, 1991, at A1.

[165] *There's No Place Like Home*, *supra* note 96, at A6.

[166] *The Antitrust Laws*, *supra* note 156, at 9.

[167] James Conahan, *Hawaii's Land Reform Act: Is it Constitutional?*, 6 HAW. B. J. 31, 32 (1969).

than five percent of the state's land was available for urban use, with the rest divided roughly between agricultural and preservation land.[168]

Another factor that has contributed to the housing shortage is that the population is growing faster than the housing supply.[169] Also, burdensome procedures to obtain building permits and zoning applications delay construction and increase financing costs.[170] Alternative legislation that would increase the land available for construction and streamline the building process would be more effective than mandatory conversion at increasing the supply of affordable housing.

Chapter 516 has other shortcomings as well. The link between the benefits to the public and the transfer of property from one private owner to another is not clear:

> The chain of events and span of time between the takings contemplated by [Chapter 516] and the alleviation of, for instance, economy-wide inflation in the State is particularly long and speculative. In the meantime, private parties enjoy the property taken by the State while the public can be guaranteed no benefit from the taking.[171]

Also, since Chapter 516 does not put any restrictions on the subsequent use of the land, the lessees who have purchased the land under the properties have enjoyed the financial benefits[172] of leasing and

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[168] David Ramsour, *Why Affordable Homes Elude Us*, *in* BANK OF HAWAII, CONSTRUCTION IN HAWAII REPORT 18 (1991) [hereinafter *Why Affordable Homes Elude Us*]. "A fundamental reason for the lack of affordable housing in Hawaii has been the local government's creation and implementation of the strictest land use laws in the United States. Because of these laws, less than five percent of the state's land is available for urban use, with the rest divided roughly two million acres of preservation land and two million acres of agricultural land (of which less than 15 percent is cultivated)." *Id.*

[169] *There's No Place Like Home*, *supra* note 96, at A6. "While the number of households increased by 23 percent from 1980 to 1989, housing wasn't keeping pace: The overall housing stock went up 18 percent and the number of residential units (excluding condos for tourists) went up by 16 percent." *Id.*

[170] *Why Affordable Homes Elude Us*, *supra* note 168, at 18.

[171] Susan Lourne, Hawaii Housing Authority v. Midkiff: *A New Slant on Social Legislation: Taking From the Rich and Giving to the Well-To-Do*, 25 NAT. RESOURCES J. 772, 790 (1985) [hereinafter *A New Slant*].

[172] The *Midkiff* decision was like a floodgate opening the way to a flood of single-family leasehold conversions. As reported in the April 5, 1987, *Honolulu Star-Bulletin and Advertiser*, of the approximately 14,500 homes with Bishop leases, 3500 homes had converted to fee simple, and 8000 more were under negotiation. After completion of the sales, many home owners sold their homes to other home buyers, often

have imposed the same restrictions on subsequent possessors as the original owners had imposed on them prior to conversion.[173]

B. Mandatory Conversion for Condominiums Does Not Acheive it's Goals[174]

To assess the effectiveness of mandatory conversion for condominiums, the goals of recently proposed bills[175] must be examined to determine if mandatory conversion will obtain its objectives. The major goals identified by the bills included to break up an oligopoly;[176] alleviating the shortage of affordable housing;[177] controlling lease rent;[178] and increasing the opportunity to own a home in fee simple.[179]

1. Break up of an Oligopoly

Proponents of mandatory conversion claim that there is a condominium oligopoly similar to the land oligopoly which existed in 1967.[180] On the surface the condominium ownership pattern appears to be comparable to the forty-seven percent private land ownership by the seventy-two largest landowners in 1967.[181] However, a deeper analysis reveals that there is essentially only one very large condominium owner. Bishop Estate owns 18.5% of the total leasehold

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reaping hundreds of thousands of dollars in windfall profits. The 1967 Land Reform Act did not contain a formula for sharing the windfall profits with the original landowners. In some neighborhoods, particularly Waialae-Kahala, purchases by offshore investors resulted in windfall profits in the seven figures. This phenomena has created resentment in the minds of some former land owners and may have strengthened resistance against extending the Land Reform Act to Condominiums. NICHOLAS ORDWAY, MODELING LONG-TERM IMPACTS OF A HYPOTHETICAL RESIDENTIAL CONDOMINIUM LEASE ON LESSORS AND LESSEES IN HAWAII 7 (1991) [hereinafter MODELING LONG-TERM IMPACTS].

[173] *A New Slant*, *supra* note 171, at 790.

[174] See *supra* notes 105-29 and accompanying text for opposing view.

[175] *See supra* notes 42-43 and 55-57 and accompanying text.

[176] *See supra* notes 43 and 56 and accompanying text.

[177] *See supra* notes 43 and 56 and accompanying text.

[178] *See supra* notes 43 and 56 and accompanying text.

[179] *See supra* notes 43 and 56 and accompanying text.

[180] See *infra* notes 118-19 and accompanying text. Proponents claim that the largest thirty-nine owners of leasehold condominiums own nearly 56% of the land. The largest landowner, Bishop Estate, owns the land under nearly 11,000 units, comprising 18.5% of the leasehold market.

[181] *Midkiff*, 467 U.S. 229, 232 (1984).

units,[182] while the next largest landowner, Magoon Estates, owns only 2.5%.[183] Overall, eighty-nine percent of the condominium projects are owned by single owners.[184] The recent decision by Bishop Estate to sell its condominium leasehold interests[185] eliminates any claim by proponents that there is an oligopoly of ownership.

2. Affordable housing

As in single family dwellings, the shortage of affordable housing is caused by a shortage in supply coupled with high demand.[186] Mandatory conversion will not help ease the housing shortage because it does not increase existing supply. Since the present tenants will continue to live in the units, there will be no increase of available units on the market.

3. Rent Control

Between 1990 and 2019 eighty-seven percent of the units in the state will be eligible for rent renegotiation.[187] The majority of the ground lease rents are based on the fair market value of the land.[188] Because of the tremendous increase in land values in recent years, lease rents are expected to increase significantly.[189]

Mandatory conversion does not alleviate increased rents for a majority of tenants because most of the units are not owner-occupied. According to a recent study performed by the state, the owner-occupancy rate for condominiums on leasehold land is only twenty-

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[182] See *supra* note 119.

[183] OWNERSHIP PATTERNS, *supra* note 118, at 34.

[184] The breakdown of condominium ownership is as follows:

415 (89%) lessors own land under a single project.

26 (5.6%) lessors own land under two projects.

25 (5.4%) lessors own land under three or more projects.

EZRA, O'CONNOR, MOON & TAM, LEASEHOLD CONVERSION OF CONDOMINIUMS AND COOPERATIVE HOUSING PROJECTS PHASE I 50 (1987) [hereinafter LEASEHOLD CONVERSION].

[185] Thomas Kaser, *Bishop Estate to Sell Leased Condo Land*, HONOLULU ADVERTISER, Aug. 9, 1991, at A3.

[186] *See supra* notes 165-70 and accompanying text.

[187] *Leasehold Conversion*, *supra* note 184, at 25.

[188] *Id.*

[189] *See supra* notes 94-95.

eight percent.[190] Since mandatory conversion will only affect owner-occupants, the majority of tenants (who are subleasing from investor-lessees) will not benefit from conversion.

A direct cap on ground lease rent would be more effective than mandatory conversion at keeping lease rent increases reasonable. Although a recent rent control ordinance by the City of Honolulu was declared unconstitutional,[191] rent control was not per se banned, and a properly crafted ordinance would be constitutional.[192]

In some respects rent control is superior to mandatory conversion. Studies indicate that as many as forty-three percent of the owner-occupants in leasehold units are elderly (55 years or older).[193] Many of the elderly are on fixed pensions and cannot afford to purchase their units. Therefore, rent control may be their only protection against significant increases in rent. In addition, rent caps may encourage voluntary conversion because lessors may find more productive investments.

4. Allow lessees to own their homes

Owning property on which one lives, along with its legal and equitable rights, is the "American dream".[194] For a majority of the

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[190] OWNERSHIP PATTERNS, *supra* note 118, at 34.

[191] In Richardson v. City and County of Honolulu, 759 F. Supp. 1477 (1990), the federal district court considered the City's passage of Bill 81, which imposed a maximum ceiling on renegotiated lease rents for residential condominiums. Under the bill, the renegotiated lease rent could not exceed the original lease rent multiplied by a rent factor determined by averaging an inflation factor and an income factor. The court held that the bill was a regulatory taking without just compensation in violation of the Fifth Amendment because by arbitrarily basing the maximum allowable renegotiated rent on the initial rent paid under the lease, it did not allow lessors a just and reasonable rate of return. Also, the court stated that although the purposes were legitimate, the means to effectuate those purposes were not rational. The Ordinance did not regulate the rent that a sublessor could charge to tenants, nor did it apply only to residential condominiums. It did not provide for any individualized consideration of the market value of a particular condominium project and did not create a city agency to oversee administration and implementation of the ordinance. *Id.* at 1479-97.

[192] *Id.* at 1479. "Careful review and analysis of constitutional law and precedent convinces this court that a properly crafted ordinance, the purpose of which is to limit lease rent increases, can pass constitutional muster." *Id.*

[193] LIEUTENANT GOVERNOR'S REPORT, *supra* note 115, at 6.

[194] H.R. COMM. REP. NO. 18, *supra* note 14, at 860.

tenants, however, this goal is not advanced by mandatory conversion because only twenty-eight percent of the units are owner-occupied.[195] Therefore, a conversion bill limited to owner-occupants will not result in the majority of the tenants owning their units.

C. Voluntary Conversion is the Fairest Solution

The recent decision by Bishop Estate, Hawai'i's largest condominium owner, to allow its leasehold tenants to buy their units makes mandatory conversion unnecessary.[196] Conversion of Bishop Estate's leasehold interests will result in an eighteen percent decrease in the total number of leasehold units.[197] Since no other owner holds more than 2.5% of the units in leasehold,[198] the market will be completely owned by small landowners. Although conversion is a viable alternative for Bishop Estate, many of the small landowners would be economically and socially injured by a forced conversion.

The announcement by Bishop Estate that it will offer its condominium leasehold interests for sale was a major blow to the proponents of mandatory conversion. Initially, Bishop Estate has offered approximately 3000 units in a dozen condominiums.[199] With the receipt of favorable tax rulings from the Internal Revenue Service,[200] Bishop Estate decided to offer all of its 12,949 units for sale to lessees.[201]

The conversion by Bishop Estate has other positive aspects. Response to Bishop Estate's offer has been favorable, with a majority of the tenants purchasing their units.[202] The relatively low conversion requirements of thirty-five percent of the units in a building assures that a majority of the buildings will be converted.[203] Also, Bishop

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[195] *See supra* note 190.

[196] See *supra* note 129 and accompanying text for opposing view.

[197] OWNERSHIP PATTERNS, *supra* note 118, at 34.

[198] *Id.*

[199] Walter Wright & Christopher Neil, *Moiliili Condo, Sandalwood Get Bishops Offer*, HONOLULU ADVERTISER, Aug. 4, 1991, at A3.

[200] Andy Yamaguchi, *Bishop Condo Fee Sales Get Clearance From IRS*, HONOLULU ADVERTISER, Sept. 21, 1991, at A4. Bishop Estate has received a favorable ruling from the IRS which will allow the Estate to sell the condominiums and not endanger their non-profit status. *Id.*

[201] Thomas Kaser, *Bishop Estate to Sell Leased Condo Land*, HONOLULU ADVERTISER, Aug. 1, 1991, at A1.

[202] *92% of Condo Owners*, *supra* note 127, at A2.

[203] Harold Morse & Greg Kakesako, *Fee Offer has Sandalwood Owners Smiling*, HONOLULU ADVERTISER, Aug. 9, 1991, at A3.

Estate is not reinvesting the proceeds into other condominiums but is concentrating on commercial investments such as shopping centers.[204] Finally, the success of the conversion may sway the small landowners into selling their units.[205]

In addition, the size and tax-exempt status of Bishop Estate allow it to change its investment holdings with relative ease.[206] This cannot be said of the small landowner who faces a number of concerns if forced to convert.

a. Taxes

Since the small landowner is not a tax-exempt organization, he would be taxed on any gain from the sale unless he reinvests the proceeds into similar property.[207] If the landowner must reinvest in similar property, this may result in the lessor purchasing another investment property of similar type, thereby continuing the landlord ownership cycle.

b. Partial Conversion

Bishop Estate allows condominiums to be converted if there is a thirty-five percent participation rate for the development.[208] A partial conversion is hard on small landowners for several reasons. The administrative costs associated with the collection of rent from the tenants who do not want to convert would remain essentially the same, and therefore would increase the cost per unit.[209] Also, the small landowner would have to deal with minority fee simple unit owners when decisions of management and operations of the building

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[204] R. Lynch, *Bishop Estate Hopes to Buy More Isle Shopping Malls*, HONOLULU ADVERTISER, Aug. 22, 1991, at A1. The Bishop Estate already has purchased the Windward Mall. In the future it hopes to acquire the Kahala Mall, Pearlridge Center, Koko Marina and other shopping and commercial centers in Hawaii Kai, as well as the Kamehameha Shopping Center in Kalihi. *Id.*

[205] Andy Yamaguchi, *Will Others Follow Bishop Lead on Conversion*, HONOLULU STAR-BULL. & ADVERTISER, Aug. 11, 1991, at A4.

[206] *Id.*

[207] An involuntary conversion under § 1033 of the Internal Revenue Code would permit the deferral of taxes on gains resulting from the sale of real property if it is reinvested in property of "like kind." I.R.C. § 1031 (West Supp. 1991).

[208] *See supra* note 203 and accompanying text.

[209] LEASEHOLD CONVERSION, *supra* note 184, at 71.

are concerned.[210] Finally, if the small landowner decides to sell his interests, the value of the remaining leased units would not be as high as a sale of a whole project.[211]

c. Emotional Attachment

Many small landowners have held the property for generations and now have strong emotional attachments to the land. To them it is not simply an investment, but a means for each generation to provide for themselves and for the benefit of generations to come.

Voluntary conversion offers a good compromise allowing the large landowners to sell and at the same time not forcing the smaller landowners to give up their property. Moreover, it has proven successful in the past, with seventy-two percent of the units voluntarily offered being converted.[212]

D. Mandatory Conversion for Condominiums is Unconstitutional[213]

The *Midkiff*[214] decision granted the legislature unprecedented deference[215] in determining what is a "public purpose" under the Fifth Amendment.[216] Moreover, the legislation need not even achieve its goals; all that is required is that the legislature rationally believes that the act will obtain its objectives.[217]

Even with the minimum rational basis test[218] set forth in *Midkiff*,[219] it is not certain that mandatory condominium conversion would be

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[210] *Id.* at 64.

[211] *Id.* at 72.

[212] LIEUTENANT GOVERNOR'S REPORT, *supra* note 115, at 1.

[213] See *supra* notes 135-41 and accompanying text for opposing view.

[214] 467 U.S. 229 (1984).

[215] Previous instances where federal courts had found a public taking to be for a constitutionally acceptable public use included takings which resulted in: condemnation of property for an historically acceptable public use; a change in the use of the land; a change in the possession of the land; a transfer of ownership from a private party to a governmental entity; and a de minimus condemnation necessary to develop nearby land. The Ninth Circuit in *Tom II* noted that the use by the Land Reform Act fit none of the descriptions. *Tom II*, 702 F.2d 788, 793-94 (9th Cir. 1983).

[216] *Midkiff*, 467 U.S. at 239-43.

[217] *Id.*

[218] *Midkiff*, 467 U.S. at 242. Legislative actions will stand if "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *See supra* note 87 and accompanying text.

[219] 467 U.S. 229.

found constitutional. The condominium situation is distinguishable from the factors which led to Chapter 516. The purpose of Chapter 516 was not to increase fee simple housing but to redistribute the large land holdings of a handful of private owners.[220] This concept of redistributing land is not readily transferable to the land under condominiums. As stated in a Legislative Reference Bureau Report:

> The Land Reform Act applies to single-family residential lots which are inherently different from condominiums and housing cooperatives. Land area for condominiums and cooperatives is likely to be less important than for single family residences due simply to their different natures. The land under a single-family residential lot could conceivably hold a condominium or cooperative housing project containing 10, 50, 100, or more units or residences.[221]

Since leasehold condominiums occupy only 1920 of the 2.1 million acres in the state,[222] the concern for the concentration of large land ownership does not apply to condominiums.

Another distinguishing factor is the willingness of the larger condominium owners to sell their interests. Unlike the refusal of large landowners to sell in 1967, Bishop Estate will voluntarily offer all of its leasehold units for fee simple sale.[223] In addition, Campbell Estate has also decided to offer in fee simple its 2.5% of the leasehold market to the leasehold tenants.[224]

Proponents of mandatory conversion may claim that forced condominium conversion will advance a valid public purpose such as breaking up of an oligopoly,[225] allowing lessees to own their own home,[226] increasing the number of affordable homes,[227] or controlling rent.[228] However, as previously noted, these problems either do not exist or will not be eliminated by a forced conversion.

E. Concluding Remarks

The continued deterioration of the housing situation in Hawai'i over the past twenty-five years clearly indicates that legislative action

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[220] *See supra* notes 14-15.

[221] OWNERSHIP PATTERNS, *supra* note 118, at 35.

[222] LEASEHOLD CONVERSION, *supra* note 184, at 42.

[223] *See supra* note 185.

[224] Rob Perez, *Bishop Estate Fee Hikes Leave Lessees Crying Foul*, HONOLULU ADVERTISER, Sept. 20, 1991, at A1.

[225] *See supra* notes 42 and 55-57.

[226] *Id.*

[227] *Id.*

[228] *Id.*

must be taken to reverse this trend. It is also just as clear that Chapter 516 has failed to alleviate the state's housing problems. Although mandatory conversion may help the relatively few owner-occupants who do convert, it does not help the majority of the people. Alternative actions such as rent control and legislation designed to encourage development would be more effective at addressing the statewide housing crisis. The current legislature must learn from the failure of Chapter 516 and realize that mandatory condominium conversion is not the answer.

V. Conclusion

The polar viewpoints expressed in this article are representative of both the general population and the State Legislature. As a result of the widely divergent views and the emotional nature of this issue, it is unlikely that a compromise solution will be reached in the near future. The Legislature must not sit idlely by on this controversial issue; a definitive decision on the mandatory condominium conversion issue will be the first step in dealing with Hawai'i's housing crisis.

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Burdick v. Takushi: Yes to Equal Voice in Voting, No to a Fundamental Right to Vote for Any Particular Candidate

I. Introduction

In *Burdick v. Takushi*[1], the United States Court of Appeals for the Ninth Circuit reversed the United States District Court for the District of Hawaii[2] and found that a ban on write-in voting in Hawai'i was constitutional.[3] The Ninth Circuit Court of Appeals held that Hawai'i's prohibition on write-in voting did not create an impermissible burden on the voter's First and Fourteenth Amendment rights of free speech and association.[4] The court found the state's asserted interests controlling in comparison to a candidate's easy access to the election process.[5]

The United States Court of Appeals for the Ninth Circuit in *Burdick* recognized a voter's constitutional right to vote and have his or her vote counted. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[6] However, the Ninth Circuit Court of Appeals held that although the right to vote did guarantee an equal voice in the election process, it did not guarantee a right to vote for any particular candidate.[7]

Part II of this note looks at the facts of the case. Part III traces the recent history of election laws in the United States. Part IV analyzes

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[1] 927 F.2d 469 (9th Cir. 1991) (Beezer, J.).
[2] 737 F. Supp. 582 (D. Haw. 1990) (Fong, J.).
[3] *Burdick*, 927 F. 2d at 476.
[4] *Id.* at 476.
[5] *Id.* at 473.
[6] *Id.* (citing Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).
[7] *Id.*

the court's level of scrutiny, its analysis of the injury to a voter's rights, the legitimacy of the state's asserted interest, and the justification for the write-in ban. Part V evaluates the impact of this decision on future voters and candidates in Hawai'i, and on election litigation in general.

II. FACTS

In June 1986, Alan B. Burdick notified Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, then Lieutenant Governor of the State of Hawaii,[8] that he wished to write in his votes in the upcoming primary election and in future elections.[9] After consulting with the state attorney general's office, the state officials advised Burdick that Hawai'i election laws did not provide for write-in voting and that such votes would be disallowed or ignored.[10]

Burdick[11] filed suit in United States District Court for the District of Hawaii on August 21, 1986. He claimed that Hawai'i's ban on write-in voting violated both the Hawaii Constitution and the United States Constitution.[12]

The district court granted Burdick's motion for summary judgment, holding that the failure to provide for write-in voting constituted a violation of Burdick's First Amendment rights of freedom of expression and association.[13] The district court issued an injunction ordering the

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[8] The lieutenant governor serves as Hawai'i's Chief Election Officer. Burdick v. Takushi, 737 F. Supp. 582, 584 (D. Haw. 1990). Burdick subsequently filed a new action on May 17, 1988, naming Benjamin Cayetano, who was elected lieutenant governor in the 1986 general election. The two actions were later consolidated. *Id.* at 585 n.1.

[9] Burdick v. Takushi, 927 F.2d 469, 471 (9th Cir. 1991).

[10] *Burdick* 737 F. Supp. at 584.

[11] Alan Burdick at the time of his filing was an attorney for the Hawai'i law firm of Goodsill Anderson Quinn and Stifel. He lived in Kailua, Hawai'i. *Lawyer Challenges Write-In Prohibition*, HONOLULU STAR-BULL., Aug. 22, 1986, at A6. Republican John J. Medeiros was running unopposed in Burdick's 19th State House District (Mokapu-Kailua). *ACLU seeks ballot space for write-ins*, HONOLULU ADVERTISER, Aug. 22, 1986, at A13. Burdick said he wanted to vote for someone other than Medeiros but not himself. Lee Catterall, *State Must Allow Write-in Votes in All Nov. 4 Races*, HONOLULU STAR-BULL., Sept. 30, 1986, at A3. "This is not an ego trip of mine . . . . People should be free to vote for the person of his choice, even if his name is not on the ballot." *Id.*

[12] *Burdick*, 737 F. Supp. at 584.

[13] *Id.*

state to provide for write-in votes in the 1986 general election.[14]

The state appealed the decision.[15] The Ninth Circuit Court of Appeals vacated the district court's injunction order[16] and directed the district court to abstain from deciding the merits of Burdick's constitutional challenge since it was unclear if write-in voting was actually banned in Hawai'i.[17] The case was remanded to United States District Court for the District of Hawaii for a definitive answer on whether Hawai'i's statutes or constitution required or permitted write-in voting.[18] On remand, the district court certified three questions to the Hawaii Supreme Court asking if the state's constitution or election laws allowed for write-in votes.[19]

On July 21, 1989, the Hawaii Supreme Court ruled that the state's statutory election scheme precluded write-in balloting and found the write-in ban permissible.[20] Burdick then renewed his motion for summary judgment in district court. On May 10, 1990, the district court granted plaintiff's motion for summary judgment[21] and preliminary

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[14] *Id.* The state moved for a stay of the preliminary injunction pending appeal; the motion was denied on October 8, 1986. *Id.*

[15] Burdick v. Takushi, 927 F.2d 469, 471 (9th Cir. 1991). The Ninth Circuit Court granted the state a stay of the preliminary injunction pending appeal. *Id.*

[16] *Id.*

[17] *Id.* The Ninth Circuit Court of Appeals recognized the Pullman abstention doctrine as controlling. *Id.* This doctrine makes it clear that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal question can be decided." Hawaii Housing Auth. v. Midkiff, 457 U.S. 229, 236 (1984).

[18] Burdick v. Takushi, 737 F. Supp. 582, 584 (D. Haw. 1990).

[19] *Id.* at 585. *See also*, Burdick v. Takushi, 70 Haw. 498, 776 P.2d 827 (1989). The three questions certified were:

> (1) Does the Constitution of the State of Hawaii require Hawai'i's election officials to permit the casting of write-in votes and require Hawai'i's election officials to count and publish write-in votes?
>
> (2) Do Hawai'i's election laws require Hawai'i's election officials to permit the casting of write-in votes and require Hawai'i's election officials to count and publish write-in votes?
>
> (3) Do Hawai'i's election laws permit, but not require, Hawai'i's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

Id.

[20] 737 F. Supp. at 585. The Hawaii Supreme Court answered "No" to each question. *Id.*

[21] *Id.* The finding by the Hawaii Supreme Court that the state's statutory election scheme prohibited write-in voting established that no unsettled question of state law existed. The Pullman abstention doctrine was no longer applicable and the district court could decide the federal question on its merits. *Id.*

injunctive relief.[22] It held that Hawai'i's ban on write-in voting impermissibly infringed on Burdick's constitutionally guaranteed rights of free expression and association.[23]

On March 1, 1991, the Ninth Circuit Court of Appeals reversed the district court and filed its decision upholding the constitutionality of the state's ban on write-in voting.[24]

III. History

A. Few Bright Lines in Election Law Cases

Lower federal courts deciding state election law challenges have found that the United States Supreme Court has established few bright lines to guide them when deciding election and ballot box cases.

One concern of the courts is whether to consider the challenged election law under the First and Fourteenth Amendments' provisions on free association and free speech or under a Fourteenth Amendment Equal Protection analysis. Irrespective of which amendment the courts evoke, they will often cite to cases decided under the other amendment.[25] The courts frequently resolve a First and Fourteenth Amendment challenge drawing from cases decided on Fourteenth Amendment equal protection analysis.[26] In turn, courts applying the "fundamental rights" strand of equal protection analysis draw from First and Fourteenth Amendment right cases.[27] The degree to which an election

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[22] *Id.* at 592-93.

[23] *Id.* at 592. The district court issued a preliminary injunction directing the State to provide for casting and counting of write-in votes. However, because of the time constraints and the fact that the Ninth Circuit Court of Appeals had previously granted a stay of the prior preliminary injunction, the district court granted the state's motion to stay the injunction pending appeal. *Id.* at 592-93.

[24] Burdick v. Takushi, 927 F.2d 469 (9th Cir. 1991).

[25] *See, e.g.*, Canaan v. Abdelnour, 710 P. 2d 268, 272 (Cal. 1985) (observing that the United States Supreme Court in evaluating a constitutional challenge to an election law replaced equal protection test with a First Amendment balancing analysis).

[26] Anderson v. Celebrezze, 460 U.S. 780, 788 n.7 (1983) (holding based on First and Fourteenth Amendment free speech analysis and did not engage in a separate Fourteenth Amendment equal protection analysis although Court relied on a number of prior election cases based on the Fourteenth Amendment Equal Protection Clause); *see also* Paul v. Ind. Election Bd., 743 F. Supp. 616, 618 (S.D. Ind. 1990) (relying substantially on previous Fourteenth Amendment equal protection election law analysis in a case governed directly by a First Amendment challenge).

[27] 460 U.S. at 788 n.7.

restriction furthers a legitimate state interest is the common concern in either challenge.[28]

The courts are also divided on whether, irrespective of the status of the plaintiff, the challenge should be considered as an injury to a voter or to a candidate.[29] Finally, the courts differ on the level of scrutiny to apply in deciding ballot-access cases.[30]

1. Voter-Plaintiffs v. Candidate-Plaintiffs

Any candidate challenging a state's regulation of its election law is also a voter, but the rights of a candidate, as compared to the rights of a voter, are not viewed equally by the courts.

A voter-plaintiff holds fundamental rights under the Constitution requiring greater protection from the courts.[31] A candidate-plaintiff is

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[28] *Id.* (citing Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979); Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393, U.S. 23 (1968)).

[29] Bullock v. Carter, 405 U.S. 134, 143 (1972). "The rights of the voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.*; *see also* Erum v. Cayetano, 881 F.2d 689, 691 (9th Cir. 1989) (holding that candidate eligibility requirements implicate basic constitutional rights of voters as well as those of candidates); Dixon v. Md. State Admin. Bd. of Election Laws, 878 F.2d 776, 779 (4th Cir. 1989) (pointing out that the conflicting positions taken by the United States Supreme Court in past decisions regarding rights of candidates and voters in ballot access cases).

[30] Rainbow Coalition of Okla. v. Okla. State Election Bd., 844 F.2d 740, 742 (10th Cir. 1988) (noting that United States Supreme Court has not been consistent in articulating the standard to evaluate the constitutionality of statutes that restrict ballot access); *see also*, Paul v. Ind. Election Bd., 743 F. Supp. at 621 n.14 (noting that proper standard of review for constitutional challenges to state election laws is problematic since United States Supreme Court not consistent in articulating the standard); Fasi v. Cayetano, 752 F. Supp. 942, 946 (D. Haw. 1990) (noting that the Ninth Circuit Court of Appeals had not clarified whether the traditional balancing test or a strict scrutiny standard of review should be used when evaluating a First Amendment claim).

[31] Burdick v. Takushi, 737 F. Supp. 582, 587 (D. Haw. 1990) (holding that the right to vote for the candidate of one's choice is a fundamental right); *see also* Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986) (holding that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the due process clause of the Fourteenth Amendment, which embraces freedom of speech); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (declaring that the right to associate for political beliefs and the right of a voter to cast a vote effectively rank among our most precious freedoms).

susceptible to a greater degree of regulation since the right to be a candidate is not viewed by the courts as a fundamental right.[32] After recognizing this distinction, courts often note the interchangeable relationship between the rights of a candidate and a voter.[33] Courts faced with this issue struggle to identify which interests are paramount.[34]

In balancing the rights and burdens of the parties, the court in *Fasi v. Cayetano*,[35] when identifying the rights at issue in light of a candidate-plaintiff and voter-plaintiffs,[36] emphasized the candidate's interest in

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[32] Bullock v. Carter, 405 U.S. at 143; *see also* Paul v. Ind. Election Bd., 743 F. Supp. at 623 (holding that candidate's right to run for public office may not be a fundamental right, but citizens' right to vote ranks among country's most precious freedoms).

[33] *Bullock*, 405 U.S. at 142-43:

> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.
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> . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Id.; *see also* Anderson v. Celebrezze, 460 U.S. at 788 (excluding candidate from ballot burdens voters' freedom of association because an election campaign is an effective platform for expressing views on the issues of the day); Dixon v. Md. Admin. Bd. of Election Laws, 878 F.2d 776, 778 (4th Cir. 1989) (reasoning that direct impact of restrictions falls on the candidate but falls equally on the voters who support him; it is through their association with and their votes for the candidate that they may most effectively express their political preference); McLain v. Meier, 851 F.2d. 1045, 1048 (8th Cir. 1988) (finding that the challenged law primarily impacted candidate, but the court considered the injury to the voter whose vote was either restricted or diluted by the law). *But cf.* Clements v. Fashing, 457 U.S. 957 (1982) (commenting that United States Supreme Court has been silent on interchangeable role of voter and candidate but holding that candidacy was not a fundamental right and that the Texas "resign-to-run" law's direct impact was on the candidate).

[34] Paul v. Indiana Election Bd., 743 F. Supp. at 623. "This court, like the courts in *Anderson* and *Burdick*, places more importance on a voter's right to vote for the candidate of his choice than on a candidate's right to run for office." *Id.* In *Paul*, the court was referring to the holding of the *Burdick* district court and not the Ninth Circuit Court of Appeals. *See also* Bullock v. Carter, 405 U.S. at 143 (observing that the rights of voters and the rights of candidates did not lend themselves to neat separation). *But see Anderson*, 460 U.S. 780 (1983) (stating that not all restrictions imposed by the states on candidates' eligibility impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates).

[35] 752 F. Supp. 942 (D. Haw. 1990).

[36] The plaintiffs were candidate Frank F. Fasi, Mayor of the City and County of Honolulu, and three voters in the State of Hawaii. *Id.* at 944.

running for office without having to resign from his existing elected position over the voters' interest that the candidate run.[37]

2. Level of Scrutiny Applied in Ballot-Access Cases

Establishing the level of scrutiny poses an even more difficult and confusing decision for the courts. Federal courts ruling on state regulation of election laws have applied varying standards of review.[38]

In *Williams v. Rhodes*,[39] heard as a Fourteenth Amendment equal protection challenge, the United States Supreme Court considered the facts and circumstances behind the law, the interests which the state claimed to be protecting, and the interests of those who were disadvantaged by the classification.[40] The Court held that only a compelling state interest in regulating elections could justify limiting First Amendment freedoms.[41] In another Fourteenth Amendment equal protection case, *Bullock v. Carter*,[42] the Court closely scrutinized the election laws and required the state to offer a reasonably necessary interest to accomplish a legitimate state objective in order to pass a constitutional

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[37] *Id.* at 948-49. The United States Supreme Court, deciding primarily under an equal protection analysis, upheld a state's "resign-to-run" law. Clements v. Fashing, 457 U.S. 957 (1982). The Court concluded it would have reached the same outcome under a First Amendment challenge since the burdens on plaintiff's First Amendment interests in candidacy were insignificant. *Id.* at 971. *But cf.* McLain v. Meier, 851 F.2d 1045 (10th Cir. 1988) (holding that in a challenge to North Dakota's third party ballot access laws a candidate-plaintiff had standing in his status as voter although he lacked standing as a candidate because of the state's age requirement). *McLain* noted that restrictive ballot access laws primarily impact candidates but that the rights of voters and the rights of candidates are not neatly separated. *Id.* at 1048.

[38] Hall v. Simcox, 766 F.2d 1171, 1173 (7th Cir. 1985) (noting that the United States Supreme Court has not settled on the standard to be applied in ruling on right to vote challenges).

[39] 393 U.S. 23 (1968). Ohio required a new party to obtain a petition signed by 15% of the number voting in the previous gubernatorial election. *Id.* at 24-25. Additional provisions virtually denied a new political party placement on the state presidential election ballot. *Id.* at 24.

[40] *Id.* at 30.

[41] *Id.* at 31. *See also*, American Party of Texas v. White, 415 U.S. 767, 781 (1973) (holding that only a compelling state interest could justify a state placing an unequal burden on minority groups).

[42] 405 U.S. 134 (1972). Texas election law required primary candidates in most district and county elections to pay a filing fee determined by a country executive committee of the political party conducting the primary election. *Id.*

test.[43] However, sixteen years after *Bullock* was decided, the Tenth Circuit Court of Appeals in *Rainbow Coalition of Okla. v. Oklahoma Election Bd.*[44] noted the shift in the courts and abandoned a heightened level of scrutiny in an equal protection challenge.[45]

The United States Supreme Court in *Anderson v. Celebrezze*[46] did not speak in terms of the level of scrutiny it would apply, but rather said that it must analytically examine three matters to decide if the challenged election restriction was unconstitutional.[47] The Court considered the injury to the protected constitutional rights of the plaintiff, it identified the state's precise interests raised as justifications for the burden on the plaintiff, and then considered the extent the state's interests made it necessary to burden the plaintiff's rights.[48] Terms like strict scrutiny and rational relation test were absent from the opinion.[49] The *Anderson* Court examined the degree to which a challenged restriction operated to exclude choices on the ballot and whether the election law unfairly or unnecessarily burdened political opportunity.[50]

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[43] *Id.* at 144 (noting that filing fee for candidates created a disparity in voting power based on wealth). *But see* Hustace v. Doi, 60 Haw. 282, 288, 588 P.2d 915, 919 (1979) (holding that standard proposed in ballot-access cases, although expressed in terms of compelling state interests, does not contemplate strict scrutiny of a challenged election law in the sense in which that term was sometimes used; favorably citing Storer v. Brown, 415 U.S. 724 (1974) (expressly rejecting contention, founded on strict scrutiny doctrine, that United States Supreme Court cases dealing with candidacy qualification cases suggested a rule which would automatically invalidate every substantial restriction on right to vote or associate)). *Hustace* held that while a burden imposed on a candidate may be substantial, the balancing of the burden against the state interests served thereby is a matter of degree. *Id.*

[44] 844 F.2d 740 (10th Cir. 1988).

[45] *Id.* at 743. Recent United States Supreme Court cases neither demanded a state show a compelling interest nor insisted that the state demonstrate it used the least restrictive means available. *Id.*

[46] 460 U.S. 780 (1983). The case was heard under a First and Fourteenth Amendment association challenge to state election laws. The United States Supreme Court did not use a Fourteenth Amendment equal protection analysis.

[47] *Id.* at 789.

[48] *Id.*

[49] Erum v. Cayetano, 881 F.2d 689, 692 (9th Cir. 1990) (stating that *Anderson* retained the elements of strict scrutiny but did not write in terms of the traditional test associated with the standard). *Anderson* did use terms associated with levels of scrutiny to evaluate the extent of injury to the voter or candidate and each interest advanced by the state. The Court considered whether the injury was substantial, *Anderson*, 460 U.S. at 789, if the election restriction was precisely drawn to advance the state's interest, and if that interest was legitimate. *Id.* at 805.

[50] *Id.* at 793.

Anderson involved a state's restriction on a presidential election; therefore, any effects on the outcome of the election could impact beyond the state's borders by influencing the results of a nationwide election.[51] The *Anderson* Court held that given the potential impact on the nation as a whole,[52] the nature and extent of the burden on voters in a presidential election outweighed the state's minimal interest.[53] The Court ruled the election law unconstitutional although it held that a state's important regulatory interests were generally sufficient to justify reasonable, nondiscriminatory restrictions.[54] After *Anderson*, lower courts have disagreed on what level of scrutiny to apply.[55]

In its most recent decision regarding the constitutionality of a state's election law, the United States Supreme Court required the state to

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[51] *Id.* at 795.

[52] *Id.* at 806. The statute imposed a significant restriction within its state borders which had direct influence on a nationwide election process. *Id.* at 795.

[53] *Id.* at 806. The limited opportunity for independent minded voters to associate in an election threatened to reduce diversity and competition in the "marketplace of ideas." *Id.* at 794.

[54] *Id.* at 789. The Court stated that constitutional challenges to specific provisions of a state's election laws could not be resolved by any "litmus paper test" that would separate valid from invalid restrictions. *Id.*; *see also*, Hall v. Simcox, 766 F.2d 1171 (7th Cir. 1985). *Hall* noted that the United States Supreme Court had not settled on the standard of review, and held that if a strict standard were applied to its case, "Indiana would be in trouble." *Id.* at 1173. The court recognized that "courts may sometimes talk the language of least drastic means but they only strike down ballot-access regulations that are unreasonable." *Id.* at 1174. The court then upheld the constitutionality of a petition nomination statute that required two per cent of those voting in the previous election to petition a candidate. *Id.* at 1177.

[55] Canaan v. Abdelnour, 710 P.2d 268, 274 n.8 (Cal. 1985) (noting that several federal courts have concluded that *Anderson* established the appropriate "analytical framework" for evaluation of election regulations). *Compare* Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986) (holding that state interest must be substantial when weighed against injury to voter); Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 780 (4th Cir. 1989) (stating that election restriction survives constitutional scrutiny if it serves a compelling governmental interest and is narrowly tailored to serve that interest); McLain v. Meier, 851 F.2d 1045, 1049 (8th Cir. 1988) (providing that, where election law is a burden of some substance on voter's right to vote, then court will apply strict scrutiny and require the law be narrowly drawn to serve a compelling state interest). *Cf.* Rainbow Coalition of Okla. v. Oklahoma Election Bd., 844 F.2d 740, 743 (10th Cir. 1988) (clarifying that because the United States Supreme Court used an inconsistent standard to evaluate a constitutional challenge to an election law, strict scrutiny will not be applied); Burdick v. Takushi, 927 F.2d 469, 472 (9th Cir. 1991) (requiring the court to weigh all the factors; the injury to a voter's rights and the precise interests presented by the state).

show a compelling interest which was narrowly tailored to serve that interest. The Court struck down the statute as an unwarranted burden on the rights of political parties and their members.[56]

B. Anderson *Test: Three-Point Analysis*[57]

Anderson v. Celebrezze[58] set the framework for analyzing the ballot-access restriction cases that followed. On April 24, 1980, John Anderson announced his decision to run for President of the United States as an independent candidate.[59] His supporters gathered the requisite signatures from registered voters and met the substantive requirements for filing in all fifty states for the November 1980 general election.[60] Even as Anderson announced his candidacy, however, he was too late to meet the technical requirements to qualify for a position on the Ohio ballot.[61]

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[56] Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 222 (1989). *Eu* was not a ballot access case. It concerned a challenge to CAL. ELEC. CODE § 11702 which prohibited central committees of political parties from endorsing or opposing candidates in primary elections. Other code sections dictating aspects of the organization and composition of the political parties' governing bodies were also struck down by the court. *Id.*

[57] Prior to *Anderson*, the United States Supreme Court restated its view on election law cases in Storer v. Brown, 415 U.S. 724 (1974). *Storer*, decided nine years before *Anderson*, clarified the rule developed through Williams v. Rhodes, 393 U.S. 23 (1968), Kramer v. Union Free School District, 395 U.S. 621 (1969), and Dunn v. Blumstein, 405 U.S. 330 (1972). The *Williams-Kramer-Dunn* rule classified burdens placed on the right to vote as constitutionally suspect and invalid unless essential to serve a compelling state interest. *Storer*, 415 U.S. at 729. The *Storer* Court said that the rule did not result in automatically invalidating every substantial restriction imposed by a state on the right to vote or to associate. *Id.* Such automatic invalidation was undesirable since states were given the initial task of determining the qualifications of voters and were authorized to prescribe the time, place, and manner of holding elections. *Id.* at 729-30. *Storer* distinguished valid state election restrictions from invidious ones. *Id.* at 730. The Court considered the facts and circumstances behind the law, the state's interests, and the interests of those injured by the classification. *Id.*

[58] 460 U.S. 780 (1983).

[59] *Id.* at 782.

[60] *Id.*

[61] *Id.* On May 16, 1980, Anderson filed a nominating petition in Ohio with sufficient signatures to have entitled him to a place on the ballot if he had filed on or before the March 20, 1980, filing deadline. *Id.*

The Sixth Circuit Court of Appeals rejected Anderson's appeal challenging the validity of an early filing deadline.[62] The United States Supreme Court decided that because of the independent's early filing deadline, a majority party nominee held a five-month political advantage over an independent candidate since majority party nominees were not encumbered by an early filing deadline.[63]

The Court reasoned that independent candidates drew their vote from loyal supporters and voters dissatisfied with the choices within the two major parties.[64] Since majority party nominees were not known until shortly before the general election, Anderson, at the required time to file, might not even know if he had sufficient support to warrant filing.[65] The United States Supreme Court in *Anderson* reversed the Sixth Circuit Court of Appeals and held the early filing deadline invalid.[66]

The *Anderson* Court applied a three-step test.[67] First, the Court considered the character and magnitude of the asserted injury to the plaintiff's rights protected by the First and Fourteenth Amendments.[68] Second, the court identified and evaluated the precise interests advanced by the state as justifications for the burden imposed by its law.[69] The Court considered the legitimacy of the burden on the plaintiff and the

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[62] *Id.* at 785. Anderson also brought litigation in two other states with similar early filing deadlines. The First and Fourth Circuit Courts of Appeals affirmed judgments ordering the respective states to place Anderson's name on the ballot. Anderson v. Quinn, 495 F. Supp. 730 (D. Me. 1980), *affirmance order*, 634 F.2d 616 (1st Cir. 1980); Anderson v. Morris, 500 F. Supp. 1095 (D. Md. 1980), *aff'd* 636 F.2d 55 (4th Cir. 1980). The United States Supreme Court granted certiorari in Anderson v. Celebrezze because of the conflict among the circuit courts. 460 U.S. 780, 786 (1983).

[63] *Id.*

[64] *Id.* at 791.

[65] *Id.* The Ohio system denied "disaffected" voters a choice of leadership and a voice on issues outside the mainstream political parties. *Id.* at 792.

[66] *Id.* at 806. By 1983 when the case was decided, Anderson had already lost his 1980 bid for president. In dicta, the Court noted that not all states' eligibility restrictions placed on candidates also imposed constitutionally suspect burdens on voters' rights. *Id.* at 788.

[67] *Id.* 789. See *supra* note 54 for discussion on the difficulties of separating valid from invalid restrictions.

[68] *Id.* In its opinion, the *Anderson* Court recognized that the rights of qualified voters to cast their votes effectively and to associate for the advancement of political beliefs were fundamental rights. *Id.* at 787.

[69] *Id.* at 789.

state's interests. Third, it considered the extent to which the state's interests made it necessary to burden constitutional rights.[70]

The Court held that Ohio's early filing deadline impinged on the voter's right of association[71] and placed a significant state-imposed restriction on a nationwide process.[72] Against this burden, the Court found that two of the state's interest, voter education and equal treatment for partisan and independent candidates, were without merit.[73] An interest in voter education did not justify an argument that the electorate, in a modern world, needed seven months to become informed about a candidate.[74] The state's assertion that it treated partisan and independent candidates alike was without merit since nominees from the Democratic and Republican Parties could appear on the Ohio general election ballot even if the specific candidate was named after Ohio's March filing deadline.[75]

Alternatively, the Court found that the state's early filing deadline was not precisely drawn to protect what was at best a questionable state interest in precluding intra party feuding.[76]

The Court then weighed the extent and nature of the burdens Ohio placed on voters' freedom of choice and freedom of association, in the setting of a nationwide election, and held that the burdens unquestionably outweighed the state's minimal interest in imposing an early filing deadline.[77] Originally, in stating the test, the Court required that the state show it was necessary to burden the plaintiff's rights. However, in its conclusion, the Court found only that the state's interest did not justify the early filing deadline for independent candidates for United States president.[78] The Court prefaced its holding by noting that its primary concern was the interest of the voter and not that of the presidential candidate, Anderson.[79]

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[70] *Id.*

[71] *Id.* at 793-94 (citing Clements v. Fashing, 457 U.S. 957, 964-65 (1982) (holding that deadline discriminated against candidates and voters whose political preference was outside of existing political parties)).

[72] *Id.* at 795.

[73] *Id.* at 796.

[74] *Id.* at 797.

[75] *Id.* at 799.

[76] *Id.* at 805.

[77] *Id.* at 806.

[78] *Id.* at 805.

[79] *Id.* at 806.

Two years later, the California Supreme Court, in *Canaan v. Abdelnour*,[80] followed the holding in *Anderson*.[81] *Canaan* noted that the *Anderson* test would not necessarily be less stringent than strict scrutiny equal protection analysis.[82] *Canaan* held that the test always requires more rigorous analysis than the deferential rational basis equal protection test.[83]

C. *Write-In Vote Cases*

Although the United States Supreme Court has not decided a case squarely addressing the right to write-in voting,[84] it has noted in some of its ballot-access decisions that the availability of a write-in option offsets certain burdens created by ballot-access restrictions.[85]

When examining the burden on voters, the state and federal courts have identified two general reasons why voters wish to write in their vote on an election ballot. The first reason arises when a voter has identified a preferred, viable candidate whose name, for some reason, does not appear on the ballot.[86] The second reason arises when a voter wishes to express his or her dissatisfaction with all the candidates listed on the ballot or with government in general.[87]

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[80] 710 P.2d 268 (Cal. 1985).

[81] *Id.* at 272. In dicta, the California court recognized that an election restriction classified on the basis of suspect criteria might require the court to return to a strict scrutiny equal protection analysis based on the Fourteenth Amendment. *Id.* at 273.

[82] *Id.* The court noted with approval that *Anderson*'s First Amendment analysis resolved previous inconsistencies in the choice and application of standards. *Id.* at 272.

[83] *Id.* The rational basis test upholds legislation that rationally furthers the state's purpose. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 315 (1976). The legislative purpose is presumed valid. *Id.* at 314.

[84] Paul v. Indiana Election Bd., 743 F. Supp. 616, 622 (S.D. Ind. 1990); *see also* Robert Batey, *Electoral Graffiti: The Right to Write-in*, 5 NOVA L. REV. 201 (1981).

[85] 743 F. Supp. at 622; *see also* American Party of Texas v. White, 415 U.S. 767, 772 n.3 (1973); Storer v. Brown, 415 U.S. 724, 737 n.7 (1974).

[86] Canaan v. Abdelnour, 710 P.2d 268, 270 (Cal. 1985); *see also* Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 986 (S.D. Ohio 1968) (noting that potential presidential candidate George C. Wallace sought space on ballot for write-in votes); Kamins v. Bd. of Elections for the Dist. of Columbia, 324 A.2d 187, 191 (1973) (deciding that electors wished to write in the name of Dr. Benjamin M. Spock for president when his name did not appear on the official ballot).

[87] Without a write-in option a voter can only express his dissatisfaction by not voting at all. Batey, *supra* note 84, at 203. *See also*, *Socialist Labor Party*, 290 F. Supp. at 987 (holding that write-in ballot permitted a voter to effectively exercise his individual

In write-in cases, the states' interests have included protecting the integrity of the election process,[88] opposing the promotion of frivolous candidates,[89] and protecting the electorate lest a sudden, popular passion catapult a person into office at the last minute.[90] States have also opposed write-in ballots for administrative reasons[91] and to assure that voters have adequate time to make an informed choice.[92]

Courts deciding the legitimacy of a write-in restriction are about evenly split.[93] Some states' bans on write-in voting have been upheld, while in other states courts emphasized the value and importance of the voter's rights[94] while finding either that the state's interest was overinclusive or that the state did not use the least drastic means available.[95]

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constitutionally protected franchise); *Canaan*, 710 P.2d 268, 276 (1985) (explaining that issue is not ballot access but the opportunity to solicit write-ins on election day; it is important for a free society to be given expression; therefore, use of write-in ballots does not and should not be dependent on the candidate's chance of success); Recent Development, *First Amendment—Voters' Speech Rights—Fedreal District Courts Mandate Availability of Write-in Voting*, 104 HARV. L. REV. 657, 661 (1990) [hereinafter *First Amendment—Voters' Speech Rights*]. In Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (1989), the court maintained that under appropriate circumstances, a vote for Donald Duck would perhaps serve as a serious satirical criticism of those in power. The court indicated it would view a vote for a fictitious character as deserving constitutional protection. *Id.* at 785 n.12. *But see* Georges v. Carney, 691 F.2d 297, 301 (7th Cir. 1982) (holding that ballot is not a vehicle for communicating messages).

[88] American Party of Texas v. White, 415 U.S. 767, 782 n.14 (1973).

[89] *See* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d at 784 (denying recognition to fraudulent or frivolous candidate so as to minimize voter confusion is in some instances a legitimate and weighty state interest).

[90] Paul v. Indiana Election Bd., 743 F. Supp. 616, 624 (S.D. Ind. 1990) (validating state's interest to remove risk that little known candidate may ride a storm of sudden popular passion into office).

[91] *See* Socialist Labor Party v. Rhodes, 290 F. Supp. at 987.

[92] Canaan v. Abdelnour, 710 P.2d 268, 277 (Cal. 1985).

[93] Annotation, *Elections: Validity of State or Local Legislative Ban on Write-In Votes*, 69 A.L.R.4th 948 (1989); *see also First Amendment—Voters' Speech Rights*, *supra* note 87, at 657 n.2 (1990).

[94] *See* Kamins v. Board of Elections for the Dist. of Columbia, 324 A.2d 187, 192 (1974).

[95] *See* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 776 (4th Cir. 1989) (observing that state interest to prevent frivolous or fraudulent candidates is legitimate and weighty but use of a filing fee to accomplish the goal is not narrowly drawn in comparison with other well known means of testing a candidate's seriousness); Paul v. Indiana Election Bd., 743 F. Supp. 616 (S.D. Ind. 1990) (holding

The Supreme Court of Arkansas, in *Davidson v. Rhea*,[96] held valid a state statute that banned write-in votes.[97] It noted that the law, in form, applied equally to all electors without discrimination.[98] In *Davidson*, the electorate wrote in the name of Arthur Davidson and rejected P.M. Rhea who was the sole mayoral candidate named on the ballot.[99] The state election law barred the counting of any write-in votes.[100] Davidson argued the act should be struck down since the constitution declared that all elections shall be free and equal.[101]

The *Davidson* court reasoned that a state was within its authority to require use of only official ballots, recognize only those votes cast in the designated manner, and deny the voter the right to write the name of a candidate upon the official ballot.[102] The court concluded that the state's election regulation did not deprive a voter of the right of suffrage as he had "the same right as any other elector to secure the printing of the name of his candidate upon the official ballot . . . ."[103]

The California Supreme Court in *Canaan v. Abdelnour*[104] held oppositely from *Davidson*. The court examined a San Diego, California, ban on write-in voting in the city's municipality elections.[105]

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that a state interest to stop sudden, popular passion from voting person into office is not compelling since unknowns are not likely to draw enough votes and since a statute to ban all write-in votes is not narrowly tailored to combat all fraudulent candidates); Canaan v. Abdelnour, 710 P.2d 268, 281 (Cal. 1985) (recognizing that state interest is invalid if overinclusive and not the least drastic means available).

[96] 256 S.W.2d 744 (Ark. 1953)

[97] *Id.*

[98] *Id.* at 746 (favorably citing Chamberlain v. Wood, 88 N.W. 109 (S.D. 1901)) (holding that a state constitutional section providing for free and equal elections does not preclude state from banning write-in votes). *Davidson*, continuing to favorably cite *Chamberlain*, held that a ban on write-in voting was a legitimate time, place, and manner restriction on voting procedures since people, through their elected representatives, could self-impose additional restraints not identified in the state constitution if they so desired. *Id.* at 746. A lawmaking body could provide when, in what manner, and under what restrictions a voter could exercise the right of suffrage. *Id.* (citing *Chamberlain*, 88 N.W. 109 (upholding a state restriction that required a voter to exercise his right by using an official ballot; that allowed a voter to designate, in the manner specified, his choice of candidates whose names were upon the official ballot, and limited the names on the ballot to candidates who complied with the legal requirements)).

[99] *Id.* at 744.

[100] *Id.* at 745.

[101] *Id.* (citing ARK. CONST. art. 3, § 2).

[102] *Id.* at 746 (citing Chamberlain v. Wood, 88 N.W. 109 (S.D. 1901)).

[103] *Id.* (citing *Chamberlain*, 88 N.W. at 109).

[104] 710 P.2d 268 (Cal. 1985).

[105] *Id.* at 269. San Diego imposed the ban in spite of a California Election Code

The *Canaan* court held that a ban on write-in voting affected two fundamental rights: the right to vote and the right of a voter to cast a ballot for his or her choice.[106] It then examined the degree of injury to these fundamental rights imposed by San Diego's ban on write-in voting.[107] The state's highest court then found that even assuming the city advanced a compelling interest, a total ban on write-in voting was an overboard means to achieve the state's goals.[108]

The *Canaan* court found that a state's interest in an informed electorate was legitimate, but unnecessary, as the court reasoned that an unknown candidate was not likely to win.[109] The court was unmoved by the state's asserted interest that elected candidates win by a majority since it was commonplace for candidates to win, irrespective of a write-in ban, by a plurality.[110]

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[105] *Id.* at 269. San Diego imposed the ban in spite of a California Election Code section which allowed write-ins at all other levels of government elections. *Id.* California's Constitution allowed citizens to adopt municipality election regulations irrespective of general laws on the subject. *Id.* The suit was brought by Jack Canaan who wanted to write in his vote for William Brotherton for mayor. *Id.* at 271. Both Canaan and Brotherton sought the write-in privilege after the nomination deadline when a civil suit was filed against the Mayor of San Diego alleging certain irregularities in campaign contributions. *Id.* Their cause gained momentum when the incumbent mayor, who advanced to the general election, was indicted for numerous alleged felonies. *Id.* at 270. In the midst of the suit, San Diego amended its code to allow write-ins for primary elections but continued to ban its use in general and recall elections. *Id.* at 269-70.

[106] *Id.* at 274-75.

[107] *Id.* The court listed several injuries imposed by the ban. Write-in ballots would no longer counter existing ballot-access restrictions, *id.* at 275, write-ins precluded voters from voting for specific, preferred persons, *id.* at 276, they prevented the candidate of choice from winning, and write-ins denied a method of expressing dissatisfaction with listed candidates, *id.*

[108] *Id.* at 277. Specifically, San Diego claimed the ordinance was necessary to assure that candidates met charter qualifications, that candidates displayed a willingness to serve, that the public was allowed adequate time to evaluate candidates ability, and that candidates elected received a majority of the votes. *Id.* The court found that the state's interest to assure that only qualified and willing candidates were elected was grossly overinclusive. *Id.* at 278.

The *Canaan* court held that the *Anderson* test required a state to use the least drastic alternative available to achieve any legitimate interests. *Id.* at 278 n.13. However, the *Anderson* test itself makes no specific reference to requiring the least onerous restrictions, but stresses the analytical and balancing process in reaching a decision.

[109] *Id.* at 278. The court said that a bar could limit candidates thereby stifling open and vigorous debate which might otherwise prove informative. *Id.* at 278-79.

[110] *Id.* 279. The court held that a voter should and would take into account that a candidate might win by a plurality. *Id.* at 279-80.

Upon balancing all the factors before it, the *Canaan* court held that the San Diego ban on write-in voting burdened a voter's fundamental rights, that the city offered insufficient justification for the burden, and that the city did not use the least restrictive alternative available to achieve its goals.[111]

D. Hawai'i Election Laws

Prior to *Anderson*, the Hawaii Supreme Court had decided two cases involving ballot-access regulations. In *Nachtwey v. Doi*,[112] the state refused to place the plaintiff's name on the ballot for United States House of Representatives when he did not satisfy filing requirements.[113] To file, a potential candidate had to either pay a filing fee along with a petition signed by twenty-five registered voters from the desired congressional district[114] or, if indigent, waive the filing fee by submitting a petition signed by at least one-half of one percent of the total registered voters in that congressional district.[115]

Floyd Nachtwey failed to comply with either requirement and instead brought suit. He claimed that the restriction denied him equal protection under the Fourteenth Amendment by failing to provide an indigent candidate reasonable access to the ballot.[116] The court affirmed the validity of the filing regulation.[117] Using a rational basis standard of review, the court held that the signature requirement could be satisfied by a reasonably diligent indigent.[118]

Hustace v. Doi[119] involved a nonpartisan candidate running for mayor of Maui County. Maria Hustace satisfied the qualifications for inclusion

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[111] *Id.* at 281.

[112] 59 Haw. 430, 583 P.2d 955 (1978).

[113] *Id.* at 431, 583 P.2d at 956.

[114] *Id.* at 431, 583 P.2d at 957.

[115] HAW. REV. STAT. § 12-6(e) (1976). The law remains the same: HAW. REV. STAT. § 12-6(e) (1990). In 1978, Nachtwey needed 759 signatures to qualify as an indigent candidate. Nachtwey v. Doi, 59 Haw. at 431, 583 P.2d at 957.

[116] *Id.* at 439, 583 P.2d at 961.

[117] *Id.* at 448, 583 P.2d at 966.

[118] *Id.* at 442-43, 583 P.2d at 963. The court held that even if a candidate could invoke fundamental rights, that right was not infringed and a strict scrutiny standard of review was not required. *Id.* at 442, 582 P.2d at 963.

[119] 60 Haw. 282, 588 P.2d 915 (1978).

in the primary election but challenged the criteria for advancing a nonpartisan candidate to the general election.[120]

Hustace claimed the regulation discriminated between partisan and nonpartisan candidates vying for advancement to the general election by placing an undue burden on the nonpartisan candidate. The court, referencing its decision in *Nachtwey*, held that a traditional strict scrutiny standard of review[121] was not required in cases dealing with candidate qualifications.[122] Instead, the court (as in *Nachtwey*) balanced as a matter of degree the burden imposed on the candidate against the state's interests.[123] Similar to *Nachtwey*, *Hustace* held that a diligent candidate could satisfy the existing requirement to advance from the primary election into the general election.[124]

Subsequent to *Anderson*, two separate courts considered a First and Fourteenth Amendment right to associate challenge to Hawai'i's election laws; the Ninth Circuit Court of Appeals in *Erum v. Cayetano*[125] and the United States District Court for the District of Hawaii in *Fasi v. Cayetano*.[126] In *Erum*, Hawai'i's statute on the requirements for advancing nonpartisan primary candidates to the general election was again challenged. Theodoric Erum, Jr. sought election to the Kauai County Council as a nonpartisan candidate.[127] In 1984 he received 10

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[120] *Id.* at 283, 588 P.2d at 916. Aside from certain exceptions not applicable here, a nonpartisan candidate receiving at least 10% of the total votes for the office sought or a vote equal to the lowest vote received by the partisan candidate who won in the primary election, shall be a candidate in the general election. HAW. REV. STAT. § 12-41 (b) (1976). Hustace requested the court to rule that a nonpartisan candidate could advance to the general election upon receiving a majority of the nonpartisan votes cast in the primary election. *Id.* at 284, 588 P.2d at 917-18.

[121] Under strict scrutiny, the party charged with discrimination carries the burden of proving that the law is precisely structured and narrowly tailored to serve a legitimate objective and that it has selected the least drastic means for effectuating its objectives. Nachtwey v. Doi, 59 Haw. at 435, 583 P.2d at 959 (citing San Antonio School District v. Rodriguez, 411 U.S. 1, 16-17 (1973)).

[122] *Hustace*, 60 Haw. at 288, 588 P.2d at 919.

[123] *Id.* at 288, 588 P.2d at 919. In applying the matter of degree test, the court looked at Storer v. Brown, 415 U.S. 724 (1974), which gave broad recognition to any practical problems which the challenged regulation was designed to address. *Hustace*, 60 Haw. at 289, 588 P.2d at 920.

[124] *Hustace*, 60 Haw. at 296, 588 P.2d at 924.

[125] 881 F.2d 689 (9th Cir. 1989).

[126] 752 F. Supp. 942 (D. Haw. 1990).

[127] *Erum*, 881 F.2d at 690.

votes out of 18,232 cast in the primary election, thus failing to qualify for the general election.[128]

The court applied the *Anderson* test and clarified that a strict scrutiny standard of review was not warranted in this form of ballot access cases.[129] In balancing all the factors before it, the court was influenced by the easy access the state afforded a candidate to the primary election ballot.[130] The interests advanced by the state were held compelling,[131] while the infringement on Erum's constitutional rights was only slight.[132]

In *Fasi*, the mayor of the City and County of Honolulu and three voters, challenged the "resign-to-run" provision of the state constitution which required Mayor Frank Fasi to resign in order to run for Governor of the State of Hawaii.[133] In determining the standard of review,[134] the court distinguished a United States Supreme Court decision decided the year before, *Eu v. San Francisco County Democratic Central Committee*,[135] which applied strict scrutiny.

In *Eu*, not a ballot-access case, the Court held invalid California's election code provisions that banned primary endorsements[136] and

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[128] See *supra* note 120 for discussion on nonpartisan requirements.

[129] *Erum*, 881 F. 2d at 692 n.7 (citing Manifold v. Blunt, 863 F.2d 1368 (8th Cir. 1988); Hatten v. Rains, 854 F.2d 687 (5th Cir. 1988); Rainbow Coalition of Okla. v. Oklahoma Election Bd., 844 F.2d 740)). Not since 1979 has the United States Supreme Court invoked strict scrutiny to decide a ballot access case. *Id.* (citing Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979)). *Erum* concluded that the most recent United States Supreme Court decisions, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), respectively, either declined to invoke any heightened level of scrutiny as an analytical standard or neglected to even mention strict scrutiny. *Erum* at 692 n.7.

[130] *Id.* at 693. In a council race, a duly registered Hawai'i voter was placed on the primary ballot by obtaining 15 signatures of registered voters eligible to vote in that election. HAW. REV. STAT. §§ 12-4, 12-5 (1985). The law remains the same. HAW. REV. STAT. §§ 12-4, 12-5 (1991 Supp.).

[131] *Erum*, 881 F.2d at 694. The court recognized that Hawai'i advanced two interests that the United States Supreme Court held compelling: (1) preventing voter confusion and overcrowded ballots, and (2) combatting unrestrained factionalism. *Id.* at 693 (citing respectively Munro v. Socialist Working Party, 479 U.S. 189 (1986), and Storer v. Brown, 415 U.S. 724 (1974)).

[132] *Id.* at 698.

[133] Fasi v. Cayetano, 752 F. Supp. at 945. HAW. CONST. art. II, § 7 requires an elected public officer to resign from office before being eligible as a candidate for another public office if the term of the office sought begins before the end of the term of the office held.

[134] *Fasi*, 752 F. Supp at 947.

[135] 489 U.S. 214 (1989).

[136] 489 U.S. at 229.

imposed restrictions on the internal governance of political parties.[137] The *Fasi* court acknowledged that strict scrutiny might be appropriate in certain ballot access cases.[138] The court held that strict scrutiny was not appropriate in this case since the plaintiff, Mayor Fasi, challenged Hawai'i's "resign-to-run" law essentially as a ballot-access case in his capacity as a candidate[139] and further explained that the right to run as a candidate was not a fundamental right.[140] Therefore, the court applied the *Anderson* test without applying a strict level of scrutiny.[141] The court upheld the constitutionality of the state's "resign-to-run" law.[142]

IV. Analysis

In *Burdick v. Takushi,*[143] the United States Court of Appeals for the Ninth Circuit reversed the United States District Court for the District of Hawaii.[144] The Ninth Circuit held that a constitutional challenge to the ban was not warranted since a voter is not guaranteed that he can

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[137] *Id.* at 233.

[138] *Fasi*, 752 F. Supp. at 947. The *Fasi* court noted that in ballot-access cases, no definitive rule existed on when to use strict scrutiny rather than a balancing analysis. *Id.* at 947 n.2. In *Erum*, 881 F.2d 689 (9th Cir. 1989), the court noted that the concurring decision in *Eu* expressed reluctance in non-ballot-access cases to use as tests such easy phrases as compelling state interest and least drastic means. *Id.* at 692.

[139] *Fasi*, 752 F. Supp. at 945-49. Although three voters also stood as plaintiffs, the court held it was Mayor Fasi's interest in becoming a candidate without resigning from office that was the primary interest at issue. *Id.* See *supra* note 37 for discussion of the United States Supreme Court's treatment of this issue.

[140] 752 F. Supp. at 950 (citing Clements v. Fashing, 457 U.S. 957 (1982)).

[141] *Id.* at 947. The court was influenced by the Ninth Circuit Court of Appeals use of the *Anderson* test in *Erum v. Cayetano*. *Id.*

[142] *Id.* at 950. The state's interests in ensuring loyalty of public officials to their electorate, preventing abuse of office, and avoiding interim elections and appointments "heavily outweigh[ed] the interest of prospective candidates in being able to run for higher office without resigning." *Id.* at 951; *see* Clements v. Fashing 457 U.S. 957, 972-73 (1982) (holding that neither the Equal Protection Clause nor First Amendment authorize courts to review how states govern themselves; therefore, courts restrain states only if a classification scheme is invidious or the state impairs interests protected by the First Amendment). *But see* Barry v. District Of Columbia Bd. of Elections and Ethics, 448 F. Supp. 1249, 1254 (D.D.C. 1978) (finding that "resign-to-run" law was a broad-gauge statute which failed to promote any cognizable objective).

[143] 927 F.2d 469 (1991).

[144] *Id.* at 476.

voice just any opinion through the ballot box.[145] The court found the state's interests compelling and legitimate.[146]

A. Level of Scrutiny

In *Burdick v. Takushi*,[147] the court applied the *Anderson* test. It did not discuss further the standard of review to apply in the case.[148] The court decided it would have to look at Hawai'i's election laws as a whole[149] to decide whether a ban on write-in voting burdened Burdick's fundamental right to vote.[150]

The court began its analysis by acknowledging the state's power to regulate elections under the Tenth Amendment and to prescribe the

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[145] *Id.* at 474. The appeals court rejected the lower court's finding that a ban on write-in voting was an "impermissibl[e] infring[ment] on Burdick's constitutional right of expression and association." *Id.* at 471. Arguably, the court could have stopped at this point in its analysis without considering the state's interest since it held that no fundamental rights were implicated. The *Anderson* test is evoked when the injury to a voter's rights is protected by the First and Fourteenth Amendments. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

[146] 927 F.2d at 474-75.

[147] *Id.* at 469.

[148] Possibly the *Burdick* court believed an ample level of scrutiny existed in the *Anderson* test itself. See *supra* notes 82-83 and accompanying text for discussion on heightened standard of review inherently built into the *Anderson* test. In comparison, the *Burdick* district court began its analysis by discussing the standard of review to use when applying the *Anderson* test. Burdick v. Takushi, 737 F. Supp. 582, 586 (D. Haw. 1990). The district court "[bore] in mind the fact that recent United States Supreme Court authority suggests a stricter level of scrutiny may be appropriate." *Id.* at 587 (citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989)). *See supra* note 138 and accompanying text for discussion on when strict scrutiny is appropriate.

[149] Burdick v. Takushi, 927 F.2d at 473. Other courts, when testing the constitutionality of a state election restriction, have insisted on looking at the "totality" of the election laws defined. Storer v. Brown, 415 U.S. 724, 735 (1974) (analyzing regulations on the direct party primary in light of the integral part it played in the entire election process). *Anderson* upheld *Storer*'s examination of a challenged election provision in the context of a state's general policy to maintain the integrity of all the routes to the ballot. Anderson v. Celebrezze, 460 U.S. at 803. *Compare* Bullock v. Carter, 405 U.S. 134, 143 (1972) (in approaching candidate restrictions, it is essential the court examine in a realistic light the extent and nature of the restrictions' impact on voters) *with* Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 990 (S.D. Ohio 1968) (holding that under a strict scrutiny test, challenged laws must satisfy the tests of "necessity," "equality," and "reasonableness").

[150] *Burdick*, 927 F.2d at 473. The court stated that the "right to vote" is a "right [to] participat[e] equally in the election of those who govern." *Id.*

qualifications of state officers.[151] It held, specifically, that the state has the power to regulate the time, place, and manner of elections so long as it does not burden excessively the First Amendment rights of state citizens.[152]

The court deviated from other ballot-access opinions by beginning its analysis with this recognition of the state's constitutional right to regulate elections. Having in effect set the atmosphere for its holding, the *Burdick* court next outlined the criteria established in *Anderson v. Celebrezze*.[153] It then proceeded under the *Anderson* test to determine the character and magnitude of the injury to Burdick's rights of expression and association.[154]

B. Equal Voice Guaranteed

The *Burdick* court acknowledged a person's constitutional right to vote and to have his or her vote counted.[155] This right "simply guaranteed [the voter] an equal voice in the election of those who govern" and was not a guaranteed right, as Burdick claimed, to vote for any particular candidate.[156]

The voter's right to a voice in the ballot box is already restricted by existing regulations on candidate eligibility requirements. The *Burdick* court listed examples of United States constitutional restrictions placed on voters: the seven-years citizenship requirement and twenty-five-years-and-older age restriction on congressional candidates, the natural-born-citizens and thirty-five-years-and-older requirement for presidential candidates,[157] and the provision that a vote for the office of United States president is for an elector rather than for a specific candidate.[158]

The *Burdick* court acknowledged United States Supreme Court decisions that upheld state restrictions on candidates' eligibility to run

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[151] *Id.* at 472. (citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

[152] *Id.* at 472 (citing Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986)).

[153] 460 U.S. 780 (1983).

[154] 927 F.2d at 473; *see also* Burdick v. Takushi, 737 F. Supp. at 587 (district court identifying one additional right, the right to vote for candidate of one's choice).

[155] 927 F.2d at 473; *see supra* note 6 and accompanying text.

[156] 927 F.2d at 473; *see* Davidson v. Rhea, 256 S.W. 744 (Ark. 1953) (upholding ban on write-in voting since state law, limiting voter's option to those names printed on the ballot, was equally applied to all voters).

[157] U.S. CONST. art. I, § 2.

[158] *Id.* art. II, § 1.

for office.[159] The court noted the "inexorably intertwined" relationship between the right to vote and the state's right to regulate the election process.[160]

In examining the injury to the voter's rights as required under the *Anderson* test, the court noted the considerable ease with which a candidate can access the ballot process.[161] A candidate is placed on the ballot after satisfying the qualifications for the office and demonstrating a minimal amount of support.[162]

In addition, the court held that Hawai'i could impose a ban on write-in voting if the ban was a reasonably content-neutral time-place-manner of speech restriction.[163]

The *Burdick* court acknowledged that a ban on write-in votes might burden a voter's First Amendment freedom of speech if, as a political statement, he desired to vote for a fictitious character.[164] Here, the court was most likely addressing the analysis in *Dixon v. Maryland State Administrative Board of Election Laws*,[165] which reached the opposite result as *Burdick*.[166] The *Dixon* court rejected Maryland's concern that a vote for a fictitious character, Donald Duck, was frivolous.[167] Instead the

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[159] *Burdick*, 927 F.2d at 473 (citing Clements v. Fashing, 457 U.S. 957 (1982) (holding that state can deny incumbent justice of the peace the right to seek election to state legislature and force state and county office holders to automatically resign if they run for higher elective office); Storer v. Brown, 415 U.S. 724 (1974) (holding that state can require candidate to sever affiliation with political party one year prior to election in order to run as independent candidate); American Party of Texas v. White, 415 U.S. 767, 783 (1973) (holding that state can deny place on ballot to frivolous candidate by requiring candidates to "demonstrate a significant, measurable quantum of community support")).

[160] *Id.*

[161] *Id.*

[162] *Id.* The court noted that under HAW. REV. STAT. § 12-5 (1990 Supp.) a candidate for county office or the legislature can gain access to the primary ballot by submitting a petition with the signatures of 15 eligible voters; a candidate for Congress, governor, lieutenant governor, or the Board of Education can gain access with 25 signatures. *Id.*

[163] *Id.* at 474. The court concluded that the ban was content-neutral since it applied to all write-in votes and was not dependant on content or subject matter. *Id.*

[164] *Id.*

[165] 878 F.2d 776 (4th Cir. 1989).

[166] *Id.* at 785 n.12. Maryland law permitted write-in votes but required write-in candidates to submit a $150 filing fee or an indigent candidate petition. *Id.* at 778. The *Dixon* court acknowledged that under Maryland laws at the time of the decision a voter would be precluded from voting for a fictitious candidate. *Id.* at 785.

[167] *Id.* at 785

Maryland court decided that the vote might be meant as serious satirical criticism,[168] and was protected under a voter's freedom of speech.[169] The court thus held invalid a fee requirement for a write-in candidate.[170]

The *Burdick* court held that a restriction on Burdick's freedom of speech was only minimal in light of the "ample alternative channels" to express political views[171] and the candidates' easy access to the ballot.[172] Under the first leg of the *Anderson* test, the court decided that the character and magnitude of the injury[173] was not a substantial burden.[174]

C. *State Offers Legitimate, Compelling Interests*

The state offered three interests in support of its election laws. The *Burdick* court, under the *Anderson* test, had to decide whether the state's advanced interests of political stability, voter education, and protecting

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[168] *Id.* at 785 n.12. The *Dixon* court held that even if satirical criticism was not the motive, the "specter of Donald Duck as successful vote-getter does not persuade us to disregard the significant violation of protected constitutional rights that we discern here." *Id.*

[169] *Id.* at 782.

[170] *Id.*

[171] 927 F. 2d at 473-74 (citing Consolidated Edison Co. v. Public Serv. Comm'n., 447 U.S. 530 (1980) (non-ballot access case involving an administration agency's ban on utility companies inserting position statements into billing mail)). In *Consolidated Edison Co.*, the United States Supreme Court found that the utility's position statements were not content-neutral and therefore the public utility commission could not use time-place-manner regulations to justify its ban. 447 U.S. at 535. A government action regulating speech based on subject matter "slips from the neutrality of time, place, and circumstances into a concern about content." *Id.* at 535-36.

[172] 927 F.2d at 474. The court noted that the United States Supreme Court had not decided whether a person's interest in casting a write-in vote was a fundamental right. It noted that the United States Supreme Court provided conflicting messages concerning the role write-in voting plays in the election process. Id. at 474 n.3. *See supra* note 85 (citing cases).

The *Burdick* court held that a voter may have a protected right to voice his opinion and attempt to influence others, but that does not mean that he has a fundamental right through a write-in vote to say that no candidate on the ballot is acceptable. *Id.* at 474.

[173] The court again qualified that any fundamental right was limited to the right to participate equally in the election of those who will make or administer the laws. *Id.*

[174] *Id.*

the internal structure of the state's election laws[175] were precise interests which justified the burden imposed by the election laws.[176]

1. Political Stability

The state first advanced an interest in protecting against "sore loser"[177] candidacy and party raiding.[178] The state feared that sore losers and party raiding would lead to intra-party feuding and factionalism which would damage the election process.[179] The *Burdick* court held that Hawai'i had a compelling interest in ensuring against unrestrained factionalism.[180] A ban on write-in voting served that interest.[181]

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[175] *Id.* at 474.

[176] *Id.* A state interest could be compelling in certain circumstances, yet fail to rise to that level in other sets of circumstances. Burdick v. Takushi, 737 F. Supp. 582, 588 (D. Haw. 1990) (citing Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989)).

[177] 927 F.2d at 474. The court defined "sore loser" limitations as those denying a candidate a spot on the ballot for the general election ballot if the candidate lost in the primary election. *Id.* at 474 n.4 (citing Anderson v. Celebrezze, 460 U.S. 780, 784 (1983)).

[178] *Id.* The court held that party raiding occurs when sympathetic voters with one party declare themselves voters of another party in order to influence or determine the results of the other party's primary. *Id.* (citing Rosario v. Rockefeller, 410 U.S. 752 (1973)).

[179] *Id.*; *see also Burdick*, 737 F. Supp. at 588.

[180] *Burdick*, 927 F.2d at 484 (citing Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (holding that state could require candidate to show modicum of support in primary election to gain ballot access to general election)).

[181] *Id.* Hawai'i's ban ensured that sore losers did not sidestep the ballot access requirements and that voters did not undermine the state's ban on cross-over voting. *Id.*

The *Burdick* district court did not share the Ninth Circuit Court of Appeal's concern that unrestrained factionalism would result from write-in voting. *Burdick*, 737 F. Supp. at 589. It found that restraining factionalism was recognized as a compelling state interest by the courts in the past. *Id.* at 588 (citing Storer v. Brown, 415 U.S. 724 (1974); Erum v. Cayetano, 881 F.2d at 689).

The district court held that the state's interest amounted to a desire to quash any possible competition generated by a candidate who does not have a place on the printed ballot but who may garner support as a write-in candidate. *Id.* at 589. It distinguished the cases cited by the state because those cases did not squarely address the issue of write-in voting. *Id.* at 589.

The district court cited *Anderson*, where the United States Supreme Court held that a state's asserted interest in political stability was really a desire to protect existing political parties from competition. *Id.* The district court concluded that a voter had the right to dissent by writing in the name of a candidate not on the ballot. *Id.*

Courts have split on whether an election regulation was justified by a state interest in maintaining political stability. Those courts supporting the interest were examining election laws that restricted minor-party candidates' access to the general election based on a sufficient showing in the primary election,[182] required a modicum of support in the primary election for non-partisan candidates to place onto the general election ballot,[183] or established a five-percent showing of support to create a new party.[184]

2. Informed Electorate

The United States Supreme Court has acknowledged that a state's concern in fostering an informed and educated electorate is a legitimate interest.[185] The *Burdick* court concluded that a ban on write-in voting fostered an informed electorate since it ensured that candidates placed themselves on the ballot in time to allow the voters ample opportunity to become familiar with the candidates.[186]

A state's interest in an informed electorate has not always warranted the specific election regulation taken by a state to achieve that end.[187] The *Anderson* Court held that an early filing date for independent

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[182] Tashjian v. Republican Party of Conn., 479 U.S. 189 (1986); *see also* Burdick v. Takushi, 927 F.2d at 474 (favorably citing *Tashjian*).

[183] Erum v. Cayetano, 881 F.2d 689 (1989).

[184] Rainbow Coalition of Okla. v. Oklahoma Election Bd., 844 F.2d 740 (1988). However, the United States Supreme Court has found that states have failed to explain how their election regulation advanced a stable political system by restricting party endorsement of candidates. Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 226 (1989) (holding that state failed to show how political system was any more stable after passing a law that banned parties from endorsing or opposing primary candidates). The *Eu* Court distinguished between a valid stable political system interest and a desire to protect existing political parties from competition. *Id.* In a prior decision, the Court questioned a state's interest in imposing early filing deadlines for independent presidential candidates. Anderson v. Celebrezze, 460 U.S. 780, 801 (1983). *Anderson* held invalid a state's claim that allowing a candidate to leave a major political party to run as an independent would damage the state's political structure and splinter a major political party. *Id.* Instead, the Court held that the statute protected existing parties from competition. *Id.* However, the Court distinguished the particular interest advanced in its case from legitimate state election regulations designed to prevent "party raiding". *Id.* at 801 n.29.

[185] *Burdick*, 927 F.2d at 474-75 (citing Anderson v. Celebrezze, 460 U.S. at 796 (1983)).

[186] *Id.*

[187] Anderson v. Celebrezze, 460 U.S. at 797.

candidates eight months before the election was not necessary for an informed electorate.[188] In reaching this conclusion, the Court considered the advancement in nationwide communication capabilities and in the electorate's literacy.[189]

3. Integrity of the Election Process

The state advanced a desire to protect the integrity of its election process.[190] The *Burdick* court found that a ban on write-in voting complemented Hawai'i's existing law which automatically 'seated' a candidate who went into the general election unchallenged.[191] No candidate could ever really run unopposed if write-in voting was allowed. The court did not elaborate on why a challenge to a policy which seated candidates undermined the integrity of the election process.[192]

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[188] *Id.* at 796-97.

[189] *Id.* at 797; *see also* Burdick v. Takushi, 737 F. Supp. 582, 590 (D. Haw. 1990) (reasoning that the system was its own cure; voters ignorant about a particular write-in candidate not likely to vote for that person). The *Burdick* district court extended the definition of "informed electorate" to include protecting the integrity of the political process from frivolous or fraudulent candidacies. *Id.* (citing McLain v. Meier, 851 F.2d 1045, 1051 (8th Cir. 1988)). It concluded, however that the state's interest in an informed electorate was not of sufficient weight to justify a burden on a voter's right. *Id.*

See *supra* notes 164 and 171 and accompanying text for the Ninth Circuit Court of Appeals' discussion of frivolous candidates.

[190] Burdick v. Takushi, 927 F.2d 469, 475 (1991). Hawai'i's election laws provide for the automatic seating of a candidate who goes into the general election unopposed. *Id.*; *see* HAW. REV. STAT. § 12-41 (1990 Supp.). The ban on write-in voting ensured that a candidate "seated" in the primary would not be challenged in the general by a write-in candidate. 927 F.2d at 475.

[191] *Id.*

[192] The *Burdick* district court held otherwise. The lower court said it went against the notion of representative government to deprive voters of the opportunity to vote for her or his choices for the sole purpose of saving the unchallenged primary election winner from spending time and money campaigning for the general election. Burdick v. Takushi, 737 F. Supp. 582, 591 (D. Haw. 1990); *see* Tashjian v. Republican Party of Conn., 479 U.S. 208, 218 (1986) (holding that possible future cost increases in administering election is not sufficient basis for infringing upon party's First Amendment rights of association and free speech); Dixon v. Maryland Admin. Bd. of Election Laws, 878 F.2d 776, 783 (4th Cir. 1989) (stating that preservation of public fisc is legitimate state objective; however, state may not extend concern to include the expenses solely arising because it chose to hold the election; i.e., cost of counting the ballots).

A state's interest in preserving the integrity of the election process has been upheld as a valid election regulation for several reasons. The integrity defense was upheld when it allowed different but equitable routes to the ballot box,[193] established waiting periods before voters themselves could switch party affiliation to vote in another party's primary,[194] and prohibited a ballot position to an independent candidate previously affiliated in a given period of time with a political party.[195]

D. State's Interest Sufficient to Burden Plaintiff's Rights

After the United States Court of Appeals for the Ninth Circuit in *Burdick* discussed all the factors advanced by both sides, it examined them under the *Anderson* test.[196] It held that the ban on write-in voting did not impermissibly infringe on Burdick's constitutional rights of expression and association.[197] The prohibition on write-in voting placed some restrictions on these rights, but that burden was justified in light of the ease of access to Hawai'i's ballots,[198] the alternatives available to Burdick for expressing his political beliefs, the state's broad powers to regulate elections, and the specific interests advanced by the state.[199] Hawai'i's prohibition on write-in voting eliminated frivolous candidacies yet provided ballot access to candidates who showed a modicum of support.[200]

The court did not say, as defined in the *Anderson* test,[201] that to prevail a state's interest must place a *necessary* burden on the plaintiff's rights.[202] The *Burdick* court did say the state satisfied the *Anderson* test

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[193] American Party of Texas v. White, 415 U.S. 767, 782 n.14 (1973).

[194] Rosario v. Rockefeller, 410 U.S. 752 (1973).

[195] Storer v. Brown, 415 U.S. 724, 733 (1974).

[196] Burdick v. Takushi, 927 F.2d 469, 475 (9th Cir. 1991).

[197] *Id.* (stating that *Anderson* test did not require state to show compelling interests or narrowly tailored laws).

[198] *Id.*; *see also* Erum v. Cayetano, 881 F.2d 689, 693 (9th Cir. 1989) (finding that effect of state access requirements on non-partisan candidates is "slight" where state offers easy access to primary election ballot).

[199] 927 F.2d at 475.

[200] *Id.*

[201] *See supra* part III.B. Although the *Anderson* test speaks of a necessary showing to justify the state interest, even the *Anderson* Court reached its holding without discussing the necessity of the regulation. See *supra* note 81 and accompanying text for discussion of the holding in *Anderson*.

[202] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

because it's interests *justified* the burden.[203] The facts in *Anderson* are distinguishable if a presidential candidate was precluded from being placed on a state election ballot by an unrealistic early filing deadline. The *Burdick* court found that a close view of the issues involved showed that no fundamental right was burdened.[204] This may have eliminated the court's need to require a *necessary* state interest and instead allowed the court to uphold only a *justified* state interest. A justified state regulation would warrant a minor burden under the court's analysis.

Before concluding,[205] the *Burdick* court addressed the conflicting opinion in *Dixon v. Maryland*.[206] In *Dixon*, the court held invalid a Maryland law which required a candidate to pay a filing fee or submit an indigent-candidate petition to qualify as an 'official' write-in candidate and have her or his vote publicly reported. The *Dixon* court held that a vote did not lose its constitutional significance if cast for a non-existent, fictional person or a candidate who is unlikely to win.[207] According to the *Dixon* court, voters may see their vote as expressing a view or increasing the voter's influence.[208]

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[203] Burdick v. Takushi, 927 F.2d 469, 475 (9th Cir. 1991). The court concluded that the *Anderson* test did not require a "showing of compelling state interests or narrowly tailored laws." *Id.*

[204] *Id.* at 474.

[205] *Id.* at 475. The Ninth Circuit actually ended its opinion by discussing the State's claim that the District Court failed to give full faith and credit to the Hawaii Supreme Court's ruling on the certified questions in Burdick v. Takushi, 70 Haw. 498, 776 P.2d 824 (1989). The Ninth Circuit Court of Appeals held the objection was without merit. 927 F.2d at 475-76.

[206] *Id.* at 475. *Dixon* applied the *Anderson* test with a level of strict scrutiny in mind. *Dixon*, 878 F.2d 776, 780 (4th Cir. 1989).

[207] 878 F.2d at 782. The court emphasized that the right to vote included the right to say no candidate was acceptable. *Id.*

[208] *Id.* The *Burdick* court said that the *Dixon* court failed to differentiate between a person's right to participate equally in the election of those who govern and a person's right to try to influence the election process. *Id.* The *Burdick* district court held oppositely from the Ninth Circuit Court of Appeals. Burdick v. Takushi, 737 F. Supp. 582 (D. Haw. 1989). The lower court weighed heavily a voter's right to vote for a candidate not listed on the ballot as a significant political expression protected by the First Amendment. *Id.* at 587.

Judge Fong, who wrote the decision for the lower court, said, "The right to vote in this society is a fundamental right," and the bar "strikes directly at the heart" of that right. Lee Catterall, *State Must Allow Write-in Votes in All Nov. 4 Races*, HONOLULU STAR-BULL., Sept. 30, 1986, at A3. Judge Fong said that if people wanted to, they could vote for Mickey Mouse. *Id.*

According to the *Burdick* court, a person may have a constitutionally protected right to try and influence the outcome of an election, but a prohibition on write-in voting does not substantially burden that hope.[209] Hawai'i voters were presented with a "myriad of other avenues" to propagate their views and increase their influence.[210]

The *Burdick* decision reflected the Ninth Circuit Court of Appeal's reasoning in *Erum v. Cayetano*.[211] A candidate's easy access to the primary ballot influenced the court's analysis when it looked at the state's election law in its entirety.

E. Hawai'i's Ban on Write-in Votes Justified

Voters feel strongly that their constitutional right to vote is a fundamental right deserving of heightened judicial scrutiny whenever it is restricted.[212] The right to associate, even when contradictory to the majoritarian view, is protected by the United States Constitution.[213] The *Dixon* court believed that freedom of speech should not be necessarily limited to the field of candidates printed on the ballot.[214] Many voters may view Hawai'i's ban on write-in voting as one more chip in the whittling away of citizens' constitutional rights.

As long as all voters have the right to an equal vote in the process and any one candidate's efforts to get on the ballot are not unduly thwarted, the state has not unduly impinged on the rights of the voters. A write-in ban does not deny the voter an equal voice. It is a legitimate requirement in the state's time, place, and manner regulation of elections.[215]

Several valid concerns support the ban on write-in voting. Write-in voting creates the inequitable situation where a candidate can bypass

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[209] Burdick v. Takushi, 927 F.2d 469, 475 (9th Cir. 1991).

[210] *Id.*

[211] 881 F.2d 689, 693 (1989) (finding that the effect on candidate's constitutional right is slight when state affords candidate easy access to primary ballot).

[212] See *supra* note 6 and accompanying text for quote on the precious right of voting.

[213] U.S. CONST. art. I.

[214] Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 779 (4th Cir. 1989).

[215] Davidson v. Rhea, 256 S.W. 2d 744, 746 (Ark. 1953) (citation omitted). The court held that the Constitution does not inhibit a state from prescribing rules, regulations, and conditions as it deems proper so long as the law applies equally to all electors without discrimination, and one elector possesses all of the rights, and no more, of every other elector. *Id.*

the primary election and devote resources only to the general election while other candidates follow the state's prescribed route through the primary election. Circumscribing the process is particularly unnecessary since Hawai'i has a very liberal policy on qualifying for the primary election. A candidate for the state house or senate only needs fifteen supporting signatures to be placed on the election ballot.[216] A candidate for Congress only requires twenty-five signatures.[217] It is an inequity that some candidates would face the additional cost and energy to follow the primary-to-general election policy developed by the state while others circumvent the system.

Write-in voting might undermine the voters' faith in the election process. Many voters may not see a vote for Mickey Mouse as an exercise in freedom of expression. They may view such a vote as being disrespectful in what is to them a serious process to select the best candidate from among those who choose to run. True, a voter might become frustrated by a bar on write-in votes, but others might as easily become frustrated by a derogation to the election process.

The state's interest regarding sore losers is a legitimate interest.[218] Examined further, the support for write-in voting may come less from individuals' concern for freedom of speech and more from a political party's desire to control election results given the overwhelming percentage of Democrats over Republicans in political office in Hawai'i.[219] The Republican Party could use a post-primary, write-in campaign, waged by a sore-loser candidate placing just below the Democrat primary winner, to pull enough votes from the Democrat to allow a Republican win in the general election.[220] This scenario counters the purpose of a primary-to-general election scheme. The primary election

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[216] HAW. REV. STAT. § 12-5 (1990 Supp.).

[217] *Id.*

[218] Burdick v. Takushi, 927 F.2d 469, 474 (9th Cir. 1991).

[219] *See Hawaii Election Results*, HONOLULU STAR-BULL., Nov. 7, 1990, at A8 (Democratic Party sweeps Hawai'i in General Election), *Here are final results of '88 general election*, HONOLULU ADVERTISER, Nov. 10, 1988, at A3 (Democrats maintain overwhelming control following local election results).

[220] Cecil Heftel waged a hard-fought campaign for governor and barely lost to John Waihee in the Hawai'i 1986 Democratic primary election. Following the district court's ruling on *Burdick*, there was movement within his campaign organization to mount a write-in effort in the general election. Ken Kobayashi and Jerry Burris, *Judge orders state to allow write-in votes*, HONOLULU ADVERTISER, Sept. 30, 1986, at A1. The issue became moot when the Ninth Circuit Court of Appeals granted a stay on the district court's order to allow write-in voting in the 1986 election.

is where all the candidates battle among themselves in order to send the top contender from each group into the general election. Under the write-in scenario the battle continues among all the original candidates into the general election thus defeating the purpose of the state's total election scheme.

Although a plurality win is already possible where three parties are represented on the general election ballot, the concern is greater when considering a write-in policy. If a sufficient number of "sore-losers" or latecomers run an active write-in general election campaign, it is conceivable that the victor could win with a showing well below fifty percent, or even thirty-three percent as is possible in a three-way campaign. The integrity of the ballot box and the primary purpose of the campaign election process would be undermined.

A ban on write-in voting supports the representative form of decision making. If the right to write-in voting is premised on freedom of speech and association, what is to confine the voter from limiting the write-in to only the issue of which candidate to select?[221] A freedom of speech First Amendment argument for write-in votes should free the voter not only to write in candidate names not printed on the ballot but to write in position statements on any number of government interests on which the voter has something to say. Under a freedom of speech and right to associate argument, voters could write in their dissatisfaction with any aspect of government, not narrowly confined to the name of a preferred candidate whose name is not on the ballot, and demand that their comment be counted and reported. This clouds the election process, which is designed for voters to select their representatives who in turn will decide the issues through legislation. As the *Burdick* court reasoned, Hawai'i's voters are given adequate opportunities and alternatives to exercise their rights of expression and association without requiring the opportunity for write-in votes.[222]

The court's emphasis on a candidate's easy access to the election process in Hawai'i is supported by several United States Supreme Court decisions.[223] The Court has struck down state regulations that limit a candidate's access to the ballot.[224] It has upheld state regulations with legitimate access requirements.[225]

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[221] *But cf.* Paul v. Indiana Election Board, 743 F. Supp. 616 (S.D. Ind. 1990).

[222] Burdick v. Takushi, 927 F.2d 469, 476 (9th Cir. 1991).

[223] *See generally* Jenness v. Fortson, 403 U.S. 431, 442 (1971); Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974).

[224] Anderson v. Celebrezze, 460 U.S. 780 (holding that early filing deadline restricted

V. IMPACT

In the voting booth, Hawai'i voters' choices will continue to be limited to those candidates whose names appear on the ballot. Voters dissatisfied with their existing representatives will need to seek out desirable candidates, file an election petition, and actively seek sufficient support for their candidate to win the primary election in order to advance their candidate to the general election.

Candidates will have to submit an official petition signed by the requisite number of supporters and file for placement on the primary ballot. If they lose in the primary, they will have to concede defeat and lend their support to an advancing candidate who best represents their views.

The impact on a voter in Hawai'i is not readily seen since the *Burdick* decision maintained the status quo. Voters unhappy with the incumbents can, with a modicum of support, place on the primary ballot a preferred candidate. Many other avenues are available to voters wishing to express their opinions to governmental representatives.

The decision does not stop voters from placing onto the primary ballot candidates who will espouse the voters' dissatisfaction with the present administration. It does not significantly narrow the choices in the primary election nor preclude one group of people access to the voting process.

The ban is reasonable when weighing a state's right to protect the integrity of the election process and to guarantee that a candidate, following the primary-to-general election route, is not prejudiced by sore losers who would continue their challenge into the general election. The ban becomes abhorrent if a voter believes it is his or her right, through the ballot, to express his dissatisfaction with the candidates or the government in general through a write-in vote.[226]

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independent's access to the ballot); American Party of Texas v. White, 415 U.S. 767 (holding that law barring minority party access to the ballot is invalid state regulation); Williams v. Rhodes, 393 U.S. 23 (1968) (requiring filing with signatures from 15% of those voting in previous election impermissibly restricts access to the ballot).

[225] Munro v. Socialist Working Party, 479 U.S. 189 (1986) (holding that state justified in requiring a minority party candidate to show a modicum of support of the votes cast in a primary election in order to advance to the general election); Storer v. Brown, 415 U.S. 724 (1974) (finding that between five and six percent signatures from those voting in last election is not unnecessarily restrictive).

[226] The conflicting views regarding the right to a write-in vote are exemplified by the divergent holdings between the *Burdick* district and circuit courts. See *supra* notes 145 and 148 and accompanying text for discussion on how the courts viewed this right.

Hawai'i's election laws remain intact after *Burdick*. The Ninth Circuit Court of Appeals gave great deference to the state's right to substantially regulate its elections when its election laws allowed liberal access to the ballot. The United States Supreme Court has only indirectly addressed write-in provisions in a state's election process, when it was upholding a state election statute that was otherwise too restrictive.[227]

The write-in issue in Hawai'i is not necessarily closed. The United States Supreme Court granted the plaintiff's petition for writ of certiorari.[228] The Court will decide directly if the right to a write-in vote is constitutionally protected.[229] However, the Court must also recognize the right of each state to select its own time, place, and manner election regulations.[230]

The make-up of the present Court might well uphold the *Burdick* court's balancing of voter's rights and state's interests. Chief Justice Rehnquist dissented in *Anderson*.[231] He based his dissent on the various alternative routes provided by Ohio to candidates seeking to advance to the general election.[232] Chief Justice Rehnquist concluded that since Ohio's ballot access laws were rational and allowed non-party candidates reasonable access to the general election ballot, the court should not interfere with Ohio's exercise of Article II, Section 1, Clause 2 of the Constitution.[233] Chief Justice Rehnquist proposed that the majority missed the point that in ballot-access cases states were not required to meet a "narrowly tailored" standard in order to pass constitutional muster.[234]

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[227] Storer v. Brown, 415 U.S. at 737 n.7.

[228] Burdick v. Takushi, 927 F.2d 469 (9th Cir. 1991), *appeal docketed*, No. 91-535 (U.S. Dec. 9, 1991).

[229] The United States District Court for the Southern District of Indiana held that the right to a write-in vote was not a ballot access case but strictly a First and Fourteenth Amendment rights of association and free speech challenge. Paul v. Indiana Election Bd., 743 F. Supp. 616, 622 (S.D. Ind. 1990); *see also* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 780 (4th Cir. 1989) (holding that election is not free if the elector may not choose the person for whom the ballot is cast) (citing Jackson v. Norris, 195 A. 576 (Md. 1937)).

[230] The Court has consistently deferred to a state's election process if it was not invidious and if it allowed easy access to the ballot. Clements v.Fashing, 457 U.S. 957, 972-73 (1982).

[231] Anderson v. Celebrezze, 460 U.S. 780, 806 (1983) (Rehnquist, J., dissenting).

[232] *Id.*

[233] *Id.* at 808.

[234] *Id.* at 817. Chief Justice Rehnquist argued that California's direct party primary was an integral part of the entire election process that winnowed out and finally rejected all but the chosen candidates. *Id.* at 817-18.

In another ballot access case, *Clements v. Fashing*,[235] Rehnquist, writing for a plurality, held as insignificant the burden placed on a plaintiff's First Amendment interests in candidacy.[236] Fashing was a Texas country judge who did not wish to resign, as required under Texas law, before running for higher office.[237] Other plaintiffs included candidates and twenty voters.[238] The case was heard primarily as an equal protection challenge to the rights of the candidate. Possibly the Court would have required the state to offer more justification for its burden on the plaintiff if the Court had heard the case as a voter's First Amendment right to associate rather than a candidate's equal protection claim. The Court did not indicate that a fundamental right to associate, guaranteed the twenty voter-plaintiffs in the case, would require the Court to apply a stricter standard of review. Instead, Chief Justice Rehnquist was silent on the interchangeable nature between the rights of voters and the rights of candidates.[239]

The United States Supreme Court will analyze the relationship between ballot-access and the right to vote. The Court may place its emphasis with the statement (quoted in many of the ballot-access cases irrespective of how they were decided): "Other rights, even the most basic, are illusory if the right to vote is undermined."[240] Or, the court may recognize a state and citizen's right to maintain the integrity of the various steps in the election process which allow candidates easy access to the ballot and voters equal voice in choosing from among those candidates listed on the ballot.

VI. CONCLUSION

Burdick v. Takushi reflected the holding in previous ballot-access cases decided by the Ninth Circuit Court of Appeals. The court distinguished the right of equal access to vote from the right to vote for any candidate.

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[235] 457 U.S. 957 (1982). The case was decided one year prior to *Anderson*.

[236] *Id.* at 971.

[237] *Id.* at 961.

[238] *Id.* at 971.

[239] *See* Anderson v. Celebrezze, 460 U.S. 780, 786 (1983). The dissent in *Clements* charged the plurality with giving new meaning to the term "legal fiction". Clements v. Fashing, 457 U.S. 957, 978 (1982) (Brennan, J., dissenting). Justice Brennan reminded the court of past decisions which had recognized that restrictions on candidacy impinged on First Amendment rights of candidates and voters, thus requiring strict scrutiny. *Id.*

[240] *See supra* note 6 and accompanying text.

Burdick placed the emphasis on the right to participate equally in the election process. The court defined the right to vote as a right to have an equal say in an election process, and the court recognized that this process could include reasonable time, place, and manner limitations. The court rejected the argument that a First Amendment right to association and free speech was unjustly undermined. Instead, the court distinguished the right to vote as a fundamental right only in that a voter has a right to equal access to the voting process.

The court respected the state's right to regulate elections and maintain the integrity of that process. The court rejected the need for a voter to use the ballot box as a means of expressing anything other than his or her choice for an office. The court held that other avenues in a representative form of government are available for expressing dissatisfaction with the status quo.

The court held that the state's interests were justified and did not excessively violate a voter's First Amendment rights, if indeed, such rights were implicated.

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Greenpeace USA v. Stone: The Comprehensive Environmental Impact Statement and the Extraterritorial Reach of NEPA

I. INTRODUCTION

The United States' inventory of unitary chemical munitions[1] totals thirty thousand tons and has spanned the globe, including stockpile sites in the continental United States, the Pacific, Asia, and Europe.[2]

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[1] The stockpile of unitary chemical munitions consists of nerve and blistering agents. UNITED STATES ARMY, UNITED STATES STOCKPILE CHEMICAL DISPOSAL PROGRAM 7-8 (1988). A unitary chemical weapon operates by essentially housing the lethal agent within the munitions shell and dispersing the agent by exploding the shell. In comparison, binary weapons contain two chemicals that are harmless while separate and become lethal only when mixed upon detonation. The dangers of storing the aging unitary munitions have escalated because of the slow deterioration of the casing shell, as well as the increasing instability of the detonation fuels. *See id.* at 1, 7-8 (1988); GREENPEACE INTERNATIONAL, ALTERNATIVE TECHNOLOGIES FOR THE DETOXIFICATION OF CHEMICAL WEAPONS: AN INFORMATION DOCUMENT 1-5 (1991).

Two different types of nerve agents, GB and VX, have been employed in unitary chemical weaponry, and these two nerve agents also comprise the European stockpile, the retrograde movement and destruction of which is at issue in this casenote. DEPARTMENT OF THE ARMY, FINAL SECOND SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT 1-1 (1990) [hereinafter FSSEIS]; *see infra* notes 11, 23-25 and accompanying text. While the nerve agents GB and VX differ in molecular structure, they have the same physiological effect on man. The passage of nerve impulses along the central nervous system is interrupted, and essential body functions, such as breathing, vision, and muscular control, are disturbed. UNITED STATES ARMY, UNITED STATES STOCKPILE CHEMICAL DISPOSAL PROGRAM 7 (1988).

[2] The chemical stockpile within the continental United States is divided among eight storage, or C.O.N.U.S., sites located at: Aberdeen Proving Ground, Md.; Anniston Army Depot, Ala.; Lexington-Blue Grass Army Depot, Ky.; Newport Army Ammunition Plant, Ind.; Pine Bluff Arsenal, Ark.; Pueblo Depot Activity, Colo.;

All agree that these weapons, obsolete and increasingly unstable,[3] should be destroyed.[4]

As the Department of Defense and the United States Army implement plans for the "demilitarization" of the chemical weapons stockpile, the concern has now shifted to where and how the destruction operation[5] should take place. The Department of Defense designated incineration as the preferred method of detoxification in 1982.[6] Environmental groups have consistently opposed the choice of incineration, and Greenpeace International has released a report detailing possible alternative disposal methods.[7] The Army's timetable has already experienced several significant delays and its costs are mounting.[8]

Tooele Army Depot, Utah; and Umatilla Depot Activity, Or. UNITED STATES ARMY, UNITED STATES STOCKPILE CHEMICAL DISPOSAL PROGRAM 3 (1988). The stockpile which the U.S. Army formerly stored at Okinawa, Japan is currently at Johnston Atoll pending destruction. *See infra* note 27. The stockpile which the U.S. Army had stored at Clausen, Germany, has been relocated to Johnston Island. Greenpeace USA v. Stone, 924 F.2d 175, 176 (9th Cir. 1990). The U.S. Army's relocation operation for this stockpile is the subject of this casenote.

[3] UNITED STATES ARMY, UNITED STATES STOCKPILE CHEMICAL DISPOSAL PROGRAM 1 (1988). The United States began to maintain a constant stockpile of unitary chemical weapons following World War I. All existing unitary chemical weapons are at least 21 years old, and some date as far back as World War II. *Id.*

[4] Congress has mandated that the entire United States arsenal of unitary chemical weapons be destroyed by 1997. National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 118 (a), 102 Stat. 1918, 1934 (1988) (codified as amended at 50 U.S.C.A. § 1521(b) (West 1991)); *see infra* note 20. In June, 1990, President George Bush and former Soviet President Mikhail Gorbachev completed the negotiation of an agreement pledging to end all chemical weapons production and reduce each country's total stockpiles to only five thousand tons of binary chemical munitions by 2002, if technologically possible. At the time of the negotiations, the former Soviet Union stored forty thousand tons of unitary chemical munitions, and their only operative disposal facility was closed in 1989 after local protests. David C. Morrison, *No Easy Out*, 23 NAT'L J. 1100 (1991).

[5] DEPARTMENT OF THE ARMY, JOHNSTON ATOLL CHEMICAL AGENT DISPOSAL SYSTEM (J.A.C.A.D.S.) ENVIRONMENTAL IMPACT STATEMENT at ii (1983) [hereinafter 1983 EIS]. In simplest terms, the destruction of a unitary chemical weapon entails opening the housing shell, removing the chemical agent, and then effectively detoxifying the harmful chemical agent, as well as the casing. *Id.*

[6] *Id.*; *see also supra* note 25.

[7] *See* GREENPEACE INTERNATIONAL, ALTERNATIVE TECHNOLOGIES FOR THE DETOXIFICATION OF CHEMICAL WEAPONS: AN INFORMATION DOCUMENT (1991). Among the alternative methods discussed in the Greenpeace report are various chemical, photochemical and electrochemical processes, and biological and organic technologies. *Id.* Nevertheless, Pat Costner, a chemist with Greenpeace who had contributed to the

In *Greenpeace USA v. Stone*,[9] the United States District Court for the District of Hawaii faced the question whether the procedural requirements of the National Environmental Policy Act[10] (NEPA) were applicable to the extraterritorial portions of the Army's movement of the fragile unitary chemical munitions stored in the Federal Republic of Germany to Johnston Atoll for ultimate destruction.[11] Greenpeace USA and other environmental organizations sought to enjoin the Army's action and to compel the Army to prepare a comprehensive environmental impact statement encompassing the entire transport and destruction operation.[12]

The district court held that NEPA governed neither the removal operation within Germany[13] nor the transport of the munitions through the global commons.[14] The court excepted the German stage of the munitions transport as a nondomestic federal action exclusively within the President's foreign policy power.[15] The court also determined that

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report, has said that Greenpeace was not specifically endorsing any of them. According to Ms. Costner, Greenpeace took the position that the entire Army project should be halted and started over. Ken Miller, *Fight Brewing over Army Plan to Burn Chemical Weapons*, Gannett News Service, June 13 1991, *available in* LEXIS, Nexis Library, GNS File.

[8] Ken Miller, *Fight Brewing over Army Plan to Burn Chemical Weapons*, Gannett News Service, June 13 1991, *available in* LEXIS, Nexis Library, GNS File. Susan Livingstone, Assistant Secretary of the Army for Installations, Logistics and Environment, reported to the Senate Subcommittee on Strategic Forces and Nuclear Deterrence that, after several setbacks, the costs of the entire estimated disposal program had already climbed to six and a half billion dollars. *Id.* Ms. Livingstone urged Congress to proceed with the construction of incineration facilities in the continental United States. *Id.* Each year of delay, Ms. Livingstone estimated, could cost $380 million. *Id.*

[9] 748 F. Supp. 749 (D. Haw. 1990).

[10] National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4332 (1988).

[11] 748 F. Supp. 749, 754 (D. Haw. 1990). The entire planned action consisted of the removal of 102,000 rounds, or 435,000 pounds by agent weight. The stockpile comprises six percent of the total United States unitary chemical arsenal in existence. *Id.* at 752.

[12] *Id.* at 754.

[13] *Id.* at 761.

[14] *Id.* at 763. The term "global commons" refers to those portions of the planet such as the oceans, the upper atmosphere, and Antarctica in which all nations have a common non-proprietary interest. Comment, *President Orders Environmental Review of International Actions*, 9 Envtl. L. Rep. (Envtl. L. Inst.) 10,011 (Jan. 1979) (citing Harding, *The Tragedy of the Commons*, 162 Sci. 1243 (1968)).

[15] 748 F. Supp. at 761.

the Army's compliance with Executive Order No. 12,114,[16] as well as foreign policy power implications, precluded application of NEPA's impact statement requirements to the transoceanic stage of the transport.[17] Reasoning that a comprehensive environmental impact statement was not required for the entire action, the court denied plaintiffs' motion for preliminary injunction.[18] On appeal, the United States Circuit Court for the Ninth Circuit dismissed the complaint as moot, since the Department of Defense operation had completed the transport of the chemical weapons stockpile to Johnston Atoll.[19]

Part II of this note states the facts of *Greenpeace* both in the district court and on appeal. Part III examines the history of NEPA, the judicial review of NEPA's environmental impact statement requirements for a nondomestic federal agency action, and the scope of a comprehensive impact statement. Part IV presents an analysis of the district court's opinion in *Greenpeace*, in which it denied the plaintiffs' motion for a preliminary injunction. Part V considers the potential impact of the district court and circuit court decisions on the judicial review of nondomestic federal agency actions.

II. Facts

The Department of Defense has undertaken a project to destroy the entire United States unitary chemical munitions stockpile pursuant to Congressional mandate.[20] In 1986, President Reagan entered into an

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[16] Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

[17] 748 F. Supp. at 762-63.

[18] *Id.* at 768.

[19] Greenpeace USA v. Stone, 924 F.2d 175 (9th Cir. 1991).

[20] Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1412(a), 99 Stat. 583, 747 (1985) (codified at 50 U.S.C. 1521(a) (1988)). The Department of Defense Authorization Act of 1986 directed the Secretary of Defense to destroy the United States stockpile of lethal chemical agents and munitions in their various locations around the world. This Congressional mandate originally set a deadline of September 30, 1994 for completing the destruction. *Id.* § 1412(b).

However, the National Defense Authorization Act of 1989, extended the deadline to April 30, 1997, unless the United States ratifies a treaty which sets an earlier date for destroying its stockpile. National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 118(a), 102 Stat. 1918, 1934 (1988) (codified at 50 U.S.C.A. § 1521(b) (West 1991)).

The Defense Appropriations Act for 1990 also included a specific appropriation for

agreement with Chancellor Kohl to remove, by December 1992, the obsolete unitary chemical munitions which had been stored in the Federal Republic of Germany (F.R.G.) (now Germany) since 1968.[21] In March, 1989, at the request of President Bush, Secretary of State Baker agreed with Chancellor Kohl to accelerate the date for removal from 1992 to the end of 1990.[22] Accordingly, the United States Army

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the retrograde movement of the United States stockpile of lethal chemical weapons for destruction. Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, Title VI, 103 Stat. 1112, 1127 (1989). The only condition placed on the use of appropriations for the retrograde program was that the Army certify that the Johnston Atoll Chemical Agent Disposal System (J.A.C.A.D.S.) has destroyed live agent chemical munitions and that adequate storage capacity exists on Johnston Atoll to safely accommodate any chemical munitions or hazardous materials transported thereto. *Id.* The Army made the required certification on July 22, 1990. 748 F. Supp. at 753.

[21] In its September 19, 1989 Notice of Intent to Prepare the FSSEIS, *see supra* note 1, the Army stated: "The European/Johnston Atoll activity is planned for the 1990 to 1992 time frame." Verified Complaint for a Declaratory Judgment and Injunctive Relief, Exhibit A (Department of the Army, D.O.D., Notice of Intent) at 1, *Greenpeace* (No. 90-00588). The FSSEIS, in its discussion of alternatives eliminated from detailed consideration, states: "Constraints greatly reduce the number of viable alternatives to the overall action proposed in this SSEIS. These constraints include the *1986 Reagan/Kohl agreement* to remove the unitary chemical stockpile from F.R.G. for destruction outside of Germany by December 1992. . . ." FSSEIS, *supra* note 1, at 3-5 (emphasis added). As plaintiffs alleged, this agreement was never reported to Congress, and these are the first documents which reference the agreement. *See* Verified Complaint for a Declaratory Judgment and Injunctive Relief at 27, *Greenpeace* (No. 90-00588).

[22] *See* Opposition to Application for Temporary Restraining Order, Declaration of James F. Dobbin, Jr., Principal Deputy Assistant Secretary for European and Canadian Affairs at 1-2 [hereinafter Dobbin Declaration], *Greenpeace* (No. 90-00588). From 1986 to 1989, Mr. James F. Dobbin, Jr. served as Deputy Chief of Mission at the United States Embassy in Germany. Dobbin Declaration at 1, *Greenpeace* (No. 90-00588).

During a telephone conversation on March 4, 1989, Secretary of State James Baker, at the request of President Bush, informed Chancellor Kohl that the United States intended to accelerate the withdrawal of unitary chemical weapons from German soil and intended to complete withdrawal by the end of 1990. Secretary Baker said in the conversation that the new date would not be made public until all questions about implementing that promise had been resolved. Dobbin Declaration at 2, Attachment A, *Greenpeace* (No. 90-00588).

A July 12, 1989 letter from Richard Cheney, Secretary of Defense, to Gerhard Stoltenberg, Minister of Defense of the F.R.G., set forth the timetable for removing the unitary weapons from Germany by September 20, 1990. Dobbin Declaration at 2, *Greenpeace* (No. 90-00588).

On April 27, 1989, Chancellor Kohl in his Declaration to the Bundestag announced publicly that President Bush had promised to complete the withdrawal of the weapons by the end of 1990. Government of the Federal Republic of Germany, Government

(Army) and Department of Defense (D.O.D.) undertook a joint plan with the German Army to remove the stockpile from the F.R.G.[23] The

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Declaration to the Bundestag (April 27, 1989), Dobbin Declaration at 3, Attachment C, *Greenpeace* (No. 90-00588).

A Record of Decision was issued by Susan Livingstone, Assistant Secretary of the Army, which only stated that President Bush had requested that the D.O.D. accelerate the Reagan-Kohl removal schedule, substituting a completion deadline of September 1990, and that a public announcement had been made to that effect in March 1990. Verified Complaint for Declaratory Judgment and Injunctive Relief, Exhibit B (Record of Decision) at 1, *Greenpeace* (No. 90-00588).

[23] *See* Opposition to Application for Temporary Restraining Order, Declaration of Louis J. Del Rosso at 2 [hereinafter Del Rosso Declaration], *Greenpeace*, (No. 90-00588). Major General Del Rosso is Director of the Chemical Retrograde Task Force (C.R.T.F.), Office of the Deputy Chief of Staff for Operations and Plans, Headquarters, Department of the Army. The C.R.T.F.'s purpose concentrated on planning the removal of the unitary munitions from their storage location in Germany and their relocation to the storage facilities at Johnston Atoll. The office coordinated, but did not direct, all of the efforts associated with the joint United States-German exercise. Major General Del Rosso oversees all of the actions of the C.R.T.F. Del Rosso Declaration at 1-2, *Greenpeace* (No. 90-00588).

Responsibilities for the removal, transportation and storage were allocated as follows. The German government was in overall control of the exercise during the movement of the stocks in Germany with the United States providing support. The ocean phase of the exercise was under the control of Unified Commanders-in-Chief, who take their direction from the Organization of the Joint Chiefs of Staff (not the Army). Once the munitions reach Johnston Island, storage and destruction is under the Army's direction. Del Rosso Declaration at 2, *Greenpeace* (No. 90-00588).

The total United States and German investment for preparation, equipment procurement, and training, totalled nearly $70 million at the date of Major General Del Rosso's Declaration, August 1990. Del Rosso Declaration at 3, *Greenpeace* (No. 90-00588).

The plan for removal and destruction of the chemical munitions provided that the munitions would first be placed in secondary steel containers at the Clausen storage site. The munitions would then be blocked, braced, and secured inside the secondary steel containers, and the containers would be secured inside special shipping containers called M.I.L.V.A.N.s. Once in the M.I.L.V.A.N.s, the United States Army would begin trucking the munitions to a temporary storage depot near the railhead at Miesau, Germany. *Id.*

On July 26, 1990, the United States and German Armies began the planned operation. By August 6, 1990, they had moved 29% of the munitions from Clausen to Miesau. Another 31% had been removed from the storage site and secured in secondary steel containers in preparation for shipment. Opposition to Application for Temporary Restraining Order at 19-20, *Greenpeace* (No. 90-00588).

Once all of the munitions were at Miesau, the subsequent phases of the planned operation required that they would be loaded onto railcars and transported by rail to

United States Army would transport the munitions via transoceanic shipment to Johnston Atoll[24] for temporary storage and eventual incineration, using the Johnston Atoll Chemical Agent Disposal System (J.A.C.A.D.S.).[25]

The Army has prepared three environmental impact statements (EIS) with respect to the J.A.C.A.D.S. facility.[26] In 1983, the Army prepared an EIS (1983 EIS) addressing the construction and operation of facilities designed to destroy the chemical weapons already stored on Johnston Atoll (the Okinawa stockpile).[27] In 1988, the Army prepared a Sup-

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a temporary storage site at the port of Nordenham, Germany. At Nordenham, the United States and German Armies would then load the M.I.L.V.A.N.s into specially outfitted container ships for the transoceanic leg of their trip to Johnston Atoll. Del Rosso Declaration at 3, *Greenpeace* (No. 90-00588).

At the Johnston Island wharf, the M.I.L.V.A.N.s would be off-loaded to transport trailers and transported to the Chemical Exclusion Area, then stored in concrete bunkers (igloos) to await destruction. The United States Army will dispose of the chemical munitions in the Johnston Atoll Chemical Agent Disposal System. FSSEIS, *supra* note 1, at 1-1.

[24] Johnston Atoll is a U.S. possession located 717 nautical miles (approximately 825 miles) southwest of Honolulu, Hawaii. Jon M. Van Dyke et al., *The Legal Status of Johnston Atoll and Its Exclusive Economic Zone*, 10 U. HAW. L. REV. 183, 184 (1988). It is composed of four islets, one of which is Johnston Island, enclosed in an egg-shaped reef and lagoon complex on a relatively flat, shallow platform approximately 20 miles in circumference. *Id.* at 186. In 1926, President Coolidge, by Executive Order, established Johnston Atoll as a federal bird refuge to provide sanctuary for sea birds. Exec. Order No. 4467 (June 1926). It became an official National Wildlife Refuge in 1940. National Wildlife Refuge Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 927 (codified at 16 U.S.C. §§ 668dd-668ee (1988)).

[25] Del Rosso Declaration, *supra* note 23, at 3, *Greenpeace* (No. 90-00588). The J.A.C.A.D.S. disposal technology involves disassembly of the chemical-agent-filled munitions and uses four separate incinerators for the destruction process. Each munitions type is disassembled by machinery designed uniquely for it, and the chemical agents are drained from the munitions and incinerated in a special furnace designed for agent destruction. The metal casing also requires decontamination in a metal parts furnace because of prior contact with the chemical agent. Explosives and propellants are destroyed in a separate deactivation furnace. A dunnage incinerator is used to burn combustible wastes. A pollution abatement system for each furnace or incinerator is used to control atmospheric emissions. FSSEIS, *supra* note 1, at 1-2. The process produces no liquid wastes; potential impacts on the environment can result only from air emissions and solid wastes. *Id.*

[26] *See infra* notes 58-62 and accompanying text (discussing the impact statement requirements of NEPA).

[27] 1983 EIS, *supra* note 5, at ii. In 1971, the United States removed its stockpile of chemical munitions from Okinawa at the request of the Japanese government and

plemental EIS (1988 SSEIS) examining the disposal of solid and liquid wastes which J.A.C.A.D.S. operations would produce.[28]

On June 8, 1990, the Army circulated a Final Second Supplemental EIS (FSSEIS) assessing the effects of receiving, storing, and ultimately destroying the European stockpile at the J.A.C.A.D.S. facility.[29] The Army released a Record of Decision, July 12, 1990, announcing its final determination to transport the European stockpile to Johnston Atoll for disposal.[30]

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shipped it to Johnston Island for storage. *Id.* at 13. These munitions were to have been moved to Umatilla Army Depot, Oregon, for continued storage as part of the deterrent stockpile. *Id.* As a result of public opposition to the planned relocation of stocks to the continental United States, Congress passed Pub. L. No. 91-672, prohibiting the transport of the munitions to the 50 states and the District of Columbia, but nonetheless authorized their destruction, provided that occurred outside the 50 states and the District of Columbia. Foreign Military Sales Act—Amendment, Pub. L. No. 91-672, § 1384, 84 Stat. 2053, 2055 (1971).

The J.A.C.A.D.S. facility was initially designed for the purpose of destroying the Okinawan stockpile of chemical munitions. 1983 EIS, *supra* note 5, at ii. At the time of the 1983 EIS, there were no plans to dispose of chemical agents or munitions on Johnston Island that were not stored there at that time. *Id.* at 13.

[28] DEPARTMENT OF THE ARMY, SECOND SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (1988) [hereinafter 1988 SSEIS].

[29] FSSEIS, *supra* note 1. The FSSEIS addressed the effects of the following proposed European stockpile activities: (1) the transport of the European stockpile from the territorial limit (12 miles) to Johnston Island, (2) the unloading of munitions from transportation ships, (3) the on-island munitions transport and handling, (4) on-island munitions storage, (5) the disposal of munitions in the J.A.C.A.D.S. facility, (6) the disposal of incineration wastes, and (7) alternatives to the proposed action. The FSSEIS also updated information from the 1983 EIS and the 1988 SSEIS. *Id.* at v.

The FSSEIS concluded that the European stockpile activities could be conducted in a safe and environmentally acceptable manner:

> In general, the effects from the destruction of the European stockpile relative to destruction of the existing Johnston Island stockpile are expected to be of the same type as those assessed in the 1983 EIS [addressing the destruction of the Okinawan stockpile]. However, the period of operation will be extended for 3 1/2 months, and a larger stockpile will temporarily exist on the island. Thus, impacts will occur over a somewhat longer period of time. No significant incremental impacts are expected during normal operations; however, because of the increased handling, storage, and disposal operations, there will be an increased potential for accidents. Standard operating procedures will be implemented to ensure the safety and to minimize overall risks. . . . The environmental impacts of routine handling and disposal operations would be minimal.

Id. at v-vi.

[30] Verified Complaint for Declaratory Judgment and Injunctive Relief, Exhibit B (Record of Decision) at 1, *Greenpeace* (No. 90-00588).

Pursuant to Executive Order No. 12,114,[31] the Army prepared a Global Commons Environmental Assessment (Environmental Assessment) for the shipment from the port of Nordenham to the territorial waters extending twelve nautical miles from Johnston Atoll.[32] The Army determined, through the preparation of the Environmental Assessment,[33] that there would be no significant impact on the global commons and therefore, no need to prepare an impact statement.[34] The Environmental Assessment concluded with a Finding of No Significant Impact.[35]

The Army prepared neither an environmental impact statement nor an environmental assessment for the transportation of the munitions within the German borders from Clausen to Nordenham. Nor did the Army prepare a comprehensive environmental impact statement detailing in one document all three phases of the munitions demilitarization process.

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[31] Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988); *see infra* note 85 (discussing the requirements of Executive Order No. 12,114).

[32] 748 F. Supp. at 754. Initially, the D.O.D. classified the Environmental Assessment as "Secret" and did not release it to the public, but published instead an "Information Paper" on July 22, 1990. *Id.* at 754 n.5. For the purposes of the *Greenpeace* litigation, the Environmental Assessment was declassified and released to the court and to plaintiffs with limited portions redacted because of national security concerns. *Id.*

[33] Department of the Defense, Global Commons Environmental Assessment (Mar. 1990), *cited in Greenpeace*, 748 F. Supp. at 761. The Environmental Assessment evaluated four potential sea routes for the shipment of the munitions from the North Sea to the territorial waters of Johnston Atoll. 748 F. Supp. at 761. It briefly discussed alternatives to ocean transport including no action, in situ destruction within Germany, and air transportation. *Id.* The Environmental Assessment also discussed the effects of the transportation on water quality, air quality, the risks to threatened, endangered and special interest species, and risks to commercial fisheries and to the human population. *Id.* at 761-62.

[34] 748 F. Supp. at 762. The Environmental Assessment concluded that the risks of fire, ship loss, and terrorist attacks were unlikely to occur against modern ships operated by trained personnel and escorted by surface vessels and/or military air patrols. *Id.* at 762 n.14.

[35] *Id.* at 761. The Finding of No Significant Impact stated, "Normal operations of all routes would cause no significant impact on the environment of the global commons, assuming that none of the low probability accidents examined actually occur." *Id.* It also stated, "Only a complete loss of a vessel, uncontrollable ship fire, or large terrorist attack would result in some release of contaminants, but the probability of these events is very low." *Id.*

On July 20, 1990, prior to the *Greenpeace* litigation, the Administrative Court of Cologne denied a group of West German citizens, who had petitioned to enjoin movement of the munitions through the F.R.G., their request for a preliminary injunction.[36] On July 26, 1990, the United States Army, with the assistance of the German Army, began the removal of the European stockpile of unitary chemical weapons from its storage site in Clausen, Germany.[37]

On August 1, 1990, plaintiffs, Greenpeace USA,[38] Stichting Greenpeace Council,[39] Institute for the Advancement of Hawaiian Affairs,[40] World Council of Indigenous Peoples—Hawai'i,[41] and Walter Keli'iokekai Paulo,[42] (hereinafter collectively referred to as Greenpeace) filed a complaint for declaratory judgment and injunctive relief against Michael P. Stone, Secretary of the Army,[43] and Richard Cheney, Secretary of Defense,[44] both acting in their official capacities (hereinafter collectively referred to as either the Army or D.O.D.), to enjoin the

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[36] *Id.* at 754. The Administrative Court of Cologne ruled that, in light of the extensive planned safety precautions, the proposed transport within the F.R.G. did not violate German Basic Law nor any German constitutional rights. *Id.*

[37] *Id.* at 753.

[38] Greenpeace USA, a non-profit corporation, is a national conservation organization with approximately 2,250,000 members/supporters in the United States, of whom over 9,000 reside in the State of Hawaii. Verified Complaint for a Declaratory Judgment and Injunctive Relief at 6, *Greenpeace* (No. 90-00588).

[39] Greenpeace Stichting Council, also referred to as Greenpeace International, is a non-profit corporation based in the Netherlands. Greenpeace Stichting Council has offices in 24 countries, including a base camp in Antarctica, and has approximately 4,000,000 members/supporters throughout the world. Greenpeace USA is one of the 24 member organizations on the Greenpeace Council. *Id.*

[40] The Institute for the Advancement of Hawaiian Affairs, a non-profit Hawaiian corporation, is composed of individuals actively engaged in improving the environment and protecting the Pacific from environmental degradation. The organization includes members who are commercial fishermen who fish in the waters surrounding Hawai'i and Johnston Atoll. *Id.* at 8.

[41] The World Council of Indigenous Peoples—Hawai'i, a non-profit Hawaiian corporation, is the Hawai'i arm of the World Council of Indigenous Peoples. The Council is a non-governmental organization which has consultative status with the United Nations. *Id.* at 9.

[42] Walter Keli'iokekai Paulo, a fisherman in Hawaiian waters and near Johnston Atoll, is a fishing boat captain who, at the time of litigation, had a contract with the United Nations as a fishing methods expert for the Pacific regional development program. *Id.*

[43] *Id.* at 10.

[44] *Id.*

movement of chemical munitions from Germany to Johnston Atoll. Plaintiffs asserted in their complaint that the Army and D.O.D. violated NEPA by, among other things, failing to prepare a comprehensive EIS covering all aspects of the transportation and disposal.[45]

On August 3, 1990, plaintiffs filed an application for a temporary restraining order to enjoin the defendants from transporting and removing the stockpile, which action was already underway.[46] The court denied plaintiffs' application for a temporary restraining order on August 9, 1990.[47] Because the transportation process had already begun, the court set a prompt hearing date for plaintiffs' motion for a preliminary injunction.[48] On August 20, 1990, the court heard plaintiffs' motion for a preliminary injunction to halt transport at the German stage.[49] On September 7, 1990, the court issued an order denying plaintiffs' motion for preliminary injunction.[50]

On November 20, 1990, plaintiffs appealed the district court's denial to the United States Court of Appeals for the Ninth Circuit.[51] The district court motions panel denied emergency relief, but calendared the appeal for expedited review.[52] However, before briefing for the appeal could be completed, the Army completed transporting the munitions from Germany to Johnston Atoll, where they are presently being stored.[53] The Court of Appeals concluded that all of the issues relating to the transfer of the munitions within the F.R.G. and across the global commons were moot, and dismissed the appeal.[54]

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[45] *Id.* at 22-23.

[46] Plaintiffs' Application for Issuance of Temporary Restraining Order, *Greenpeace* (No. 90-00588); *see also supra* note 23.

[47] Order Denying Application for Temporary Restraining Order at 20, *Greenpeace* (No. 90-00588).

[48] *Id.* at 20-21.

[49] 748 F.Supp. at 752.

[50] Order Denying Plaintiffs' Motion for Preliminary Injunction at 1, *Greenpeace* (No. 90-00588). On September 28, 1990, the court issued clarifying amendments, which in no way affected the substance or ruling of the court. *See* Order Clarifying and Amending Order Denying Plaintiffs' Motion for Preliminary Injunction at 3, *Greenpeace* (No. 90-00588); *see also* Amended Order Denying Plaintiffs' Motion for Preliminary Injunction, *Greenpeace* (No. 90-00588).

[51] Greenpeace USA v. Stone, 924 F.2d 175 (9th Cir. 1990).

[52] *Id.* at 176.

[53] *Id.*

[54] *Id.* The Court of Appeals declared the issue of a preliminary injunction pending determination of extraterritorial application to be moot. *Id.* The court also clarified

III. History

A. Enactment of the National Environmental Policy Act: An Environmental Charter

1. Federal Agency Environmental Review

The National Environmental Policy Act of 1969[55] (NEPA), enacted by Congress in response to growing national concern over the increased degradation of the world environment,[56] is the nation's basic environmental charter.[57] NEPA is essentially a procedural statute. The core provision of NEPA requires that a federal agency prepare an environmental impact statement (EIS) for any proposed major action significantly affecting the quality of the human environment.[58] The EIS must

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that it had "not yet fully considered the issues relating to the destruction [of the European stockpile at the J.A.C.A.D.S. facility], but counsel for the government has represented that the European stockpile will not be destroyed until the district court has considered the merits of plaintiff's complaint." *Id.*

[55] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370a (1988)).

[56] National Environmental Policy Act of 1969, § 2, 42 U.S.C. § 4321 (1988); *see also infra* note 81.

Title I contains a declaration of the policy and the statute's substantive and procedural provisions. The statutory policies are contained in § 101, as well as the responsibility of the Federal Government to use "all practical means" to carry out the environmental policy set forth in the Act. 42 U.S.C. § 4331 (1988).

Section 102(2) contains the principal substantive and procedural requirements, including the EIS requirement in § 102(2)(C), and other decision making responsibilities for federal agencies. *Id.* § 4332.

Title II creates the Council on Environmental Quality in the Executive Office of the President. *Id.* § 4342; *see also infra* note 64.

[57] 40 C.F.R. § 1500.1(a) (1991) ("The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment.").

[58] National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1988). Section 102(2)(C) requires that:

> [A]ll Agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the

discuss the environmental impact of the action,[59] any unavoidable adverse effects of the action,[60] and any alternatives to the action.[61] The timing of the agency preparation of the EIS is procedurally crucial: an agency must have a final statement ready at "the time at which it makes a recommendation or report on a proposal for federal action."[62]

NEPA is designed to ensure that federal agencies will be compelled to consider the environmental impacts of their actions during the development and planning stage of a proposal.[63] However, NEPA provides virtually no guidelines for the scope and implementation of its policies, i.e., what form the agency's environmental review process should take. NEPA does, however, provide for the creation of the Council on Environmental Quality, which in turn has promulgated the regulations necessary to effectuate the impact statement requirement.[64]

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proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. The "detailed statement" is what has become known as the EIS.

The language of NEPA is broad and sweeping, but NEPA itself does not define its statutory terms; the Council on Environmental Quality regulations define the terms of NEPA. *See generally* 40 C.F.R. §§ 1500-1517 (1991). In some instances, these regulations codify what the Council on Environmental Quality views as the majority court rule defined through litigation and judicial review. The courts have had to interpret each key term of this section in order to determine whether an EIS is required: Is there an agency "proposal" for an "action"? Is it "federal"? Is it "major"? Is it "significant"? Does the action affect the "human" environment? Therefore, whether a federal agency has taken an action that falls under NEPA must ultimately be determined through judicial review. *See* DANIEL R. MANDELKER, NEPA LAW & LITIGATION § 8:01 (1984 & Supp. 1990). Also see Justice Marshall's comment on the court's role in the evolution of NEPA doctrine, *infra* note 69.

[59] 42 U.S.C. § 4332(2)(C)(i) (1988).

[60] *Id.* § 4332(2)(C)(ii).

[61] *Id.* § 4332(2)(C)(iii).

[62] Kleppe v. Sierra Club, 427 U.S. 390, 406 (1979) (emphasis omitted) (quoting Aberdeen & Rockfish Ry. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 320 (1975)).

[63] *See* MANDELKER, *supra* note 58, §§ 1:01, 6:01, 7:09.

[64] Council on Environmental Quality, 40 C.F.R. §§ 1500-1517 (1991). Title II of NEPA creates the Council on Environmental Quality in the Executive Office of the President. National Environmental Policy Act of 1969, §§ 201-209, 42 U.S.C. §§ 4341-47 (1988). The statute originally imposed limited responsibilities on the Council for

Thus, the Council on Environmental Quality regulations provide the actual requirements and procedures of environmental review carried out at the agency level.[65]

2. Judicial Review under NEPA

NEPA contains no provision for judicial review, nor is there any discussion about judicial enforcement of the EIS requirement in NEPA's

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environmental review, research and reporting. *Id.* § 202, 42 U.S.C. § 4342 (1988). It was through a later Executive Order issued by President Nixon in 1970 that the authority to adopt "guidelines" for the preparation of impact statements was delegated to the Council. Exec. Order 11,514, 35 Fed. Reg. 4247 (1970), *reprinted in* 42 U.S.C. § 4321 (1988). President Carter then modified the 1970 Executive Order in 1977, authorizing the Council to adopt regulations rather than guidelines on impact statement preparation. Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (1977), *reprinted in* 42 U.S.C. § 4321 (1988). In November 1978, the Council adopted the regulations, 43 Fed. Reg. 55,978 (1978) (codified at 40 C.F.R. §§ 1500-1517 (1991)), to implement the Carter order.

[65] The environmental review process by which agencies decide whether to prepare an impact statement is an informal decision making process. Council on Environmental Quality regulations provide these guidelines for conduct of the agency's review:

(1) The agency applies its regulations on "categorical exclusions," 40 C.F.R. § 1508.4 (1991), to determine whether an action "normally requires" or "normally does not require" an impact statement. *Id.* § 1501.4(a).

(2) If the action is not covered by a categorical exclusion, the agency prepares an "environmental assessment." *Id.* § 1501.4(b). The environmental assessment provides "evidence and analysis" on which the agency determines whether to prepare an impact statement. *Id.* § 1508.9(1). The agency may prepare an environmental assessment though it is not required to do so. *Id.* § 1508.4.

(3) If the agency decides not to prepare an impact statement, it prepares a "finding of no significant impact" (FONSI), *id.* § 1501.4(e), which is based on the environmental assessment, *id.* § 1501.4(c), and the environmental review process terminates.

(4) Alternatively, the agency will rely on the environmental assessment as the basis for its decision to prepare an environmental impact statement. *Id.* §§ 1501.4(c)-(d).

(5) Having decided to prepare an impact statement, the agency first prepares a "draft statement," *id.* § 1502.9(a), followed by a "final statement," *id.* § 1502.9(b), and a "supplemental" statement, if necessary, *id.* § 1502.9(c).

(6) The agency must circulate both the draft and final impact statements to federal, state, and local agencies with environmental expertise and to the public. *Id.* §§ 1502.19, 1503.1-1503.4.

(7) The agency must respond to any comments made on the circulated impact statements. 40 C.F.R. § 1503.4 (1991).

The environmental review process concludes when the agency has responded to all comments and considers the impact statement adequate. *See* MANDELKER, *supra* note 58, § 3:02.

legislative history.[66] Judicial review of NEPA was established shortly after enactment in *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*.[67] In *Calvert Cliffs*, the Court of Appeals for the District of Columbia Circuit held that NEPA's environmental decision making responsibilities apply to all federal agencies even though such agency's enabling legislation does not specifically require the consideration of environmental concerns.[68] This decision made the federal courts the principal enforcers of NEPA's environmental mandates.[69]

The most persistent challenge presented to the courts has been the application of the EIS requirement.[70] When a federal agency decides to prepare an environmental impact statement for a proposal, it must determine its scope; the agency must decide whether to consider an action individually or along with other related actions.[71] The issue in

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[66] *See* RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 30 (1976).

[67] 449 F.2d 1109 (D.C. Cir. 1971).

[68] *Id.* at 1119.

[69] *See* Kleppe v. Sierra Club, 427 U.S. 390 (1981) (Marshall, J. concurring in part, dissenting in part). Justice Marshall adequately described the court's role in the evolution of NEPA doctrine when he stated:

> A statute that imposes a complicated procedural requirement on all "proposals" for "major Federal actions significantly affecting the environment" and then assiduously avoids giving any hint, either expressly or by way of legislative history, of what is meant by a "proposal" or by a "major Federal action" can hardly be termed precise. In fact, this vaguely worded statute seems designed to serve as no more than a catalyst for the development of a "common law" of NEPA. To date, the courts have responded in just that manner and have created such a "common law." Indeed, that development is the source of NEPA's success. Of course, the Court is correct that the courts may not depart from NEPA's language. They must, however, give meaning to that language if there is anything in NEPA to enforce at all.

Id. at 420-21 (citations omitted).

[70] MANDELKER, *supra* note 58, § 1:05.

[71] NEPA does not specifically detail the scope of an impact statement. The EIS "scoping" requirement has been imposed by Council on Environmental Quality regulations. 40 C.F.R. §§ 1502.4(a), 1508.25 (1991). NEPA itself only requires an impact statement on all "proposals for legislation and other major Federal actions." 42 U.S.C. § 4332(2)(C) (1988).

Council on Environmental Quality regulations define "proposals," 40 C.F.R § 1508.23 (1991), and "major Federal actions," *id.* § 1508.18. The regulations then provide that:

> [a]gencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. . . . Proposals or parts of proposals which

this case is whether a group of related actions constitute a single action for which a cumulative impact statement is necessary.[72] A "segmentation" problem arises if a federal agency plans a number of related actions but decides to prepare impact statements on each action individually rather than prepare one impact statement for the entirety.[73] The courts must decide whether the proposal of a federal agency action or program, for which the agency has prepared an impact statement, has been improperly "segmented" from other related actions.[74] An

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are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

Id. § 1502.4(a).

Agencies are then directed to § 1508.25 in order to determine which proposals shall be the subject of a particular statement, that is, the action's "scope." That section reads, in pertinent part:

> Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. . . . To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:
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> (a) Actions (other than unconnected actions) which may be:
>
> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken simultaneously.
>
> (iii) Are interdependent parts of the larger action for their justification.
>
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
>
> . . . .
>
> (b) Alternatives, which include: (1) No action alternative.
>
> (2) Other reasonable courses of actions.
>
> . . . .
>
> (c) Impacts, which may be: . . . (3) Cumulative.

Id. § 1508.25.

[72] MANDELKER, *supra* note 58, § 9:10.

[73] *Id.* §§ 9:01, 9:10.

[74] *Id.* § 9:10; *see also* Note, *Appropriate Scope of an Environmental Impact Statement: The Interrelationship of Impacts*, 1976 DUKE L.J. 623 (1976) (discussing early segmentation cases).

For instance, much of the segmentation litigation has been over "highway" cases. Highways may cover substantial distances, and when completed provide a continuous traffic facility. Yet the inclusion of an entire proposed highway in a single impact

agency decision *not* to prepare an impact statement at all may also be challenged in court.[75]

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statement may be impracticable—highway systems are projected over a long period of time and require flexible planning. The courts are about equally divided in their approval or disapproval of what segments have been selected by the highway agency under impact statement scoping, yet they have been able to fashion certain criteria under which to discuss the issue. *See* MANDELKER, *supra* note 58, §§ 9:12-9:14.

Although at times reflecting some of the same concerns as the criteria developed under the "highway" cases, the courts have been less successful in adopting universally accepted rules to be applied in "non-highway" cases. *See* MANDELKER, *supra* note 58, § 9:15. Nevertheless, the segmentation line of cases has developed that prohibits federal agencies from dividing a proposed action into multiple individual decisions, thereby avoiding analysis of connected action or cumulative effects. The courts disapprove segmentation when they have found that proposed actions are interdependent, including their preparatory or consequential effects. *See, e.g.*, Save the Yaak Comm. v. Block, 840 F.2d 714, 720-21 (9th Cir. 1988) ("The road reconstruction, timber harvest, and feeder roads are all 'connected actions' . . . . Both connected actions and unrelated, but reasonably foreseeable, future actions may result in cumulative impacts."); Sierra Club v. Marsh, 769 F.2d 868, 877 (1st Cir. 1985) ("[Defendants] fail[ed] to consider adequately the fact that building a port or causeway may lead to the further development of [the island], and that further development will significantly affect the environment."); City of Rochester v. United States Postal Service, 541 F.2d 967, 972-73 (2d Cir. 1976) ("To permit noncomprehensive consideration of a project divisible into smaller parts . . . would provide a clear loophole in NEPA. . . . The [employee] transfer decision is plainly a consequential, if not an inseparable, feature of the construction [of a new postal facility].").

In Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973), the defendants sought to limit the scope of a preliminary injunction sought by plaintiffs. Defendants argued that they should be allowed to continue preparatory core drilling and seismic studies, notwithstanding the final outcome of plaintiffs' suit to enjoin the planned cratering experiment pending the preparation of an impact statement. The court looked to whether the primary purpose of the segmented activity was to further the project which plaintiffs sought to enjoin. The court enjoined all further work on the project, noting that:

> [i]f the court adopted the rule advanced by defendants and considered the specific environmental impact of each segment of the project, much of the force of NEPA would be undercut. Almost every project can be divided into smaller parts, some of which might not have any appreciable effect on the environment. The court would be forced to take each project apart piece by piece, hole by hole and explosion by explosion. Work allowed to proceed because it does not have a specific environmental impact would increase the government's "stake" in the project and thereby influence the decision making process when it is time to reevaluate the project in light of the environmental considerations.

Id. at 811, 821. *See also infra* notes 100, 104-10 and accompanying text.

[75] MANDELKER, *supra* note 58, § 8:01. If the agency's decision not to prepare an EIS is challenged, the environmental assessment and the Finding of No Significant Impact, if prepared, will provide the basis for court review of that decision. *Id.*

In either case under NEPA, plaintiffs may seek remedial relief through an injunction,[76] which will delay the agency's project or action until the agency has complied with NEPA. Moreover, plaintiffs usually ask for a preliminary injunction.[77] The issuance of a preliminary injunction is often critical, for if the plaintiff is not able to secure a preliminary injunction, the agency will be able to continue its project even though the district court may find that it has not complied with NEPA.[78]

B. The Extraterritorial Application of NEPA

1. The Act is Silent

NEPA is worded in the language of a universal appeal.[79] Yet the language of NEPA does not explicitly indicate whether the Act governs

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[76] FED. R. CIV. P. 65.

[77] *Id.* 65(b). In order to obtain a preliminary injunction plaintiff must either (1) show a combination of probable success on the merits and the possibility of irreparable injury or (2) raise serious questions and prove that the balance of hardships tips in the plaintiff's favor. *See, e.g.*, Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci, 857 F.2d 505, 507 (9th Cir. 1988). Not actually two separate tests, these standards should be viewed as "extremes of a single continuum." *Id.* As the court in *Half Moon Bay* explained, "If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Id.*

[78] MANDELKER, *supra* note 58, § 4:46. Plaintiffs in a NEPA case often also ask for a declaratory judgment in addition to an injunction. *See, e.g.*, Atchison, T. & S.F. Ry. Co. v. Callaway, 431 F. Supp. 722 (D.D.C. 1977) (declaratory relief proper in NEPA cases). Although a preliminary injunction is the more effective remedy, the declaratory judgment allows a court to declare the legal obligations of the defendant without the proof of "irreparable harm" necessary for a preliminary injunction. See National Org. for the Reform of Marijuana Laws (NORML) v. Department of State, 452 F. Supp. 1226 (D.D.C. 1978) (granting declaratory relief absent showing of irreparable harm for preliminary injunction), discussed *infra* at notes 127-33 and accompanying text. Also see *supra* note 77 for preliminary injunction test. A court is more inclined to grant declaratory relief, instead of an injunction, if it believes that the defendant agency will observe its obligation to fully comply with NEPA. MANDELKER, *supra* note 58, § 4:56.

[79] The Act recognizes "the profound impact of *man's activities* on . . . the *natural environment*" and declares "the continuing policy of the Federal Government . . . to use all practicable means . . . to create and maintain conditions under which *man and nature* can exist in productive harmony." 42 U.S.C. § 4331(a) (1988) (emphasis added). The Act requires impact statements when agency actions affect the "*human* environment," *id.* § 4332(2)(C) (emphasis added), and requires recognition of the "*worldwide . . . character* of environmental problems," *id.* § 4332(F) (emphasis added).

extraterritorial federal agency actions.[80] As with many other NEPA issues, the Act's legislative history has been of little help in rendering a conclusive answer to this question.[81] Moreover, when the Council on

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[80] NEPA does place other environmental decision making responsibilities on federal agencies in addition to the EIS required by § 102(2)(C). *See* 42 U.S.C. §§ 4332(2)(A), (B), (E)-(I) (1988). For example, § 102(2)(F) provides:

> [A]ll agencies of the Federal Government shall . . . recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.

Id. § 4332(2)(F).

This provision, originally offered by Senator Jackson at a Senate Interior Committee hearing, was added to the bill during conference committee deliberations. *See* 115 CONG. REC. 40,416-40,417 (1969). Senator Jackson stated:

> The purpose of the provision is to give statutory authority to all Federal agencies to participate in the development of a positive, forward looking program of international cooperation in dealing with the environmental problems all nations and all people share. Cooperation in dealing with these problems is necessary, for the problems are urgent and serious. Cooperation is also possible because the problems of the environment do not, for the most part, raise questions related to ideology, national security and the balance of world power.

Id.

[81] A brief overview of the legislative history of NEPA, with a view to the Act's extraterritorial application and the impact statement provision of § 102(2)(C), shows that during the 1960s Congress had grappled with various approaches to a national environmental policy. Many of NEPA's concepts and ideas were incorporated from predecessor bills. *See* 115 CONG. REC. 19,011 & 29,068 (1969).

In 1968, the House Committee on Science and Astronautics and the Senate Committee on Interior and Insular Affairs had convened a Joint Colloquium to explore considerations relevant to environmental management and policy. *Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Astronautics*, 90th Cong., 2d Sess. (July 17, 1968).

Both committees issued separate reports prior to convening the Joint Colloquium. The Senate Committee's report, in a section entitled "National Policy and International Cooperation," expressed the understanding of the Committee that:

> [t]he United States, as the greatest user of natural resources and manipulator of nature in all history, has a large and obvious stake in the protection and wise management of man-environment relationships everywhere. . . . Effective international control would . . . be in the interest of the United States, and could hardly be prejudicial to the legitimate interests of any nation.

STAFF OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 90TH CONG., 2D SESS., A NATIONAL POLICY FOR THE ENVIRONMENT 13 (Comm. Print 1968). The House

Environmental Quality adopted its 1978 regulations,[82] designed to

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Report further demonstrated what may be considered a Congressional assumption that NEPA would have extraterritorial application: "Implicit in this section [, 42 U.S.C. § 4341,] is the understanding that the international implications of our current activities will also be considered, inseparable as they are from purely national consequences of our actions. H.R. REP. No. 378, 91st Cong., 1st Sess. 9, *reprinted in* 1969 U.S.C.C.A.N. 2751, 2759.

The Joint Colloquium resulted in a Congressional White Paper which summarized the proceedings. STAFF OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS AND SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 90TH CONG.,2ND SESS., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT, (Comm. Print 1968) [hereinafter WHITE PAPER]. The White Paper was inserted into the Congressional Record during debate by Senator Jackson, 115 CONG. REC. 29,078 (1969). The White Paper recommended the following policy statement: "It is the policy of the United States that: Environmental quality and productivity shall be considered in a world-wide context, extending in time from the present to the long-term future." WHITE PAPER, *reprinted in* 115 CONG. REC. 29,081-82 (1969). The participants began to recognize that the articulation of substantive goals alone would not suffice; mandatory procedures would be necessary to compel the gathering of information and coordination of agency action within the government. *Id.*

On February 18, 1969, Senator Jackson introduced S. 1075, the Senate version of what would become NEPA. *See National Environmental Policy: Hearings on S. 1075, S. 237 and S. 1752, Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 1 (1969). The EIS requirement developed from a recommendation by Dr. Lynton Caldwell, who testified at the Senate committee hearings. Dr. Caldwell contended that a statement of national environmental policy would be meaningless unless it was implemented through some "action-forcing mechanism":

> When we speak of policy we ought to think of a statement which is so written that it is capable of implementation; . . . [that it is] not merely a statement of desirable goals or objectives; but that it is a statement which will compel or reinforce or assist all of these things, the executive agencies in particular. . . .

Id. at 116. Following the hearings, Senator Jackson amended S. 1075, adding the action-forcing provisions which became § 102 of the final Act. *See* SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. No. 296, 91st Cong., 1st Sess. 1-2 (1969). Because the version of the bill on which the Senate hearings were held did not contain the impact statement provisions, the Senate Report does not address the geographic scope of the assessment process.

While the Senate weighed S. 1075, House consideration began with Representative Dingell's introduction of H.R. 6750. *See Environmental Quality: Hearings on H.R. 6750, H.R. 11886, H.R. 11942, H.R. 12077, H.R. 12190, H.R. 12207, H.R. 12209, H.R. 12228, H.R. 12264, H.R. 12409, Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine & Fisheries*, 91st Cong., 1st Sess. 3 (1970). H.R. 6750 contained a policy statement, which later became NEPA § 101(a), and also established a Council on Environmental Quality. The House Report stated that "[t]he international aspects are clearly a major part of the questions which the Council [on Environmental Quality] will have to confront." H.R. REP. No. 378, 91st

improve the impact statement process, it completely omitted any discussion of whether NEPA applies to federal agencies' overseas activities. The Council explained that this omission was due to the expected issuance of an Executive Order setting out the Carter administration's position on the issue.[83]

2. *The Effect of Executive Order No. 12,114*

On January 4, 1979, President Carter issued Executive Order No. 12,114 (the Order),[84] marking the first time that the executive set

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Cong., 1st Sess. 7 (1969). *See also* RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH, 20-26 (1976).

A House-Senate conference committee drafted the final wording of the Act, combining the independent Senate and House bills. H.R. REP. No. 765, 91st Cong., 1st Sess. 7-12 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2768.

Subsequent to NEPA's enactment, the House Committee on Merchant Marine and Fisheries held oversight hearings on agency compliance with § 102(2)(C) and § 103 of NEPA. *Administration of the NEPA, Part 2: Appendixes to Hearings before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 548 (1970). Although not a direct part of the Act's legislative history, the oversight hearings informed the regulations implementing the Act and represented the first consideration of NEPA's extraterritorial scope. The subcommittee rejected a memorandum of law presented by the State Department which contended that federal activities occurring within another country's jurisdiction should not be subject to NEPA requirements. *Id.* at 591 ("[s]uch a position is contrary both to the language and intent of NEPA").

[82] *See supra* note 64.

[83] Francis M. Allegra, Comment, *The "NEPA-Abroad" Controversy: Unresolved by an Executive Order*, 30 BUFF. L. REV. 611, 614 (1981) (citing 9 Env't Rep. (BNA) 1366 (Dec. 1, 1978)).

[84] Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

The Council on Environmental Quality had long held to the view that impact statements were required for actions with environmental effects abroad. *See* Yost, *American Governmental Responsibility for the Environmental Effects of Actions Abroad*, 43 ALB. L. REV. 528 (1979). In 1978, the Council proposed regulations to that effect. *See* Comment, *Forthcoming CEQ Regulations to Determine Whether NEPA Applies to Environmental Impacts Limited to Foreign Countries*, 8 Envtl. L. Rep. (Envtl. L. Inst.) 10,111, 10,112 (June 1979). Because of intense agency opposition to the proposed regulations, the regulations were transformed into the comparatively lax guidelines contained in Executive Order No. 12,114. Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988). *See* Comment, *Nuclear Export to Philippines Beyond NEPA's Reach*, 11 Envtl. L. Rep. (Envtl. L. Inst.) 10,078, 10,079 (Mar.-Apr. 1981); Comment, *President Orders Environmental Review of International Actions*, 9 Envtl. L. Rep. (Envtl. L. Inst.) 10,011 (Jan. 1979).

specific rules for federal agencies to assess the extraterritorial impact of their projects, exports, and actions.[85] The Order declares that while

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[85] The Executive Order comprises a citation of authority and three sections which reflect the compromises reached by its authors, namely, representatives of the Council on Environmental Quality and the State Department.

Section 1 briefly outlines and narrowly limits the scope of the Order. Exec. Order No. 12,114, § 1-1, 44 Fed. Reg. 1,957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988). The Order expresses a substantive purpose "to enable. . . Federal agencies . . . to be informed of pertinent environmental considerations and to take such considerations into account, along with other pertinent considerations of national policy." *Id.* It is likely that the Order's primary purpose must be inferred from its declaration that it "represents the . . . government's exclusive and complete determination of the procedural and other actions to be taken by the Federal agencies to further the purpose of [NEPA], with respect to the environment outside the United States, its territories, and possessions." *Id.*

Section 2 identifies four categories of agency actions abroad and requires an EIS only for "major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation." *Id.* §§ 2-3(a), 2-4(a)(i), 2-4(b)(i), 44 Fed. Reg. 1957-58 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

This Section also introduces two *new* assessment documents, "bilateral or multilateral environmental studies," *id.* § 2-4(a)(ii), 44 Fed. Reg. 1958 (1979), *reprinted in* 42 U.S.C. § 4321 (1988), and "concise reviews of environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents," *id.* § 2-4(a)(iii), 44 Fed. Reg. 1958 (1979), *reprinted in* 42 U.S.C. § 4321 (1988). Both of these new categories of assessment documents are less stringent than the NEPA-required EIS and are to be used, inter alia, where government actions affect the environment of a foreign nation not participating with the United States or not otherwise involved in the action. *Id.* §§ 2-3(b), 2-4(b)(ii), 44 Fed. Reg. 1957-58 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

For "major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under [section 2-3], or . . . by international agreement," the agency is directed to determine which of the category of document, of the three alternatives, is to be prepared. *Id.* §§ 2-3(d), 2-4(b)(iv), 44 Fed. Reg. 1958 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

Section 2 then presents classes of exemptions, *id.* § 2-5(a), 44 Fed. Reg. 1959 (1979), *reprinted in* 42 U.S.C. § 4321 (1988), procedural modifications, *id.* § 2-5(b), 44 Fed. Reg. 1959 (1979), *reprinted in* 42 U.S.C. § 4321 (1988), and discretionary categorical exclusions, *id.* § 2-5(c), 44 Fed. Reg. 1959-60 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

Section 3 contains other definitions and exceptionary provisions. Under the "multiple impacts" clause, the agency need not prepare an EIS for actions affecting the environment of a foreign nation when that action affects the United States or global commons environment and thus already requires preparation of an EIS (for those areas). *Id.* § 3-5, 44 Fed. Reg. 1960 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

it is based on "independent authority,"[86] it "furthers the *purpose* of the National Environmental Policy Act."[87] The ambiguity regarding the Order's source of authority is intentional. The Order avoids confronting the issue of NEPA's extraterritorial applicability by omitting reference to NEPA in the citation of authority and omitting reference to the "policy" of NEPA in the "Purpose and Scope" section.[88]

The Order requires an "environmental impact statement" for actions "affecting the environment of the global commons outside the jurisdiction of any nation" as well as those "permitted" impacts affecting globally significant resources.[89] Yet the Order's definition of "environment" limits itself to actions which do "significant *harm*,"[90] while NEPA addresses any "actions significantly affecting the *quality* of the human environment."[91]

Another subsection, "Rights of Action," expressly limits the purpose of the Order to "solely" establishing agency procedures, stating that "nothing in this Order shall be construed to create a cause of action." *Id.* § 3-1, 44 Fed. Reg. 1960 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

[86] Exec. Order No. 12,114 does not make clear whether the independent authority is the President's general constitutional executive power, U.S. CONST. art. II, § 1, cl. 1, his specific authority over executive agencies, U.S. CONST. art. II, § 2, cl. 1, or his responsibility for foreign policy and national security, U.S. CONST. art. II, § 2, cls. 1, 2. Every executive order must include a "citation of authority under which it is issued." Exec. Order No. 11,030, § 1(b), 3 C.F.R. 610 (1959-1963 Compilation), *reprinted in* 44 U.S.C. § 1505 (1988). The executive order must be authorized by the Constitution or an Act of Congress. Youngstown Sheet & Tubing Co. v. Sawyer, 343 U.S. 579, 585 (1952). In the absence of such authorization or a mandate from Congress, the Supreme Court has held that the doctrine of separation of powers does not accord the President lawmaking capacity and, consequently, the order will be regarded as simply an expression of the President's personal policies. *Id.* at 587-89.

[87] Exec. Order No. 12,114, § 1-1, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988) (emphasis added).

[88] *See supra* note 85; *see also* ALLEGRA, *supra* note 83, at 638-43 (discussion).

[89] Exec. Order No. 12,114, §§ 2-3(a) & (d), 2-4(a)(i), (b)(i), (iv), 44 Fed. Reg. 1959 (1979), *reprinted in* 42 U.S.C. § 4321 (1988). But many areas generally considered to be part of the global commons are nevertheless subject to jurisdictional claims of one or more nations, and these areas are possibly excluded from the EIS requirement. For example, areas possibly excluded because of jurisdictional claims which might otherwise be thought as part of the global commons include the North Sea and the Mediterranean. *See* Comment, *President Orders Environmental Review of International Actions*, 9 Envtl. L. Rep. (Envtl. L. Inst.) 10,011, 10,012 (Jan. 1979); ALLEGRA, *supra* note 83, at 646.

[90] Exec. Order No. 12,114, § 3-4, 44 Fed. Reg. 1960 (1979), *reprinted in* 42 U.S.C. § 4321 (1988) (emphasis added).

[91] 42 U.S.C. § 4332(2)(C) (1988) (emphasis added).

Commentators and members of Congress have criticized the Order on several grounds.[92] The Order contains numerous exceptions and exemptions which substantially limit its command in foreign policy decisions, including all executive actions involving national security interests, intelligence activities, arms transfers, and export licenses.[93] The Order also allows agencies to modify the contents, timing, and availability of documents in order to avoid adverse impacts on foreign relations or to reflect, inter alia, diplomatic factors, governmental confidentiality and national security considerations, and difficulties in obtaining information.[94] Lastly, the Order stipulates that it does not create a cause of action; therefore, neither the Council on Environmental Quality nor environmental groups can enforce it.[95]

3. Court Interpretation: Assuming without Deciding

The courts first confronted the question of NEPA's extraterritorial application in *Wilderness Society v. Morton*.[96] Plaintiffs, various American environmental groups, had been granted an injunction preventing the Secretary of the Interior from issuing a permit for the trans-Alaska pipeline until the Secretary properly complied with the procedural requirements of NEPA.[97]

Canadian intervenors, the Wilderness Society, had sought participation in the action to enforce the procedural requirements of NEPA in order to avert potentially harmful effects upon Canadian territory. The District Court for the District of Columbia denied the Canadian group's application for intervention on the grounds that counsel for the plaintiff American groups were "extraordinarily able and that if the American environment [were] protected, [the] Canadian environment must, of necessity, be protected."[98]

The court of appeals reversed the district court's decision and granted standing to the Canadian intervenors. While recognizing that the

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[92] Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 ENVTL. AFF. 543, 566 (1991).

[93] Exec. Order No. 12,114, § 2-5(a), 44 Fed. Reg. 1959 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

[94] *Id.* § 2-5(b).

[95] *Id.* § 3-1.

[96] 463 F.2d 1261 (D.C. Cir. 1972) (per curiam).

[97] *Id.* at 1261.

[98] *Id.* at 1262.

American groups were indeed extraordinarily able, the court found that the interests of the two countries' groups were not necessarily identical and, moreover, were "sufficiently antagonistic . . . to require granting of the application for intervention."[99]

Before the issue of NEPA's extraterritorial application directly presented itself again, the courts addressed the scope of NEPA as applied to United States trust territories in *Enewetak v. Laird*[100] and *Saipan ex rel. Guerrero v. United States Department of Interior*.[101] In *Guerrero*, plaintiffs brought an action in the United States District Court for the District of Hawaii to enjoin implementation of a lease agreement for the construction and operation of a hotel on public land in Saipan. The district court dismissed the action, and the United States Court of Appeals for the Ninth Circuit affirmed that court's dismissal.[102] Acknowledging that NEPA applies to federal agency activity in the Trust Territory, the court found that the Trust Territory Government was not a "Federal Agency" and therefore that its decision on the lease agreement was not a "'federal' action" within the meaning of NEPA.[103]

In *Enewetak*, the United States District Court for the District of Hawaii considered the application of NEPA to one of the Pacific Island Territories under United States administration. Plaintiffs, representing the people of Enewetak, sought a preliminary injunction against a multi-agency defense project, the Pacific Cratering Experiments, that was simulating the cratering effect of nuclear blasts with high explosives.[104] Prior to hearing, the defense agencies agreed to prepare a new impact statement to remedy a draft statement claimed to be inadequate.[105]

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[99] *Id.* at 1263.

[100] 353 F. Supp. 811 (D. Haw. 1973).

[101] 356 F.Supp. 645 (D. Haw. 1973), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

[102] Saipan *ex rel.* Guerrero v. United States Dept. of Interior, 502 F.2d 90, 93 (9th Cir. 1974), *cert. denied* 420 U.S. 1003 (1975).

[103] *Id.* at 96.

[104] 353 F. Supp. at 813. Plaintiffs, hereditary and elected leaders of the people of Enewetak Atoll, alleged that the defendants, the Secretary of Defense, Secretary of the Air Force, Assistant Secretary of the Air Force, Commander in Chief of the United States Military Forces in the Pacific Ocean Area, and Director of the Defense Nuclear Agency respectively, had not complied with the provisions of NEPA and other laws of the United States. *Id.* at 812-13.

[105] *Id.* at 813. Defendants had filed the Draft Environmental Statement with the Council on Environmental Quality. *Id.*

Although the ultimate question was the scope of the preliminary injunction sought by plaintiffs,[106] the court first had to determine that it had subject matter jurisdiction under NEPA.[107] The court looked for guidance in the legislative history of NEPA and the language of section 102(2)(F).[108] In finding jurisdiction, the court finally relied on the use of the term "nation," and not "United States," in the Act's statement of legislative policy.[109] In concluding that NEPA was applicable to federal agency action in the Trust Territories, the court reasoned:

> In view of [the] expressed concern with the global ramifications of federal actions, it is reasonable to conclude that the Congress intended NEPA to apply in all areas under its exclusive control. In areas like the Trust Territory there is little, if any, need for concern about the conflicts with United States foreign policy or the balance of world power.[110]

Two subsequent cases, *Sierra Club v. Atomic Energy Commission*,[111] and *Environmental Defense Fund v. United States Agency for International Develop-*

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[106] See *supra* notes 76-78 and accompanying text for discussion of preliminary injunction. In the usual case in which the court grants a preliminary injunction, it enjoins all further work on the project until an adequate impact statement has been prepared. Ongoing activities may be allowed to continue when they will not cause environmental harm or in other extenuating circumstances. *See, e.g.*, Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973). *Contra* Foundations on Economic Trends v. Weinberger, 610 F. Supp 829 (D.D.C. 1985).

[107] 353 F. Supp at 815. Federal legislation is not automatically applicable to the Trust Territories, and the court had to determine whether Congress intended NEPA to apply. The court addressed the "problem of statutory construction [that] arises when a statute—such as NEPA—is silent on the extent of its coverage." *Id.*

[108] *Id.* at 814-18; *see also supra* notes 58, 81.

[109] 353 F. Supp. at 816. Interpreting the language of NEPA in order to define its scope, the court concluded:

> By its own terms, NEPA is not restricted to United States territory delimited by the fifty states. . . . Where one would have suspected "United States" to be have been used, the lawmakers substituted the much broader term "Nation."
>
> . . . .
>
> Moreover, NEPA is framed in expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment—not merely United States citizens located in the fifty states.

Id.

[110] *Id.* at 818.

[111] 4 Envtl. L. Rep. (Envtl. L. Inst.) 20,685 (D.D.C. Aug. 3, 1974). Plaintiffs, Sierra Club and other environmental groups, sought a declaratory judgment that the export of nuclear plants and nuclear fuels was subject to NEPA, requiring the Atomic

ment,[112] more squarely presented the issue of NEPA's extraterritorial application. However, in both these cases, defendant agreed to prepare an EIS and a trial on the merits was never reached.

A trilogy of cases, *Sierra Club v. Coleman* (*Coleman I*),[113] *Sierra Club v. Coleman* (*Coleman II*),[114] and *Sierra Club v. Adams*,[115] provided the next significant development in the judicial determination of the extraterritorial scope of NEPA. These three cases involved an action brought by environmental organizations to enjoin further activity on the Darien Gap highway through Panama and Columbia by the Federal Highway Administration.

In *Coleman I*, the Highway Administration had prepared a Final Environmental Impact Assessment, which they claimed was the "functional equivalent of an environmental impact statement as defined by NEPA."[116] The United States District Court for the District of Columbia found that the assessment failed to adequately discuss the potential adverse effects of the highway project upon United States territory, namely, the potential spread of aftosa.[117] The court also found that the assessment failed to adequately discuss possible alternatives to the chosen route.[118] Holding that defendants had satisfied neither the

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Energy Commission and the Export-Import Bank to prepare an EIS covering the entire program. *Id.* The State Department and Atomic Energy Commission conceded that NEPA applied to them and agreed before a trial on the merits to prepare an EIS. *Id.*

[112] 6 Envtl. L. Rep (Envtl. L. Inst.) 20,121 (D.D.C. Dec. 5, 1975). Plaintiff, an environmental organization, brought suit to require the defendant, the Agency for International Development, to prepare an EIS for its international pest management program. *Id.* The defendant agreed before a trial on the merits to prepare an EIS, including impacts of the project within foreign countries. *Id.*

[113] 405 F. Supp. 53 (D.C. Cir. 1975).

[114] 421 F. Supp. 63 (D.C. Cir. 1976).

[115] 578 F.2d 389 (D.C. Cir. 1978).

[116] 405 F. Supp. at 56.

[117] *Id.* at 55-57. Aftosa, or "hoof-and-mouth" disease, is the most serious known livestock disease. The Darien Gap served as an effective land barrier against the introduction of aftosa into Central and North America from Columbia, where it is epidemic. *Id.* at 55. The court found that, although defendants' assessment recognized the probable transmission of the disease absent "the most stringent of control programs" and discussed "evolving plans for preventing transmission of the disease to North America," the assessment was defective for failure to discuss the environmental impact on the United States in the event of a breakdown of the control program. *Id.*

[118] *Id.* at 55-56. The court emphasized that the discussion of possible alternatives would allow defendants to address "the impact of the road upon the lives of the

procedural nor the substantive requirements of NEPA,[119] the court enjoined the defendants from further construction until an impact statement was prepared.[120] Following issuance of the injunction, the Secretary of Transportation and others filed the required Final Environmental Impact Statement, which itself subsequently became the subject of a lawsuit.[121]

In *Coleman II*, the district court found that the EIS, prepared by defendants pursuant to *Coleman I*, nevertheless remained inadequate.[122] The court extended the preliminary injunction granted in *Coleman I*.[123] Defendants appealed, and in *Adams* the United States Court of Appeals for the District of Columbia vacated the district court's ruling on the impact statement.[124] The court of appeals found that the prepared impact statements sufficiently addressed all potential adverse impacts which fell within the scope of NEPA.[125] Of significance to the present discussion, the court noted that it was assuming, without explicitly deciding, that NEPA's impact statement requirement should be applied extraterritorially to the construction project.[126]

[native] Choco and Cuna Indians, and the opportunities which alternative routes may present for avoiding the 'cultural extinction' so casually predicted by the Assessment for those tribes . . . ." *Id.* at 56.

[119] *Id.* at 54-55. Plaintiffs based the motion for preliminary injunction on the defendants' failure to fully comply with NEPA requirements by not circulating either the draft or final assessments, as well as failure to adequately discuss potential adverse impacts of the project. *Id.*

[120] *Id.* at 56-57.

[121] 421 F. Supp. at 63.

[122] *Id.* at 65-66 (1976). See *supra* notes 117-18 for details of the EIS required by the court order. While the court found that the EIS, as prepared, was "a significant improvement over the earlier assessment," it held that the EIS still failed to adequately discuss any of the above cited topics. *Id.* at 65.

[123] *Id.*

[124] 578 F. 2d at 397.

[125] *Id.* at 397. For example, the court held that the discussion of the aftosa problem "supplies in reasonable detail the information the decisionmaker would require to balance and consider fully the environmental factors of a decision to proceed, and this is all NEPA requires." *Id.* at 395.

[126] *Id.* at 391-92 n.14. Quoting from the brief of the appellant, the United States Government, the court explained that the Government "never questioned the applicability of NEPA to the construction of [the] highway in Panama." *Id.* Yet, as the court noted, the Government "also intimated that this position might not apply to 'purely local concerns (Indians and alternate routes).'" *Id.* The court commented:

> The effect of construction . . . also brings into question the applicability of NEPA to United States foreign country projects that produce entirely local

In *National Organization for the Reform of Marijuana Laws (NORML) v. Department of State*,[127] plaintiff, the National Organization for the Reform of Marijuana Laws, brought an action against various federal agencies participating in a Mexican herbicide (paraquat) spraying program designed to eradicate marijuana and heroin-producing poppy plants.[128] The plaintiff sought a declaratory judgment that the defendants had violated NEPA by failing to prepare and consider an impact statement with respect to United States participation in the program, as well as an injunction that would enjoin defendants from providing further assistance in the program until they had fully complied with NEPA.[129]

The United States District Court for the District of Columbia found that the participation of the United States in the eradication program was a major federal action within the scope of NEPA.[130] The court stressed that NEPA certainly mandated the preparation of an impact statement concerning the effects of the Mexican herbicide spraying as it related to the United States' environment.[131] Yet the defendants, after filing the action, had already begun to prepare an EIS on the effects of the Mexican eradication program in the United States.[132] As

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> environmental impacts, or as in this case, some impacts that are strictly local and others that also affect the United States . . . .
>
> In view of the conclusions that we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave consideration of this important issue to another day.

Id.

[127] 452 F. Supp. 1226 (D.D.C. 1978), *appeal dismissed*, No. 78-1669 (D.C. Cir. Apr. 24, 1979).

[128] *Id.* at 1228.

[129] *Id.* at 1228. In addition, NORML also sought a mandatory injunction directing the defendants to inform the Mexican Government that an environmental impact statement must be prepared before additional United States assistance could be made available and to use their "best efforts" to persuade the Mexican Government to call a moratorium on the herbicide spraying program until such an impact statement was completed. *Id.* The court held that this presented a "non-justiciable political question beyond [its] Article III powers," and that "[o]rdering such relief would infringe upon the President's constitutional authority to conduct foreign relations." *Id.* at 1235 (citing Flast v. Cohen, 392 U.S. 83 (1968)).

[130] *Id.* at 1232.

[131] *Id.*

[132] *Id.* at 1234. The defendants did not concede that the United States' participation in the eradication program fell within the scope of NEPA requirements. *Id.* at 1231-32. The defendants only announced, subsequent to the filing of the lawsuit, that they had begun to prepare an EIS on the effects of the Mexican program in the United States. *Id.* at 1229.

a result, the court declined to issue the injunction and only rendered a declaratory judgment against defendants for failing to prepare a detailed EIS in advance, in accordance with NEPA procedures.[133]

Yet plaintiff directly posed the question of NEPA's extraterritorial applicability by further arguing that NEPA also required the defendants to fully discuss any impacts which the United States' participation in the eradication program could have in *Mexico*.[134] By the time of trial, however, the defendants had also already announced that they were planning to prepare an "environmental analysis" of the program's effects within Mexican territory.[135]

Noting first that the extraterritorial application of NEPA still remained an "open question,"[136] the court deftly avoided providing any conclusive resolution of this additional issue. Citing the defendants' willingness to prepare an EIS on United States impacts and an "environmental assessment" of Mexican impacts, the court determined that it "need only assume, without deciding, that NEPA is fully applicable to the Mexican herbicide program."[137] Having rendered a declaratory judgment in favor of plaintiff on the issue of an impact statement concerning the United States effects of the spraying program, the court reached an abrupt conclusion on the issue of Mexican effects, by stating that "[d]efendants, of course, remain obligated by their own agreement . . . to prepare an 'environmental analysis' of the program's effects in Mexico, and the Court does not disturb that course of conduct."[138]

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[133] *Id.* at 1235. See *supra* note 78 for a comparison of declaratory judgments and injunctions. In its analysis, the court noted the directly conflicting policies of NEPA and the eradication program based on criminal legislation, and weighed further complications generated by "the strong overtones of foreign policy which cannot be ignored." *Id.* at 1234. The court concluded that "the balance must tilt in favor of withholding the equitable remedy of injunction." *Id.*

[134] *Id.* at 1232.

[135] *Id.* at 1229.

[136] *Id.* at 1232.

[137] *Id.* at 1233. In fact, the opinion states that the defendants "[had] *urge[d]* the [District] Court not to reach the question of extraterritorial application of NEPA, but simply assume its applicability without deciding." *Id.* at 1229 (emphasis added).

[138] *Id.* at 1233. Arguably, this conclusion effectively adopts the view that an "environmental assessment" is sufficient in lieu of an environmental impact statement for this extraterritorial agency activity. Special note should be made that this opinion predates the issuance of Exec. Order No. 12,114, which includes "environmental assessments" in its categorization of environmental assessment documents. *See supra* notes 84-85 and accompanying text.

4. *Nuclear Resources Defense Council v. Nuclear Regulatory Commission: A Limited Holding*

Against the combined backdrop of NEPA and the recently issued Executive Order No. 12,114,[139] the United States Court of Appeals for the District of Columbia again faced the question of the extraterritorial applicability of NEPA's environmental impact statement in *Natural Resources Defense Council v. Nuclear Regulatory Commission.*[140] Petitioners, the Natural Resources Defense Council, sought review of a Nuclear Regulatory Commission decision licensing the export of critical nuclear components for a nuclear reactor to be built in the Philippines.[141] The reactor site was near an American military base, in the shadow of four volcanoes, and in a known earthquake zone.[142]

Petitioners challenged two aspects of the Nuclear Regulatory Commission's decision: (1) the Commission's finding of "non-inimicality" under the Atomic Energy Act,[143] and (2) the Commission's decision

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[139] *See supra* notes 84-85.

[140] 647 F.2d 1345 (D.C. Cir. 1981).

[141] *Id.* at 1355. In 1974, the government of the Philippines, acting through its wholly owned National Power Corporation, undertook to acquire from Westinghouse the country's first nuclear reactor. In 1976, the Westinghouse Corporation applied to the Nuclear Regulatory Commission for an export license. *Id.* at 1351.

The procedural framework applicable to nuclear export licensing is established in the amended Atomic Energy Act. 42 U.S.C. § 2155 (1988); *see also* 10 C.F.R. § 110 (1991). The process is quite detailed and entails the cooperation of administrative agencies and executive departments.

In May of 1980, a divided Commission issued two orders authorizing the export of the critical nuclear components. In the first, *In re* Westinghouse Elec. Corp., 11 N.R.C. 631 (1980), the Commission concluded that Westinghouse's export license application met the applicable licensing criteria prescribed by the Atomic Energy Act of 1954, 42 U.S.C. § 2201 (1988), as amended by the Nuclear Non-Proliferation Act of 1978, 22 U.S.C. §§ 3201-3282 (1988). 11 N.R.C. at 631.

In the second, *In re* Westinghouse Elec. Corp., 11 N.R.C. 672 (1980), the Commission declared that it would only consider those "health, safety and environmental impacts arising from the exports of nuclear reactors . . . that could affect the territory of the United States or the global commons." *Id.* at 672; *see also* 647 F.2d at 1348.

[142] MANDELKER, *supra* note 47, § 5.17.

[143] 647 F.2d at 1355. Petitioners alleged a violation of § 103(d) of the Atomic Energy Act, which states in part: "[N]o license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to common defense and security or to the health and safety of the public." 42 U.S.C. § 2133(d) (1988). The Commission had found that the granting of the export license would not be "inimical" under the statute, but had

not to prepare a site-specific environmental impact statement under NEPA.[144] Upholding the Commission's position in both respects,[145] the court of appeals ruled that NEPA did not require the preparation of an EIS within Philippine sovereign territory, yet expressly limited its holding to the specific facts of the case.[146]

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refused to consider the threat posed by a reactor to either the Filipino public or to the American military bases and personnel located in the Philippines. 647 F.2d at 1355.

In upholding the Commission's approach under the Atomic Energy Act, the court concluded that "the Commission has properly and sufficiently relied on the executive's foreign policy, extraterritorial and national security conclusions" in its consideration of the common defense and security concerns. *Id.* at 1364. In addition, the court relied on the "presumption against extraterritoriality" in statutory interpretation to "uphold the Commission's decision that the public health and safety standard obligates it to consider only the American public within the United States." *Id.*

[144] 647 F.2d at 1355. The Commission's evaluation was segmented into three distinct spheres of possible impact: U.S. territory, the global commons, and the Philippines.

No impact statement or environmental assessment was prepared for effects within Philippine sovereign territory. The Commission decided that its consideration of health, safety, and environmental impacts was properly confined to those that affect the territory of the United States and the global commons. *Id.* at 1352 (citing 11 N.R.C. at 672).

With regard to the global commons and United States territory, "[t]he Commission interpreted NEPA to *require* consideration of environmental impacts on the United States, and to *permit* consideration of impacts on the global commons." *Id.* at 1353 (emphasis added). The Commission found that those respective impacts "do not rise to a level of magnitude that would require us to vote to deny the export licenses." *Id.*

The Commission based this evaluation on "public comment and generic environmental analyses," including technical analyses by Commission staff, generic environmental impact statements prepared by other federal agencies, a programmatic environmental impact statement ("U.S. Nuclear Power Export Activities"), and information contained in the environmental assessments prepared by the executive branch pursuant to the directives of Exec. Order No. 12,114. *Id.*; see also *supra* note 85 and accompanying text for discussion of Exec. Order No. 12,114.

[145] *Id.* at 1368.

[146] *Id.* at 1366. One commentator has noted: "The most striking aspect of the way in which the court resolved the NEPA issues is its frailty." Comment, *Nuclear Exports to Philippines Beyond NEPA's Reach*, 11 Envtl. L. Rep. (Envtl. L. Inst.) 10,079, 10,081 (Mar.-Apr. 1981). Only two members of the three-judge panel participated in the decision, and each wrote separate opinions. Judge Ginsburg, who attended oral argument as the third member of the bench, recused herself without explanation prior to disposition of the case, leaving only Judge Wilkey, writing the court's opinion, and Judge Robinson, writing a concurrence based upon different reasoning. *Id.*

Judge Wilkey, who wrote the opinion of the court, ruled in favor of the Nuclear

The court of appeals first acknowledged that it was again treading on unsettled waters when called upon to interpret NEPA's extraterritorial reach.[147] The court then examined the Commission's evaluation of possible health, safety, and environmental effects of the Philippines reactor upon United States territory and the global commons. The Commission had based its conclusion of no significant domestic or global effects on the concise environmental review and other environmental documents provided by the executive branch.[148] The court held that this assessment was neither "unreasonable" nor in violation of NEPA.[149]

Regulatory Commission, but expressly refused to express any opinion on the matter outside the context of nuclear exports and clearly based his decision on the foreign policy concerns articulated by Congress in the Nuclear Non-Proliferation Act, 22 U.S.C. §§ 3201-3282 (1988). Judge Wilkey stressed: "I find only that NEPA does not apply to NRC nuclear export licensing decisions—and not necessarily that the impact statement requirement is inapplicable to some other major federal action abroad." 647 F.2d at 1366.

Most significantly, Judge Robinson declared "inapposite" the presumption against the extraterritorial application of statutes, which figured prominently in Judge Wilkey's opinion that an impact statement was not required. *Id.* at 1384-88. Eschewing Judge Wilkey's foreign policy analysis, Judge Robinson deferred to the Commission's interpretation of its duties under the Atomic Energy Act and the Nuclear Non-Proliferation Act. *Id.* at 1379-84. On the NEPA issue, Judge Robinson relied on Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976), to hold that the brief statutory time period within which the Commission was required to act on export licenses precluded NEPA's application. 647 F.2d at 1385-86. Thus the precedential impact of the Wilkey opinion was restricted by its own terms, and its logical foundations have been called into question. *See* 11 Envtl. L. Rep at 10,081.

[147] 647 F.2d at 1355. Judge Wilkey commented, "Construing the equivocal reach of NEPA abroad, however, is a judicial endeavor oft-encountered, but not yet fully realized by any court. We, too, will face this issue tentatively." *Id.* Addressing the court's role in attempting to determine and follow Congress' intent on this issue, Judge Wilkey stated:

> [W]hatever the wisdom of restraining the extraterritorial grasp of this country . . . it would shrink before an unequivocal mandate from Congress. Where a statute directs an agency of the United States to consider foreign environmental impacts no court of the United States will contravene the will of Congress. . . . The Congress most assuredly may prescribe conduct relating to the grant or denial of a license authorizing the export of a nuclear reactor from the United States. Here, however, the Congressional mandate is vague.

Id. at 1357 (footnotes omitted).

[148] *Id.* at 1365; *see also supra* note 144.

[149] 647 F.2d at 1365. Judge Robinson, however, seemed more inclined to take this issue to task:

The court framed the central issue as being whether the Nuclear Regulatory Commission must "take cognizance of Philippine impacts in an environmental impact statement[.]"[150] The answer was no.[151] Judge Wilkey ruled that the foreign policy power of the President controlled in this instance.[152] The Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act of 1978,[153] places responsibility on the executive branch to ensure achievement of the nation's foreign policy goals to defeat nuclear proliferation through regulation of the exportation of all nuclear components and materials.[154] Yet the Nuclear Non-Proliferation Act says nothing to either incorporate or limit the scope of NEPA's procedural requirements for environmental review in appropriate cases.[155]

> I do have some concerns about NRC's methodology in reaching this decision, however, for its analysis of the potential dangers of the reactor . . . appears to be cursory at best. . . . I would have serious reservations were the reactor not so far removed from this country and relatively distant from any of its territories or possessions, but perhaps that is why NRC did not say more than it did.

Id. at 1379 (Robinson, J., concurring).

[150] *Id.* at 1366.

[151] *Id.* Although the court stressed that its final holding was to be construed extremely narrowly, it did acknowledge the depth of the question presented by the facts: "Since the Commission had prepared no EIS, one must go beyond the issue of strict compliance to decide whether NEPA *applies at all* in this situation." *Id.* (emphasis added).

[152] *Id.* at 1366. A treaty between the Philippines and the United States was negotiated in 1968 establishing a general framework for nuclear sales to the Philippines. *Id.* at 1351 n.15 (citing Agreement for Cooperation Concerning the Civil Uses of Atomic Energy, June 13, 1968, 19 U.S.T. 5389).

The Commission submitted the Westinghouse application for an export license to the executive branch which recommended issuance on December 12, 1977. *Id.* at 1351. However, the Department of State, concerned about the suitability of the site, requested that the Commission defer action on the application in order that it could prepare a study of its own. *Id.*

After the Philippine Atomic Energy Commission allayed the Department of State's concerns, the executive branch advised the Nuclear Regulatory Commission that it recommended the issuance of an export license for the proposed reactor's component parts on November 3, 1978. *Id.* On September 28, 1979, the executive informed the Commission of its view that the proposed reactor itself met all export licensing requirements and recommended the issuance of the license. *Id.* at 1351-52. At that time, the executive branch submitted to the Commission a "Concise Environmental Review" discussing siting and environmental considerations and the Philippines nuclear regulatory process. *Id.* at 1352.

[153] The Atomic Energy Act of 1954, 22 U.S.C. §§ 2011-2296 (1988), was amended by the Nuclear Non-Proliferation Act of 1978, 22 U.S.C §§ 3201-3282 (1988).

[154] Atomic Energy Act of 1954, 42 U.S.C. § 2155(b)(2) (1988).

[155] 647 F.2d at 1358-63. An explanation of the differing scope of the several Acts is

Focusing on the policy directive of NEPA's section 102(F),[156] Judge Wilkey reasoned that NEPA "looks toward cooperation, not unilateral action, in a manner consistent with [United States] foreign policy."[157] He presented the following comparison between the Congressional intent behind the Nuclear Non-Proliferation Act and NEPA:

> [W]hen the NNPA Congress turned to environmental protection, it focused on international cooperation and left open the issue of extraterritorial application of NEPA. The intention of the NEPA Congress,

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provided by their legislative history. The provisions of the Atomic Energy Act and the Nuclear Non-Proliferation Act do not stipulate environmental criteria or guidelines. Rather, after extended debate on the Senate floor, a compromise agreement was inserted into the Atomic Energy Act to reflect some concern for environmental protection, but was not to affect interpretation of NEPA one way or another. *See* 124 CONG. REC. S1449-54 (1978) (debate on S. 897); *id.* at S1069-72, S1079-83. The Senators consciously intended that their debate and legislation on the Nuclear Non-Proliferation Act not supercede or prejudge eventual interpretation of whether NEPA requires environmental impact statements for U.S. activities having effects wholly within foreign jurisdictions. *See* 124 CONG. REC. S1449-50 (1978) (remarks of Sen. Glenn and Sen. McClure); *see also* Ronald J. Bettauer, *The Nuclear Non-Proliferation Act of 1978*, 10 LAW & POL'Y INT'L BUS. 1105, 1161-63 & n.335 (1978) (discussing legislative history).

The terms of the amendment to the Atomic Energy Act call on the President to "endeavor to provide," in any new or modified bilateral or multilateral agreement, "for cooperation between the parties in protecting the international environment from radioactive, chemical or thermal contamination arising from peaceful nuclear activities." 42 U.S.C. § 2153e (1988).

At the time of the reactor license decision, the existing agreements for cooperation, between the United States and the Philippines, did not contain such environmental provisions. Moreover, the court noted:

> [T]he "compromise" provision of NNPA, 42 U.S.C. § 2153e (Supp. II 1978), refers to the "international" environment and not to the domestic environment of the importing nation. Solicitude for particular foreign *domestic* environments is distinguishable from bilateral concern for the shared "international" environment, and is consequently difficult to ascribe to NNPA.

647 F.2d at 1362 n.80.

[156] *See supra* notes 56, 79-80.

[157] 647 F.2d at 1366. The case presented two main issues: a claim under NEPA and a claim under the Atomic Energy Act as amended by the Nuclear Non-Proliferation Act. *See supra* note 155. Neither act explicitly required administrative review of exclusively foreign environmental impacts. *Compare* 647 F.2d at 1362 ("[T]here is no explicit mandate in NNPA . . . which requires administrative review of environmental factors in the recipient country.") *with* 647 F.2d at 1367 ("The intention of the NEPA Congress . . . is obscure."). The court's analysis for the two issues was in most respects parallel.

> however, is obscure. All we can know for sure is that the earlier Congress also recognized the merits of *cooperation* and *foreign policy* temperance.[158]

Because the administrative and executive action at issue fostered cooperation with the Philippines, Judge Wilkey concluded that the "foreign policy" clause of section 102(F) itself restricted the extraterritorial reach of the impact statement requirement.[159]

Before concluding his opinion, Judge Wilkey included a comparative analysis of the prior NEPA cases.[160] *Enewetak v. Laird*[161] found NEPA applicable to a trust territory and was therefore consistent with the foregoing foreign policy analysis. In *Wilderness Society v. Morton*,[162] nonresident Canadian citizens were granted an application for intervention in a NEPA suit brought by American environmentalists over the trans-Alaska pipeline. Again, Judge Wilkey noted that *Morton* did not present any foreign relations or separation of powers problems.[163] Moreover, Judge Wilkey stressed that the primary issue in *NRDC v. NRC* concerned wholly Philippines impacts, and he posited that "[i]f anything, the direction of the foreign antagonism runs against the petitioners themselves, who from non-adjacent America presume that they can represent the Philippine environment."[164]

Lastly, Judge Wilkey addressed the *Coleman* and *Adams* cases.[165] In *Coleman I*, the court had found that the highway project might have

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[158] 647 F.2d at 1367.

[159] *Id.* at 1366. As to the Nuclear Non-Proliferation Act issue, the court had also found that:

> NRC decisionmaking touches on matters germane to foreign public policymakers. Technical NRC decisions will confront equally technical, *but also political*, decisions of the President (and executive branch), and foreign leaders. If the Commission's . . . review . . . were to impede or challenge the development of foreign nuclear energy programs, it would, in turn, inhibit the conduct of United States foreign relations.

Id. at 1357-58.

[160] *Id.* at 1368.

[161] 353 F. Supp. 811 (D. Haw. 1973); *see supra* notes 100, 104-10 and accompanying text.

[162] 463 F.2d 1261 (D.C. Cir. 1972); *see supra* notes 96-99 and accompanying text.

[163] 647 F.2d at 1367.

[164] *Id.*

[165] Sierra Club v. Adams, 578 F. 2d 389 (D.C. Cir. 1978); Sierra Club v. Coleman II, 421 F. Supp. 63 (D.D.C. 1976); Sierra Club v. Coleman I, 405 F. Supp. 53 (D.D.C. 1975). See *supra* notes 113-26 and accompanying text for a discussion of these three cases.

potential effects on U.S. livestock.[166] Therefore, the extraterritoriality question was not an issue on appeal in *Adams*—the government no longer contested the application of NEPA to the Panamanian highway project.[167] Judge Wilkey concluded that the highway construction project, with potential effects on United States interests, was sufficiently distinguishable from the nuclear component export license for the Philippines reactor project.[168]

IV. ANALYSIS

In *Greenpeace*, plaintiffs' action for preliminary injunction presented three claims which alleged violations of NEPA's procedural requirements.[169] In applying the test for issuance of a preliminary injunction,[170] the district court first examined whether substantial questions had been raised on the merits of plaintiffs' claims.[171] This formed the heart of the court's treatment of the case.[172]

The court determined that it could not disturb the agency's decision if that agency has taken a "hard look" at the decision's environmental

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[166] *Coleman I*, 405 F. Supp. at 55; *see supra* note 117 and accompanying text.

[167] *Adams*, 578 F.2d at 391-92 n.14; *see* supra note 126.

[168] 647 F.2d at 1369. Judge Wilkey also noted that the United States had two-thirds of the financial responsibility and control over the highway construction project. *Id.* Judge Wilkey explained that *Adams* provided the basis for the court's assumption in National Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State, 452 F. Supp. 1226, 1232 (D.D.C. 1978), *appeal dismissed*, No. 78-1669 (D.C. Cir. Apr. 24, 1979), that NEPA applied to the Mexican herbicide spraying program. 647 F.2d at 1367 n.120. See *supra* notes 127-38 and accompanying text for a discussion of *NORML*. Moreover, the court in *NORML* rejected plaintiffs' argument urging that an impact statement addressing potential Mexican effects be required, notwithstanding the uncontested requirement of an impact statement addressing United States effects. 452 F. Supp. at 1234-35; *see also supra* notes 136-38 and accompanying text.

[169] Plaintiffs also brought a claim under the Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, 103 Stat. 1112 (1989), 748 F. Supp. 749, 765-67, and a claim grounded in two treaty considerations, *id.* at 767, namely, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *opened for signature* Mar. 22, 1990, UNEP/IG.80/3 (signed by the United States March 22, 1989), and the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 26 U.S.T. 2403 (ratified by United States Apr. 29, 1974; entered into force Aug. 30, 1975). The court rejected these three claims. *Id.* at 765-67.

[170] *See supra* note 77.

[171] 748 F. Supp. at 757.

[172] *Id.* As the court stated: "The crux of this issue . . . is whether NEPA applies extraterritorially to the circumstances at hand." *Id.*

consequences.[173] As such, the court could not set aside the agency decision unless the action was taken without observing statutory procedures or was "arbitrary, capricious, an abuse of discretion, or otherwise not according to law."[174]

A. Substantial Questions or a Probable Success on the Merits

Plaintiffs' first claim for preliminary injunction addressed the issue of segmentation under NEPA.[175] Plaintiffs asserted that the defendants had improperly divided the chemical munitions removal operation into three portions—the movement within the F.R.G., the transoceanic shipment, and the incineration at Johnston Atoll.[176] This segmentation, plaintiffs claimed, enabled the Army to appraise the possible environmental impacts attributed to each separate portion in a manner independent of other phases of the operation.[177] Plaintiffs maintained that a "comprehensive environmental impact statement" covering the entirety of the removal, transportation, and incineration process of the European stockpile was required under NEPA.[178]

Plaintiffs' also alleged that the defendants violated NEPA requirements by failing to evaluate a full range of alternatives.[179] Lastly,

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[173] *Id.* at 767-68 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

[174] *Id.* at 757 (citing Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987)).

[175] *See supra* note 71-74 and accompanying text for discussion.

[176] Verified Complaint for a Declaratory Judgment and Injunctive Relief at 22-23, *Greenpeace* (No. 90-00588).

[177] *Id.* The Army prepared neither an impact statement nor an environmental assessment for the F.R.G. segment. Only an environmental assessment, the Global Commons Environmental Assessment, was prepared for the transoceanic transportation phase of the operation, and that assessment concluded with a Finding of No Significant Impact. *See supra* notes 31-35 and accompanying text. The 1983 EIS, 1988 SSEIS, and FSSEIS addressed only the handling of the munitions on Johnston Atoll and the impact of the operation and chemical incineration at the J.A.C.A.D.S. facility. *See supra* notes 26-30 and accompanying text.

[178] 748 F. Supp. at 757.

[179] 748 F. Supp. at 763-65. Council on Environmental Quality regulations require that the impact statement "[r]igorously explore and objectively evaluate all reasonable alternatives," including "the alternative of no action." 40 C.F.R. § 1502.14(a) & (d) (1991). The regulations are quite explicit concerning the purpose of this requirement: "This section is the heart of the environmental impact statement. . . . [I]t should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among

plaintiffs claimed that the defendants violated NEPA and the regulations of the Council on Environmental Quality by failing to consider important new information regarding unitary chemical destruction technology in its FSSEIS for the J.A.C.A.D.S. facility.[180]

1. The Design of Plaintiffs' Claims

Plaintiffs' claims are correlative and must be considered in concert. The thrust of plaintiffs' argument was that the Army chose to frame its consideration of possible environmental impacts of the entire operation as an issue concerning only the proper disposal of chemical weapons destined for the J.A.C.A.D.S. destruction facility and *not* as an issue concerning the proper disposal of the chemical weapons stored in Germany. Therefore, the Army concentrated on preparing the FSSEIS only as concerned the arrival and destruction of the European stockpile at the J.A.C.A.D.S. facility.[181]

By improperly framing this central concern, as plaintiffs claimed, the Army was able to severely limit the scope of the FSSEIS which it had prepared and to avoid the preparation of a comprehensive environmental impact statement which would fully discuss other possible alternatives. These alternatives would encompass, on the one hand, a "no action" alternative or postponement of the removal operation,[182]

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the options by the decisionmaker and the public." 40 C.F.R. § 1502.14 (1991). The wide scope accorded the possible alternatives to be considered is evidenced by the regulation's instruction that they shall "[i]nclude reasonable alternatives not within the jurisdiction on the lead agency." *Id.* § 1502.14(c).

[180] 748 F. Supp. at 765.

[181] In the discussion of alternatives, the FSSEIS states: "The no action alternative is that the European stockpile would never be *received at Johnston Island*. . . . [The 1983 EIS and the 1988 SSEIS] present a detailed analysis for current J.A.C.A.D.S. operations on Johnston Island; therefore, no detailed assessment of the no action alternative is given in this [FSSEIS]." FSSEIS, *supra* note 1, at 3-4 (emphasis added).

[182] Plaintiffs asserted that the defendants avoided consideration of the "no action" or postponement alternatives by "improperly creat[ing] an 'agreement' with a December 1990 deadline." 748 F.Supp at 764 (citing Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 15). Recognizing the President's prioritization of the stockpile removal, the court rejected plaintiffs' contention. *Id.* at 764-65; *see supra* note 21-22 and *infra* note 193.

Here, however, the court effectively overlooked the full thrust of plaintiffs' argument. Plaintiffs contended that the Army need only temporarily maintain the status quo ante of storage in Germany in order to allow time to prepare the extraterritorial environmental impact statement in issue. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 36-37, *Greenpeace* (No. 90-00588).

and on the other hand, in situ destruction within Germany[183] or alternative disposal sites in the continental United States.[184] These alternatives would also incorporate recent chemical munitions destruction technologies.[185]

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[183] Plaintiffs contended that in situ destruction of the chemical munitions in Germany may very well have been safer than the transportation process itself, in light of the fragility of the obsolete munitions, *see infra* note 184, as well as recent advancements in unitary chemical weapons destruction technology, *see infra* note 185.

[184] The court acknowledged that "[t]he Army's viable alternatives for disposing of these lethal weapons are admittedly limited. The J.A.C.A.D.S. facility is currently the *only* incinerator of its kind capable of destroying the munitions in question." 748 F. Supp. at 764. At the time of litigation there were eight Army installations, located in the continental United States (C.O.N.U.S. sites), which stored the remaining 94% of the total United States stockpile of unitary chemical weapons. While the construction of an independent chemical munitions disposal facility was proposed for each of the C.O.N.U.S. sites, only one such facility, at the Tooele Army Depot in Utah, was under construction. Completion of the Tooele disposal facility was not expected until December 1992. *Id.* at 753 n.4.

The court also cited the inherent risks in transporting and handling the munitions within the continental United States. *Id.* In fact, the 1988 SSEIS, *supra* note 28, led to the Army's decision to build chemical munitions disposal facilities at each of the eight C.O.N.U.S. sites in order to avoid transporting the munitions within the United States. *Id.*

Nevertheless, the full intent of plaintiffs' contention was that if transport of the chemical munitions was to be had at all, the transportation over the shorter route to the Eastern seaboard of the continental United States would pose less risk than the longer transoceanic shipment to Johnston Atoll in the central Pacific Ocean. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 15, *Greenpeace* (No. 90-00588). Also, by implementing the destruction of weapons at a continental facility there would be greater availability of remedial support. *Id.*

The court rejected these contentions. The court observed that Congress' earlier implementation of Public Law 91-672, *supra* note 27, when presented with the shipment of the Okinawan stockpile to the continental United States, fairly evidenced "the political problems which would likely arise if [the Army] were to attempt to ship the European stockpile to storage facilities in the continental United States." 748 F. Supp. at 764 n.20.

[185] Plaintiffs also submitted the testimony of Dr. Wayne Landis, an expert in environmental toxicology, who asserted the feasibility of the alternative disposal methods via biodegradation or chemical catalysts. 748 F. Supp. at 764. Dismissing plaintiffs' contention, the court noted:

> These options, though not discussed in the SSEIS, were documented and reviewed in the 1984 report prepared by the National Research Council, which confirmed the appropriateness of the Army's choice, and is referenced in the 1988 Chemical Stockpile Disposal Program Final Programmatic Environmental Impact Statement (CSDP FPEIS), which in turn is incorporated by reference

Concurrently, the isolation of the German and transoceanic segments also abetted the Army's determination that neither of those two portions of the operation required the preparation an impact statement *at all.*[186]

2. Applying the Extraterritoriality Issue First

Despite plaintiffs' presentation of the segmentation issue, the court chose to separately address each portion of the munitions operation. The court first considered whether NEPA should apply at all to the removal and transport of the stockpile within the Federal Republic of Germany,[187] or to the transoceanic shipment of the stockpile.[188] This approach tacitly generated a two-tiered analysis—any questions concerning NEPA's applicability to an extraterritorial segment are addressed antecedent to the issue of improper segmentation. In effect, a negative response to the extraterritoriality issue necessarily precluded subsequent consideration of the segmentation issue.[189] In this manner, the court focused only upon the distinct question of NEPA's extraterritorial application vel non as determinative in resolving those questions presented by plaintiffs' NEPA claim.

3. Political Question Analysis

Initially, the court looked to the principles of statutory construction for ascertaining Congress' intent as to the scope of NEPA's application and influence. Here, however, the court agreed with Judge Wilkey's observation in *NRDC v. NRC* that "NEPA's legislative history illuminates nothing in regard to extraterritorial application."[190] Notwithstanding the absence of express congressional direction, the court did acknowledge that it "is convinced that Congress intended to *encourage* federal agencies to consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially."[191] Nonetheless, regarding the circumstances and

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> in the SSEIS. Hence, the court cannot find, based on the Landis declaration, that the Army failed to consider a reasonable range of alternatives . . . .

Id.

[186] *See supra* notes 31-35 and accompanying text.

[187] 748 F. Supp. at 757-61.

[188] *Id.* at 761-63.

[189] *See also supra* note 172.

[190] 647 F.2d 1345, 1367 (D.C. Cir. 1981); *see also supra* note 81.

[191] 748 F. Supp. at 759.

unique facts of *Greenpeace*, the court denied extraterritorial application of NEPA. The court based its decision on the presumption against the extraterritorial application of legislation, as well as the political question doctrine and presidential foreign policy powers.[192]

As a preliminary measure, the court determined that an operative presidential agreement with Chancellor Kohl and the people of Germany did indeed exist.[193]

The court then moved to a discussion of the United States' and Germany's joint participation in the transport of the munitions while within German borders. The decisive factor in this step of the court's analysis was the German government's approval of the removal operation and not the German Army's part in the weapons transport.[194] Maintaining that the German government had complete sovereignty in its own internal decision making, the court concluded that the German phase of the transport operation was a wholly extraterritorial action falling under the purview of the German government.[195]

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[192] *Id.* at 757. The court actually affirmed and reiterated the conclusion which was reached in the earlier denial of plaintiffs' motion for a temporary restraining order and stressed the duplication of that earlier conclusions:

> The court . . . is not convinced NEPA applies extraterritorially to the movement of munitions in Germany or their transoceanic shipment . . . largely based on the political question and foreign policy implications which would necessarily result from such an application of a United States statute to joint actions taken on foreign soil based on an agreement made between the President and a foreign head of state. After further briefing and argument, the court's determination with respect to the application of NEPA remains unchanged.

Id. (citations omitted).

[193] *Id.* at 758. Plaintiffs asserted that the government lacked a written agreement for the accelerated date and maintained that the extant oral agreement evidenced by a Record of Decision was insufficient in its stead. *Id.* The agreement in question and the Record of Decision are discussed *supra* at note 22. The court rejected plaintiff's argument that there existed no written agreement as "more semantic than substantive," and noted that "[the president's] promise was diplomatically sufficient to be relied upon by the Chancellor and communicated to both the West German legislature and the West German people." *Id.*

[194] *Id.* at 759-60. The court acknowledged the substantial part which the United States played:

> Although there is no question that the movement of the weapons is being effectuated in large measure by the United States Army personnel to eliminate United States weapons, the removal operation takes place entirely within the [F.R.G.] and the environmental impacts of the actual overland production are felt solely within that country.

Id. at 760.

[195] *Id.* Therefore, the court further asserted that it was not even necessary for it to

The court supported this position by comparing the instant Army action to the agency activity under review in *NRDC v. NRC*, that is, the NRC's issuance of an export license for critical nuclear components *to a foreign country*.[196] Yet plaintiff's design had been to challenge the executive decision to accelerate the munitions transport *towards the United States*.[197] In this respect, the court likewise concluded that the Department of Defense's action, viewed as part of an executive commitment to further the congressional mandate for demilitarization of all unitary chemical weapons, was carried out within the scope of the president's foreign policy power and thus beyond judicial review.[198] In this fashion, the court declined to impose NEPA requirements, precluding the segmentation issue presented by the plaintiffs.

The court took care to limit its conclusion to the "specific and unique facts" of the case presented.[199] The court ended this part of

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resolve its initial inquiry into the relative involvements of the two nations. *Id.* at 759 n.11. The court explained that this conclusion was founded on the "unrefuted evidence indicat[ing] that the FRG is supportive of the Army's action and has participated in, cooperated with, and encouraged the removal of these weapons." *Id.* The court thus focused on the role of the FRG in determining the overall legality of the removal operation: "The West German government has reviewed and approved the operation. A West German court has denied a request for injunctive relief brought by West German citizens to halt the movement of the weapons, finding that the operation comported with and did not violate West German law." *Id.* at 760 (citations omitted).

[196] 647 F.2d 1345 (D.C. Cir. 1981); *see also supra* notes 141, 144, 149, 151-52 and accompanying text. As the court explained: "Similar concerns are present here. An extraterritorial application of NEPA to the Army's action in the [F.R.G.] with the approval and cooperation of the [F.R.G.] would result in a lack of respect for the [F.R.G.]'s sovereignty, authority and control over actions taken within its borders." 748 F. Supp. at 760.

[197] The court's primary focus on the role of the German government in effectuating the removal of the European stockpile is evidenced by the court's following observations:

> These obsolete munitions have been stored on West German soil since 1968 at the sufferance of the West German people and the President's commitment to the FRG to remove these munitions by the end of 1990 undoubtedly stemmed from diplomatic concerns which are clearly beyond the purview of this court's review . . . .
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> . . . .
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> Imposition of NEPA requirements to [the German phase of the] operation would encroach on the jurisdiction of the [F.R.G.] to implement a political decision which necessarily involved a delicate balancing of risks to the environment and the public and the ultimate goal of *expeditiously ridding West Germany* of obsolete unitary chemical munitions.

748 F. Supp. at 759-60 (emphasis added).

[198] *Id.* at 761.

[199] *Id.*

the opinion with a final observation about "circumstances, [in which] NEPA *may* require an agency to prepare an EIS for action taken abroad."[200] These would include extraterritorial agency actions which also have "direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country."[201] The court supported this proposition by citing *Adams*[202] and *NORML*,[203] both of which involved agency actions having a possible environmental effect introduced from without United States territory to within. The reference to these cases is the one instance in which the court gave some recognition to the possible interdependence of agency actions which occur extraterritorially and their potential for impacts within the United States.

4. The Global Commons Compared

Turning to address the transoceanic shipment of the munitions, the court followed a similar method of inquiry and analysis. Again, the court sought first to determine whether NEPA should be applied at all to the Army's activity in the global commons. Although the court initially claimed to limit the significance of the executive foreign policy power in deciding this question, foreign policy implications inevitably played a central part in its analysis.[204]

The court took the view that the transoceanic movement of the munitions was a "necessary consequence" of the removal operation,

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[200] *Id.*

[201] *Id.*

[202] Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); *see supra* notes 113-26 and accompanying text.

[203] National Organization for the Reform of Marijuana Laws (NORML) v. Department of State, 452 F. Supp. 1226 (D.D.C. 1978); *see supra* notes 127-38 and accompanying text.

[204] 748 F. Supp. at 763. Comparison of the court's initial approach to the transoceanic question with its final holding reveals the influence of foreign policy concerns. Initially the court approached the question by explaining: "The foreign policy considerations which were critical to the preceding analysis [of the F.R.G. portion] . . . are not implicated to *the same extent* by the transoceanic shipment." *Id.* at 761 (emphasis added). Yet it later concludes:

> Nevertheless, the court finds the transoceanic shipment's *relationship* to the removal of the weapons from West Germany is compelling and hence, *implicates many of the same foreign policy concerns* which affect the movement of the weapons through West Germany and distinguish it from the actual incineration at the J.A.C.A.D.S. facility.

Id. at 763 (emphasis added).

which was based on the President's accelerated deadline pursuant to foreign policy power.[205] The court indicated that the transoceanic shipment was a "connected activity," tied to both the removal of weapons from West Germany *and* the ultimate disposal of the weapons at Johnston Atoll, and cited the Council on Environmental Quality regulations which would indeed require that a single impact statement be prepared.[206] Ironically, because the action was as equally "connected" to the removal from West Germany as to the arrival at Johnston Atoll, the court incorporated the executive foreign policy power as a controlling factor[207] and distinguished the actual incineration at the J.A.C.A.D.S. facility.[208]

The court considered the defendants' preparation of the Global Commons Environmental Assessment and Finding of No Significant Impact,[209] in compliance with Executive Order No. 12,114,[210] as an additional factor supporting the conclusion that the preparation of an impact statement under NEPA would not be required for the global commons.[211] Additionally, the court rejected plaintiffs' contention that

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[205] *Id.* at 763.

[206] *Id.* (citing 40 C.F.R. § 1502). The court cites to 40 C.F.R. § 1502, which at no point makes specific reference to a "connected activity." This section, however, does state that "an agency shall use the criteria for scope (§ 1508.25) to determine which proposals(s) shall be the subject of a particular statement." 40 C.F.R. § 1502.4 (1991). The scoping provision *does* employ the term "connected actions," for which a single impact statement must be prepared. *Id.* § 1508.25(a)(1).

[207] Discussed *supra* at note 204 and accompanying text.

[208] 748 F. Supp at 763.

[209] *See supra* notes 31-35.

[210] *See supra* notes 84-85 and accompanying text for discussion.

[211] 748 F. Supp. at 762. Again, the court narrowly limited its holding: "[U]nder the *specific facts* of this case . . . the Army's compliance with Executive Order 12114 is to be given weight in determining whether NEPA requires defendants to consider the global commons portion of the removal of the European stockpile in the same EIS which covers the J.A.C.A.D.S. project." *Id.* The *NRDC v. NRC* court had similarly reasoned that it was acceptable for the Nuclear Regulatory Commission to rely on the executive branch's assessment, pursuant to Executive Order No. 12,114, of the potential impacts which the licensing of nuclear component exports would have on the global commons. 647 F.2d at 1365 and n.110; *see supra* notes 144, 148 and accompanying text,

Nonetheless, the *Greenpeace* court was careful to reject defendants' assertion that Executive Order No. 12,114 preempts application of NEPA to *all* federal agency actions taken outside the United States. 748 F. Supp. at 762 (citing Independent Meatpackers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975), *cert. denied*, *sub. nom.* Nat'l Ass'n of Meat Purveyors v. Butz, 424 U.S. 966 (1976)).

defendants had failed to comply with Executive Order No. 12,114 as well as with NEPA by preparing only the Global Commons Environmental Assessment instead of a more extensive impact statement.[212]

B. The Balance of Hardships

Having determined that success for plaintiffs on the issue of NEPA's extraterritorial application was unlikely, the court proceeded to the other end of the preliminary injunction equation.[213] The court determined that the balance of hardships tipped decidedly in the defendants' favor.[214]

The court found that it needed only to look at the facts as they presented themselves at the time: the removal of munitions was already underway and "compelling circumstances" required immediacy of action.[215] Those compelling circumstances were the time constraints forced by the President's agreement.[216] The court was also persuaded that interrupting and reversing the shipment would pose significant safety concerns and require the rescheduling of detailed plans made by the defendants.[217] Consequently, the district court denied the plaintiffs' request for preliminary injunction against the defendant.[218]

V. Impact

The legislative directive behind NEPA and the question of non-domestic application remains far from clear. This problem has in part been exacerbated by the grand, sweeping language used in NEPA,[219] the nation's environmental "charter."[220] The courts themselves have

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[212] 748 F. Supp. at 762 n.15. The court cited the Executive Order's specific stipulation that it does not create a cause of action. *Id.*; *see supra* note 95 and accompanying text. The court also noted that it lacked judicial standards to apply to the enforcement of Executive Order No. 12,114 and rejected the application of NEPA's requirement of a "convincing statement of reasons." 748 F. Supp. at 762 n.15; *see also* notes 86-94 and accompanying text.

[213] *See supra* note 77.

[214] 748 F.Supp. at 768.

[215] *Id.*

[216] *See supra* notes 22, 193 and accompanying text.

[217] 748 F.Supp. at 768.

[218] *Id.*

[219] *See* Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 Envtl. L. 447, 447-54 (1990).

[220] *See supra* note 57 and accompanying text.

invited further guidance from Congress.[221] Executive Order No. 12,114 provides no executive support for enforcement of NEPA's impact statement requirements when agency actions are wholly extraterritorial.[222]

After *Greenpeace*, the question of NEPA's extraterritorial application still remains an "open" question. The precedent which *Greenpeace* provides for the direct question of NEPA's extraterritorial application is limited. The district court narrowly restricted its holding to the specific facts presented, as has become the most common approach to any attempt at judicial resolution of NEPA's nondomestic applicability;[223] and, ultimately, the issue did not reach the Ninth Circuit, as it had already become moot by the time of appeal.[224]

Yet the court's analytical treatment of issues in *Greenpeace* distinguishes it markedly from prior cases involving NEPA requirements. *Greenpeace* presents a specific question about the approach taken under NEPA: whether NEPA requires comprehensive impact analysis for federal agency actions spanning the globe from foreign into domestic jurisdictions. Plaintiffs argued that NEPA compelled a comprehensive impact statement addressing the entirety of the Army weapons demilitarization project for the European stockpile and its ultimate destination of Johnston Atoll—*not* that the Army need only provide a separate impact statement for the stockpile movement within German borders. The court evaded this fundamental contention. By analyzing each portion of the unitary chemical munitions transport and destruction project separately, the case restricts the reach of NEPA's comprehensive impact statement requirement.

The court has provided tacit approval to the segmentation of this type of federal agency operation. By isolating the German and transoceanic phases of the European stockpile demilitarization project, the court was able to subject these discrete portions to "foreign policy" considerations and the high degree of deference granted the President in foreign policy matters. This approach, however, inextricably intertwines the procedural mandate of NEPA's impact statement requirement for actions which do have domestic impacts with the executive

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[221] *See supra* note 147.

[222] *See supra* notes 86-95.

[223] *See supra* notes 146, 199 and accompanying text.

[224] *See supra* note 54 and accompanying text.

foreign policy and foreign national sovereignty considerations of wholly extraterritorial actions.[225]

This approach also forgoes the result achieved in *Sierra Club v. Coleman I*[226] and *National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State.*[227] In those cases, environmental impact statements were prepared to address the potential United States impacts of the wholly extraterritorial actions.[228] Moreover, in *Coleman I* the court also required that the impact statement address all possible alternatives, i.e., the "no-build" alternative, and include an analysis of why the shorter route was preferable to the longer route.[229] In *Greenpeace*, the plaintiffs argued for a comprehensive environmental impact statement which would fully address all alternatives for the destruction of the unitary chemical munitions stored in Germany. The court looked solely to the environmental impact statement prepared by the defendants to detail the effects which the accelerated demilitarization of the European stockpile would have on Johnston Atoll.

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[225] The court recognized the delicate balancing test which it must perform:

> Other than the D.C. Circuit decision of NRDC v. NRC, the court has found no other case which accentuates as sharply the necessity of balancing the environmental goals of NEPA against the particular foreign policy concerns which federal action abroad necessarily entails. It is perhaps precisely this potential conflict which caused Congress to leave open the question of whether NEPA applies to the environmental impacts of federal action abroad.

748 F. Supp. at 760-61 (citations and footnotes omitted).

[226] 405 F. Supp. 53 (D.D.C. 1975); *see also* Sierra Club v. Adams, 578 F. 2d 389 (D.C. Cir. 1978); Sierra Club v. Coleman II, 421 F. Supp. 63 (D.D.C. 1976); see *supra* notes 113-26 and accompanying text for discussion of these three cases.

[227] 452 F. Supp. 1226, 1232 (D.D.C. 1978), *appeal dismissed*, No. 78-1669 (D.C. Cir. Apr. 24, 1979); see *supra* notes 127-38 and accompanying text for discussion.

[228] *Cf.* Natural Resources Defense Council v. Nuclear Regulatory Commission, 647 F.2d 1345, 1368 (D.D.C. 1981) (concluding that the *export* of critical nuclear reactor components to a foreign country was a sufficiently distinguishing factor). See *supra* notes 146, 149 for discussion.

[229] 405 F. Supp. at 55. When the prepared impact statement was examined on appeal in *Adams*, the court of appeals commented:

> We . . . believe the FEIS discussion of alternatives is adequate. . . .
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> The FEIS considers a wide range of alternatives to the proposed highway, both in Panama and in Columbia. In addition to a number of alternative highway routes, the FEIS also explores various "non-highway" alternatives and a "no action" alternative. . . . The discussions of these alternatives are somewhat brief, but in view of the fact that Congress has authorized United States assistance in constructing a *highway* . . . we believe these discussions are reasonable.

578 F.2d at 395-96 (footnotes omitted).

V. Conclusion

In actuality, the line of "NEPA abroad" cases has never provided much substantive precedent or guidance. The facts typically present an opportunity for narrowly limited holdings in lieu of Congressional guidance. In most cases, court resolution of the extraterritorial reach of NEPA also has been short-circuited by agency compliance. This has been most prevalent for those extraterritorial actions which also have potential domestic impacts. Yet this issue did reach the *Greenpeace* court. By analyzing the isolated extraterritorial action instead of its domestic consequences, the court accorded superior weight to the foreign policy concerns of federal agency actions occurring in another nation, notwithstanding domestic impacts.

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Keomaka v. Zakaib: The Physician's Affirmative Duty to Protect Patient Autonomy Through the Process of Informed Consent

I. Introduction

The concept of informed consent represents the legal principle that a physician has a duty to disclose sufficient information regarding the risks and benefits of treatment to a patient. The purpose of informed consent is to provide the patient with sufficient information to intelligently exercise judgment about whether to undergo the proposed treatment.[1] Physicians often have available to them several different therapeutic approaches to any given disease.[2] The doctrine of informed consent requires that the physician inform the patient of these options, and the risks and benefits associated with each.

In *Keomaka v. Zakaib*,[3] the Intermediate Court of Appeals reaffirmed earlier decisions and provided further guidance regarding causality and the nature of the physician's duty to obtain informed consent from his or her patient.

Part II of this note reviews the development of the law regarding informed consent, both nationally and in Hawai'i. Part III then analyzes the *Keomaka* court's interpretation of the doctrine of informed

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[1] Black's Law Dictionary 779 (6th ed. 1990).

[2] For example, the treatment of depression can involve several different forms of psychotherapy, at least five different classes of medications, and electroconvulsive therapy, either individually or in almost any combination. Each individual treatment approach, as well as each contemplated combination of treatments, carries its own set of risks and benefits. *See* American Psychiatric Association Task Force on Treatments of Psychiatric Disorders, Treatments of Psychiatric Disorders 1728-41 (1989).

[3] 8 Haw. App. 518, 811 P.2d 478 (1991).

consent in light of statutory language and the underlying policy issues related to informed consent. Finally, part IV of this note examines *Keomaka* and its potential impact on physician behavior and health care delivery.

II. Facts

On March 9, 1984, Richard Keomaka suffered injuries to his left middle finger and right ankle.[4] When Keomaka continued to feel pain and numbness in his finger, he was referred by his initial treating physician to George Zakaib, M.D., an orthopedic surgeon, for further evaluation and treatment.[5] After x-rays revealed a foreign body imbedded in Keomaka's finger, Dr. Zakaib operated on Keomaka and removed a piece of pencil lead. Dr. Zakaib told Keomaka that the pain and numbness were due to pressure on the nerve exerted by the pencil lead and that if problems continued, further surgery could be done.[6] The options were to remove the damaged nerve and either join the two ends of the removed section (repair) or to place a piece of nerve from some other part of the body between the two sections of nerve (graft). Keomaka obtained a second opinion and then told Dr. Zakaib that he would proceed with the surgery.[7] Prior to surgery Dr. Zakaib and Keomaka discussed the procedure and risks involved, and Keomaka signed a surgical consent form.[8] At trial there was disagreement as to the contents of the conversation and the circumstances surrounding the signing of the consent form.[9]

On August 1, 1984, Dr. Zakaib operated on Keomaka. He removed a section of the sural nerve from just above Keomaka's right ankle and grafted it into the nerve in Keomaka's damaged finger.[10] After surgery Keomaka began to experience problems with the right ankle region. On October 24, 1984, Dr. Zakaib operated on Keomaka's right leg, discovering and removing a neuroma.[11] Because he continued

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[4] *Id.* at 520, 811 P.2d at 481.

[5] *Id.* at 521, 811 P.2d at 481.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 522, 811 P.2d 481. A neuroma is a nonmalignant tumor mass formed by the sprouting ends of the cut nerves. It is often tender to pressure and the resultant sensations are experienced as coming from the area where the nerve used to go. Seymour Schwartz, Principles of Surgery 1909 (1974).

to suffer pain and discomfort, Keomaka consulted other physicians.[12]

Eventually Keomaka consulted James Doyle, M.D., regarding his finger problems. Dr. Doyle operated on Keomaka's finger and buried the damaged nerve between the bones of the middle and index fingers.[13] Keomaka contended that this procedure was an alternative treatment to the actual procedure carried out on August 1, 1984, and that Dr. Zakaib should have told him about this procedure. Keomaka contended that by failing to disclose this, Dr. Zakaib "was negligent and careless in advising [Keomaka] concerning [the August, 1984] surgery and failed to elicit from [Keomaka] an informed consent for said surgery."[14]

A jury trial resulted in a special verdict in Dr. Zakaib's favor.[15] Keomaka appealed, alleging that:

(1) The court erred when it required Keomaka to prove that "acting rationally and reasonably, Keomaka would not have undergone the surgery if Zakaib had made the statutorily required disclosures to him."[16]
(2) The court erred when, in the absence of evidence to support the theory that a superseding cause was responsible for plaintiff's injury, it gave instructions on superseding cause to the jury.[17]
(3) The court erred when it instructed the jury on contributory negligence.[18]

The Intermediate Court of Appeals denied Keomaka's first point on appeal.[19] However, the court agreed with Keomaka on his second point[20] and emphatically held that there was no room for contributory negligence on the part of the plaintiff/patient in informed consent situations.[21]

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[12] *Keomaka*, 8 Haw. App. at 522, 881 P.2d at 481.
[13] *Id.* at 522, 811 P.2d at 482.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 527, 811 P.2d at 483.
[17] *Id.* at 529, 811 P.2d at 485.
[18] *Id.* at 531, 811 P.2d at 486.
[19] *Id.* at 528, 811 P.2d at 485.
[20] *Id.* Because the verdict was vacated on other grounds, the court did not discuss the issues related to the special verdict form and relevant jury instructions, except to note that "the proper wording should have been 'a legal cause,' rather than 'the legal cause.'" *Id.*
[21] *Id.* at 533, 811 P.2d at 487.

III. History and Development of the Doctrine of Informed Consent

A. Development of the Doctrine of Informed Consent

This part examines the nationwide case law, Hawai'i case law, and Hawai'i statutory law that have defined the medical tort of negligent failure to disclose the risks of treatment, otherwise known as providing professional service without informed consent. When a physician fails to obtain informed consent from a patient before proceeding with treatment, he or she has breached the professional standard of conduct expected of physicians. Because of this, liability is based on negligence.[22]

The basic elements of a cause of action based on negligence are: (1) a duty or obligation recognized by the law, (2) a breach of that duty, (3) a legally recognized causal connection between the conduct and the injury, and (4) actual loss or damage to another.[23]

Although couched in terms of trespass, *Schloendorff v. Society of New York Hospital*[24] is often viewed as the initial case involving the physician's requirement to obtain informed consent.[25] It was another forty-three

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[22] W. Page Keeton et. al., Prosser and Keeton on the Law of Torts § 32, at 190 (5th ed. 1984) [hereinafter Prosser and Keeton]. Historically, there has been debate as to whether to consider informed consent cases to arise out of battery or negligence. The confusion seems to have originated from Justice Cardozo's statement in Schloendorff v. Society of N.Y. Hosp., in which he stated that "every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." 105 N.E. 92, 93 (N.Y. 1914). Current legal theory restricts assault and battery to situations where there has been no consent to the procedure, as opposed to situations where consent was obtained but it was done so without proper disclosure. *See* Cobbs v. Grant, 502 P.2d 1 (Cal. 1972); Natanson v. Kline, 354 P.2d 670 (Kan. 1960). *But see* Roger Crisp, *Medical Negligence, Assault, Informed Consent, and Autonomy*, 17 J.L. & Soc'y 77 (1990) (arguing support for a theory of battery for situations where there was consent to a procedure without adequate risk disclosure).

[23] Prosser and Keeton on Torts, *supra* note 22, § 30, at 164-65.

[24] 105 N.E. 92 (N.Y. 1914).

[25] Prosser and Keeton, *supra* note 22, at 190. "The informed consent doctrine is based on principles of individual autonomy, and specifically on the premise that every person has the right to determine what shall be done to his own body." *Id.* (citing Schloendorff v. Society of N. Y. Hosp., 105 N.E. 92 (N.Y. 1914)). *Schloendorff* involved a situation where the plaintiff consented to an examination under anesthesia but specifically told her physician that she did not give him permission to perform surgery. Nonetheless, after examination, and without waking the patient to disclose his findings, the physician proceeded to remove a tumor. *Schloendorff*, 105 N.E. at 93.

years before a court addressed the first element of negligence and established the legal duty of a physician to provide a "full disclosure of facts necessary to an informed consent."[26]

In *Salgo v. Leland Stanford Jr. University Board of Trustees*[27] the plaintiff was suffering from peripheral vascular disease of unknown etiology.[28] The defendant physicians performed aortography with radio-opaque contrast media under general anesthesia.[29] The next day the plaintiff awoke to discover that his legs were permanently paralyzed.[30] The plaintiff alleged, inter alia, that he had not been provided with adequate disclosure of the risks associated with aortography.[31]

The *Salgo* court first established that the physicians had a duty to disclose.[32] The court then recognized that there were two options facing a physician. On the one hand the physician could address every risk, no matter how remote. On the other hand he or she could view each patient as a unique individual and to use his or her best discretion as to what disclosure was necessary for informed consent.[33] The *Salgo* court held that the latter course was the more reasonable one and therefore directed the lower court to instruct the jury "that the physician has such discretion consistent, of course, with the full disclosure of facts necessary to an informed consent."[34] The court stated that physicians should:

> recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.[35]

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[26] Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 317 P.2d 170, 181 (Cal. 1957).

[27] *Id.*

[28] *Id.* at 173.

[29] Aortography is the examination of the aorta, the main artery leading from the heart to the lower body. It is done by injecting a medium that is opaque to x-rays into the aorta through a hollow needle that has been inserted into the aorta. SIDNEY I. LANDAU, 1 INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY, 171 (1986).

[30] *Salgo*, 317 P.2d at 172-75.

[31] *Id.* at 181.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

Several years later, in *Natanson v. Kline*,[36] the *Salgo* standard was adopted.[37] In addition, the court held that the decision about what to disclose involved primarily a medical judgment.[38] Therefore the duty was limited to disclosures that a reasonable physician would make in similar circumstances.[39]

In holding to the professional standard, the court stated that it viewed the failure to obtain informed consent in the same light as any other act of professional malpractice, i.e. "the standard of conduct of a reasonable and prudent medical doctor of the same school of practice as the defendant under similar circumstances."[40] The *Natanson* court felt that physicians' recognition of their own obligation to maintain standards would properly protect patients.[41]

In a subsequent ruling related to the same case the court clarified several issues.[42] First, the court made clear that the defendant could raise the defense of assumption of risk[43] only when the plaintiff was in a position of equal competence with the defendant to make judgments regarding risks and hazards.[44] The court said that this was not a situation where the physician had disclosed adequate risk information.[45] Second, the court clarified that a lay witness could testify as to whether or not a physician had advised his or her patient of the risks and alternatives regarding his or her treatment. However, only expert testimony from medical witnesses could establish whether the disclosures were in accordance with reasonable medical practice.[46]

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[36] 350 P.2d 1093 (Kan. 1960). The case itself involved the question of whether or not Dr. Kline negligently performed radiation treatment for breast cancer, and whether or not the patient had given informed consent to the procedure. *Id.* at 1095.

[37] *Id.* at 1106.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 1107.

[41] *Id.*

[42] Natanson v. Kline, 354 P.2d 670 (Kan. 1960).

[43] The defense of assumption of risk is at times both controversial and confusing because of the various ways in which it has been conceptualized by the courts. *Prosser and Keeton on Torts* states:

> The defense of assumption of risk is in fact quite narrowly confined and restricted by two or three elements or requirements: first, the plaintiff must know that the risk is present, and he must further understand its nature; and second, his choice to incur it must be free and voluntary.

PROSSER AND KEETON, *supra* note 22, § 68, at 486.

[44] *Natanson*, 354 P.2d 670 at 672.

[45] *Id.*

[46] *Id.* at 673.

One year before the *Natanson* court issued its opinion, Jerry W. Canterbury consulted William Thornton Spence, M.D. about persistent back problems.[47] Dr. Spence performed back surgery which initially was without complications. However, the day after surgery Mr. Canterbury fell and suffered additional injuries that left him unable to walk without crutches, unable to control the flow of urine, and unable to sustain employment.[48] Mr. Canterbury sued Dr. Spence and Washington Hospital Center, alleging, inter alia, that Dr. Spence had not provided him with sufficient information regarding the risks of surgery so as to allow him to give informed consent to the operation.[49]

In 1972, Mr. Canterbury's case was heard by the United States Court of Appeals for the District of Columbia Circuit.[50] The *Canterbury* court began its analysis of the doctrine of informed consent by reaffirming that each individual has the right to determine what happens to his or her body and that true consent "entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each."[51] It then found that a physician has the duty to provide reasonable disclosure of the choices of therapy and the inherent and potential dangers involved.[52] While these findings were in line with previous rulings, the *Canterbury* court broke with the *Natanson* court on the standard by which a physician should be judged regarding the disclosure of risk information.

The *Canterbury* court decided that "respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves."[53] The court discussed the role of the professional standard of care in relation to the general standard of care and found that physicians were held to a higher standard of care in activities

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[47] Canterbury v. Spence, 464 F.2d 772, 776 (D.C. Cir. 1972).

[48] *Id.* at 777-78.

[49] *Id.* at 778.

[50] *Id.* at 772.

[51] *Id.* at 780.

[52] *Id.* at 782 n.27. The court indicated that:

> the disclosure rule summons the physician only to a reasonable explanation. . . . That means generally informing the patient in nontechnical terms as to what is at stake: the therapy alternatives open to him, the goals expectably to be achieved, and the risks that may ensue from particular treatment and no treatment.

Id.

[53] *Id.* at 784.

demanding professional skills.[54] The court also found that there were some activities that physicians engaged in that did not require professional skills, and were thus open to evaluation via the general standard of care expected from any reasonable person in a like situation.[55] From these findings the *Canterbury* court concluded:

> In sum, the physician's duty to disclose is governed by the same legal principles applicable to others in comparable situations, with modifications only to the extent that medical judgment enters the picture. We hold that the standard measuring performance of that duty by physicians, as by others, is conduct which is reasonable under the circumstances.[56]

The court then held that the scope of the disclosure was to be determined by a patient-centered standard as opposed to the professional standard articulated by the *Natanson* court.[57] However, the court, recognizing that a physician would be hard-pressed to know exactly what each and every patient might deem relevant in a given situation, adopted an objective standard based on "the average reasonable patient . . . with due regard for the patient's informational needs and with suitable leeway for the physician's situation."[58] The court also acknowledged several exceptions to the disclosure requirement. These included risks inherent in any procedure (such as infection), hazards that the patient is already aware of, and emergencies where there is no time to obtain consent and waiting for consent would greatly endanger the patient.[59] In addition, the *Canterbury* court recognized the "therapeutic privilege" exception to disclosure of risk information. According to the *Canterbury* court this privilege occurs when a patient might become "so ill or emotionally distraught on disclosure as to foreclose a rational

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[54] *Id.*

[55] *Id.* at 785.

[56] *Id.*

[57] *Id.* at 786. The court defined this standard as follows:

> The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked.

Id. at 786-87.

[58] *Id.* at 787; *see also* Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent to Therapy*, 64 Nw. U. L. Rev. 628 (1970) (discussing the issue of reasonableness on the part of the patient).

[59] *Canterbury*, 464 F.2d at 788.

decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient."[60]

In keeping with negligence theory, the *Canterbury* court determined that in addition to breach of duty, there must also be evidence of a causal connection between the breach and the injury, and that without injury or harm there was no actionable negligence.[61] It therefore determined that unless the disclosure of risk information would have led the patient to opt for a different treatment, the failure to provide that information, while a breach of duty, would not be sufficient for a cause of action.[62] The court also felt that making this determination based solely on an assessment of the patient's credibility was unsatisfactory.[63] The court therefore opted for an objective standard of causation: "in terms of what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance."[64]

B. Hawai'i Law

In Hawai'i, it is a medical tort to provide "professional service without informed consent."[65] The tort occurs when a physician, owing

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[60] *Id.* at 789 (citing Nishi v. Hartwell, 52 Haw. 188, 473 P.2d 116 (1970)). See *infra* notes 67-78 and accompanying text for discussion of *Nishi*.

[61] *Canturbury*, 464 F.2d at 790.

[62] *Id.*

[63] *Id.* The court's hesitancy to trust the accuracy of the plaintiff's memory and judgment is well supported by empirical research. Research demonstrates that people do not even accurately remember their own predictions and therefore end up exaggerating what they thought they knew at a previous point in time. "This research does not imply that hindsight is a knowing misrepresentation of fact, for individuals will be truthful in their hindsight recall. The hindsight bias arises from cognitive limitations on people's ability to recall past perspectives accurately." Jon F. Mertz & Baruch Fischhoff, *Informed Consent Does not Mean Rational Consent*, 11 J. LEG. MED. 321, 346 (1990).

[64] *Canterbury*, 464 F.2d at 791; *see also* Cobbs v. Grant, 502 P.2d 1 (Cal. 1972) (objective patient standard used). *But see* Scott v. Bradford, 606 P.2d 554 (Okla. 1979) (holding that the jury would be able to assess the credibility of the patient). The *Bradford* court's view seems dependent on assuming that the patient, when testifying, actually has an accurate remembrance of the past. This conclusion is suspect. *See* Jon F. Mertz & Baruch Fischhoff, *supra* note 63. A recent study confirmed the unreliability of patient memories. Ninety percent of 144 patients that had been informed of the risk of death from gall bladder surgery were able to correctly recall that warning prior to surgery. However, only three weeks after surgery fifty-four percent of those who correctly remembered before surgery stated that they had not been told that death was a potential risk. Terrance C. Wade, *Patients May Not Recall Disclosure of Risk of Death: Implications for Informed Consent*, 30 MED. SCI. L. 259 (1990).

[65] HAW. REV. STAT. § 671-1(2) (1985).

a duty to disclose risk information to a patient, negligently performs that duty, and as a result the patient suffers harm.[66]

In 1970, two years before the landmark *Canterbury* decision, the Hawaii Supreme Court in *Nishi v. Hartwell*,[67] enunciated its position on the doctrine of informed consent.[68] *Nishi* involved a situation where the patient, Dr. Nishi, a dentist, was paralyzed after a thoracic aortography.[69] Paralysis was a known risk, but because Dr. Nishi was highly frightened and suffered from hypertension, Dr. Hartwell felt it was clinically inadvisable to discuss that particular risk with Dr. Nishi.[70]

Nishi sued on a theory of battery, alleging that the failure to disclose the risk of paralysis vitiated Dr. Nishi's consent to the procedure and therefore constituted an unlawful touching of Dr. Nishi's body.[71] The *Nishi* court held that Dr. Nishi had consented to the touching but was not told of a collateral hazard.[72] Therefore the doctrine of informed consent was involved and the action was in negligence.[73]

In discussing the doctrine of informed consent, the court, citing the *Salgo* decision,[74] stated that the doctrine of informed consent requires the physician to disclose to his or her patient all relevant information, including associated hazards, concerning a proposed treatment to the patient so that the consent would be an intelligent one based on complete information.[75] The court went on to recognize that a physician

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[66] Mroczkowski v. Straub Clinic and Hosp., Haw. App. 605, 566, 732 P.2d 1255, 1257 (1987). In *Mroczkowski* the court defined the tort as follows:

> A physician's negligent failure to disclose the risks of harm prior to treatment involves the following five material elements: (1) the physician owed a duty to disclose to the patient prior to treatment the risk of the harm suffered by the patient; (2) the physician negligently performed or failed to perform his or her duty of disclosure; (3) the patient suffered the harm; (4) the physician's negligent performance or nonperformance of duty was a cause of the patient's harm in that: (a) the physician's treatment was a substantial factor in bringing about the patient's harm and (b) the patient, acting rationally and reasonably, would not have undergone the treatment had he or she been properly informed of the risk of the harm that in fact occurred and (5) no other cause is a superseding cause.

Id.

[67] 52 Haw. 188, 473 P.2d 116 (1970).

[68] *Id.*

[69] *Id.* at 190, 473 P.2d at 118.

[70] *Id.* at 193-94, 473 P.2d at 119-20.

[71] *Id.* at 190, 473 P.2d at 118.

[72] Id. at 191, 473 P.2d at 118.

[73] *Id.* at 191, 473 P.2d at 118-19.

[74] *See supra* text accompanying notes 27-35.

[75] *Nishi*, 52 Haw. at 191, 473 P.2d at 119.

may withhold disclosure of information regarding any untoward consequences of treatment where full disclosure will be detrimental to the patient's total care and best interest.[76] The court also held that it would use a professional standard, i.e. "by reference to relevant medical standards."[77] This meant the plaintiff had to use expert medical testimony to prove that the physician had not met the standard of disclosure.[78]

In 1976, in response to what was perceived as a "national crisis in the area of medical malpractice," the Hawaii Legislature enacted legislation that attempted to develop standards for informed consent.[79] Act 219 directed the Board of Medical Examiners to establish standards for specific treatments and procedures.[80] In addition, the Board was to make sure that the standards "include provisions which are designed to reasonably inform and to be understandable by a patient or a patient's guardian of the probable risks and effects of the proposed treatment or surgical procedure, and of the probable risks of not receiving the proposed treatment or surgical procedure."[81]

It can be inferred from the final sentence of that section of the Act that these standards were to be developed to lend some potential protection to the physician, provided that he or she followed them. The Act stated: "The standards established by the board shall be prima facie evidence of the standards of care required but may be rebutted by either party."[82] The legislation also codified the common law exception to risk disclosure in the case of emergency treatment when "consent is not reasonably feasible under the circumstances without adversely affecting the condition of the patient's health."[83] While one commentator claimed that the law was silent on the standard of disclosure,[84] arguably by instructing the Board of Medical Examiners

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[76] *Id.*

[77] *Id.* at 195, 473 P.2d at 121.

[78] *Id.*

[79] Act 219, 8th Leg., 2d Sess. (1976), *reprinted in* 1976 HAW. REV. LAWS 523 (codified at HAW. REV. STAT. § 671-3(b) (1976)).

[80] *Id.* at 524 (codified at HAW. REV. STAT. § 671-3(b) (1976)).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Linda S. Martell, Note, Leyson v. Steuermann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent?*, 8 U. HAW. L. REV. 569, 589 (1986) [hereinafter *Hawaii's Doctrine of Informed Consent*] ("Hawaii represents one of only eight states that remain silent on the standard of disclosure.").

to develop the standards, the legislature was implicitly opting for a professional standard for disclosure of risk information. In the alternative, by referring to "a patient" or "a patient's guardian," as opposed to "the patient" or "the patient's guardian" there is also the suggestion that the legislature was adopting an objective patient standard regarding disclosure. There is no argument, however, that the legislation was silent on the issue of whether to adopt an objective or subjective standard on causation.

In 1983, the legislature amended the statute to more clearly identify the scope of the disclosure.[85] The amended statute stated:

> If the standards established by the board of medical examiners include provisions which are designed to reasonably inform a patient, or a patient's guardian, of:
> (1) The condition being treated;
> (2) The nature and character of the proposed treatment or surgical procedure;
> (3) The anticipated results;
> (4) The recognized possible alternative forms of treatment; and
> (5) The recognized serious possible risks, complications and anticipated benefits involved in the treatment or surgical procedure, and in the recognized possible alternative forms of treatment, including nontreatment, then the standards shall be admissible as evidence of the standard of care required of the health care providers.[86]

Again, the legislative language is ambiguous as to whether the standard of disclosure was patient-centered or professional.[87] However, there is

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[85] Act 223, 12th Leg., 2nd Sess. (1983), *reprinted in* 1983 Haw. Sess. Laws 468 (codified at HAW. REV. STAT. § 671-3 (1987)).

[86] HAW. REV. STAT. § 671-3(b) (1985). The original statute read as follows:

> (b) The board of medical examiners shall, insofar as practicable, establish reasonable standards of medical practice, applicable to specific treatment and surgical procedures, for the substantive content of the information required to be given and the manner in which it is given and in which consent is received in order to constitute informed consent from a patient or a patient's guardian. The standards shall include provisions which are designed to reasonably inform and to be understandable by a patient or a patient's guardian of the probable risks and effects of the proposed treatment or surgical procedure, and of the probable risks of not receiving the proposed treatment or surgical procedure. The standards established by the board shall be prima facie evidence of the standards of care required but may be rebutted by either party.

Id. § 671-3(b) (1976).

[87] *Hawaii's Doctrine of Informed Consent*, *supra* note 84, at 590.

some legislative history to support a patient oriented standard of disclosure.[88]

In 1985, in *Leyson v. Steuermann*,[89] the Intermediate Court of Appeals examined the doctrine of informed consent. While the court's discussion of the doctrine was contained in dicta,[90] it laid the foundation for its future rulings regarding informed consent. The *Leyson* court, noting ambiguity in the language of *Nishi* and *Hawaii Revised Statutes* section 671(3), did not reach the issue of standard of disclosure.[91] The court did, however, reaffirm that exceptions to the informed consent doctrine include unforeseen or immaterial risks, emergency situations, patient incapacitation, patient waiver, where disclosure would be harmful to the patient (therapeutic privilege), or where the risks are commonly understood, obvious, or already known to the patient.[92] The court stated that the defendant has the initial burden of presenting evidence to support one of the limitations and that once such evidence is presented, the plaintiff then has the burden of proving their nonexistence.[93]

The *Leyson* court described the tort of negligent failure to disclose risk information as follows:

> (1) Steuermann owed a duty to disclose to Leyson the risk of one or more of the collateral injuries that Leyson suffered; (2) Steuermann breached his duty; (3) Leyson suffered injury; and (4) Steuermann's breach of duty was a cause of Leyson's injury in that: (a) Steuermann's

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[88] The amendment to HAW. REV. STAT. § 671-3(b) was prompted by concerns regarding patients' needs for accurate and up to date information about mastectomies. The joint report of the House Health and Judiciary Committees stated:

> Your Committees . . . have amended the bill to reflect in a measure the concerns of the medical community, while continuing to support the conviction of the Legislature that patients are entitled to know the range of options available to them so as to make informed decisions about the course of their treatment.

H.R. STAND. COMM. REP. No. 823, 12th Leg. 1st Sess. (1983), *reprinted in* 1983 HAW. H. R. J. 1219.

[89] 6 Haw. App. 504, 705 P.2d 37 (1985). The case involved a situation where the plaintiff was being treated for psoriasis (a skin disorder) with oral and intramuscular corticosteroid medications. He subsequently developed a number of orthopedic and ophthalmologic problems secondary to the steroid treatment.

[90] *Leyson*, 6 Haw. App. at 519-20, 705 P.2d at 48. The court's holding affirming the lower court's judgment in favor of defendant Steuermann was based on procedural issues unrelated to the doctrine of informed consent. *Id.*

[91] *Id.* at 513, 516, 705 P.2d at 45-46.

[92] *Id.* at 513-14, 705 P.2d at 45.

[93] *Id.* at 514, 705 P.2d at 45.

> treatment was a substantial factor in bringing about Leyson's injury and (b) Leyson, acting rationally and reasonably, would not have undergone the treatment had he been informed of the risk of the harm that in fact occurred; and (5) no other cause is a superseding cause.[94]

By defining element (4)(b) above in terms of the specific patient "acting rationally and reasonably," the court broke with previous courts[95] by blending objective and subjective aspects of a patient oriented standard of causation.[96] This new "modified objective" standard examined causation from the view of the "actual patient [subjective component] acting rationally and reasonably [objective component]."[97]

In another footnote, the court addressed the order of proof regarding superseding cause.[98] It indicated that the plaintiff's burden of disproving the existence of a superseding cause arose only after the defendant had produced sufficient evidence to raise the issue.[99]

In *Mroczkowski v. Straub Clinic & Hospital, Inc.*,[100] the Intermediate Court of Appeals noted the elements of the tort of negligent failure to disclose risk information that it had developed in *Leyson*.[101] It then held that before a plaintiff can argue that the duty to disclose a risk was negligently performed, he or she must prove "that the harm he [or she] is complaining about was a probable risk of the . . . operation

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[94] *Id.* at 516-17, 705 P.2d at 47.

[95] *See, e.g.*, Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 317 P.2d 170 (Cal. 1987); Canturbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

[96] The court stated:

> There is disagreement whether this question (causation) should be examined from the viewpoint of Leyson, a reasonable person in Leyson's position, an ordinary person in Leyson's position, or some other viewpoint. Moreover, we recognize that what a reasonable and competent physician thinks his patient should be told is not necessarily what the patient would find significant in making his decision. Since it never happened, however, it is impossible to determine what Leyson would have done had he been properly informed. Moreover, the reasonableness factor would weigh heavily, if not predominantly, in the determination of the credibility and weight of the evidence on the subject. Consequently, we opt for the application of a modified objective standard that determines the question [of causation] from the viewpoint of the actual patient acting rationally and reasonably.

Id. at 517 n.10, 705 P.2d at 82 n.10.

[97] *Id.*

[98] *Id.* at 517 n.11, 705 P.2d at 82 n.11.

[99] *Id.*

[100] 6 Haw. App. 605, 732 P.2d 1255 (1987).

[101] *Id.* at 608, 732 P.2d 1257.

and that [the defendant] knew or should have known of that fact."[102] The court examined the various possible standards to use in determining the meaning of "probable risk" and held that the applicable standard at the time of Mroczkowski's surgery was "all probable risks of harm that the physician knew of or should have known of."[103] However, in a later footnote[104] the court indicated that as of June 8, 1983, the standard had become "all recognized serious possible risks of harm and complications that the physician knew or should have known of, plus other information."[105]

IV. ANALYSIS

Keomaka v. Zakaib[106] is the most recent in a trio of decisions by the Intermediate Court of Appeals regarding the doctrine of informed consent.[107] The court prefaced its opinion by reviewing the development of the doctrine of informed consent in Hawai'i.[108] It noted that "[t]he doctrine is based on principles of individual autonomy, and specifically on the premise that every person has the right to determine what shall

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[102] *Id.* at 610, 732 P.2d at 1259.

[103] *Id.* at 608-09, 732 P.2d at 1258.

[104] *Id.* at 609 n.1, 732 P.2d at 1258.

[105] *Id.* at 608 n.1, 732 P.2d at 1259 n.1. Once again the court declined to address whether the question of seriousness of the risk was to be "answered from the point of view of the patient, the physician, or otherwise." *Id.* In *Mroczkowski* the court did not need to address this question because Mroczkowski never got across the initial threshold of proving through expert testimony that the harm he complained of was a probable risk of the surgery he underwent. *Id.* at 610, 732 P.2d at 1259. In addition, the court, in a footnote, cited Leyson v. Steuermann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent*, 8 U. HAW. L. REV. 569, 590 (1986), which stated that "[a]lthough these provisions [of HAW. REV. STAT. § 671(3)] provide guidelines for informed consent, the statute fails to denote whether the professional or patient standard of disclosure applies." *Id.* at 609 n.1, 732 P.2d at 1259 n.1.

[106] 8 Haw. App. 518, 811 P.2d 478 (1991).

[107] The first case was Leyson v. Steuermann, 5 Hawaii App. 504, 705 P.2d 37 (1985), and the second was Mroczkowski v. Straub Clinic & Hospital, Inc., 6 Hawaii App. 504, 732 P.2d 1255 (1987). Part III of this note discusses these two cases; *see also* Linda Martell, Note, Leyson v. Steuermann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent?*, 8 U. HAW. L. REV. 569 (1986) (discussing earlier informed consent law in Hawai'i).

[108] *Keomaka*, 8 Haw. App. at 523-25, 811 P.2d at 482-83.

be done to his own body.''[109] After mentioning early Hawai'i common law recognition of the tort of failure to disclose risk information,[110] the court proceeded to review more recent statutory law,[111] and the interpretation of that law by the Intermediate Court of Appeals.[112] The court noted that 1976 legislation[113] created the statutory tort of ''the rendering of professional service without informed consent,''[114] and that amendments made in 1983[115] established standards for the disclosure of risk information that would be admissible into evidence.[116] Then, referring to their earlier decision in *Leyson*, the court identified the following five material elements in ''the tort of a physician's negligent failure to disclose the risks of harm prior to treatment:''[117]

> 1. [T]he physician owed a duty to disclose to the patient prior to treatment the risk of the harm suffered by the patient;
> 2. [T]he physician negligently performed or failed to perform his or her duty of disclosure;
> 3. [T]he patient suffered the harm;
> 4. [T]he physician's negligent performance or nonperformance of duty was a cause of the patient's harm in that:
>
> (a) the physician's treatment was a substantial factor in bringing about the patient's harm and
>
> (b) the patient, acting rationally and reasonably, would not have undergone the treatment had he or she been properly informed of the risk of the harm that in fact occurred and
>
> 5. [N]o other cause is a superseding cause.[118]

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[109] *Id.* at 523, 811 P.2d at 482 (quoting from PROSSER AND KEETON, *supra* note 22, § 32, at 190 (5th ed. 1984)). The phrase ''right to determine what shall be done to his own body'' is part of Justice Cardozo's language in Schloendorff v. Society of N. Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914). In that case the cause of action was based on trespass, rather than negligence, but the underlying concept of consent has been carried over into the tort of the physician's failure to disclose the risks of harm. *Id.*

[110] 8 Haw. App. at 523, 811 P.2d at 482 (citing Nishi v. Hartwell, 52 Haw. 188, 473 P.2d 116 (1970)); *see supra* note 67 and accompanying text.

[111] *Id.* at 523-24, 478 P.2d at 482-83.

[112] *Id.* at 524-25, 478 P.2d at 483.

[113] Act 219, 8th Leg., 2d Sess. (1976), *reprinted in* 1976 Haw. Sess. Laws 523-33; *see supra* note 79 and accompanying text.

[114] HAW. REV. STAT. § 671-1(2) (1985).

[115] Act 223, 12th Leg. 1st Sess. (1983), *reprinted in* 1983 Haw. Sess. Laws 468, 469 (codified at HAW. REV. STAT. § 671-3(b) (1985)); *see supra* note 79 and accompanying text.

[116] *Keomaka*, 8 Haw. App. 518, 524, 811 P.2d 478, 482 (1991).

[117] *Id.* at 524-25, 811 P.2d at 483,(quoting Mroczkowski v. Straub Clinic & Hosp., 6 Haw. App. 563, 566, 732 P.2d 1255, 1257 (1987)).

[118] *Id.*

The court then concluded that the first three elements were not at issue[119] but that element 4(b) and element 5 of its analysis were at issue.[120]

A. Material Element 4(b): The Patient, Acting Rationally and Reasonably, Would Not Have Undergone the Treatment Had He or She Been Properly Informed of the Risk of the Harm That in Fact Occurred

The court examined the trial court's instruction 26.[121] It noted that the instruction was a verbatim recitation of the *Mroczkowski* elements, and that "the plaintiff must prove these elements by a preponderance of the evidence."[122] Keomaka contended that this formulation required him to prove causation twice, once when he addressed Zakaib's negligence in providing risk information and again when he was required to prove that, had the risk information been provided, he would not have undergone the surgery.[123] Keomaka contended that while instruction 26 was consistent with *Leyson* and *Mroczkowski*, it nonetheless "misstated the law and was reversibly erroneous."[124] The court disagreed, stating that Keomaka's contention was without merit.[125] The court supported its conclusions with three arguments.

First, using case law related to non-medical negligence, the court reaffirmed the need for causality to be established vis a vis both the treatment rendered and the nondisclosure of the risk.[126] Second, the

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[119] *Id.* The court noted that the jury found Zakaib negligent and implicit in that finding were the first two elements of the tort. It was also self-evident that Keomaka suffered harm to his right lower extremity, thus satisfying the third element. *Id.*

[120] *Id.*

[121] *Id.* "Instruction 26 is a verbatim recitation of the five material elements of the medical tort of informed consent stated in *Mroczkowski*. Instruction 26 adds: 'The plaintiff must prove these elements by a preponderance of the evidence.'" *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* at 526, 811 P.2d at 484.

[125] *Id.* at 528, 811 P.2d at 485.

[126] *Id.* The court referred to the Hawaii Supreme Court's requirement for a "reasonably close causal connection between the conduct and the resulting injury" (quoting Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 385, 742 P.2d 377, 383 (1987) (quoting PROSSER AND KEETON, *supra* note 22, § 30, at 165)). The court also relied on Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir. 1972) ("A causal connection exists when, but only when, disclosure of significant risks incidental to treatment would have resulted in a decision against it.").

court examined *Hawaii Revised Statutes* section 671-1(2)[127] and noted that the definition of professional negligence included a requirement that the negligence (in this case providing service without informed consent) "proximately causes death, injury, or other damage to a patient."[128] Since the legislature did not define "proximately causes," the court held that "the legislature accepted the common law proximate causation rules relating to the doctrine of informed consent as set forth in *Prosser and Keeton*."[129] The court's third argument involved examination of the legislative history of *Hawaii Revised Statutes* section 671. While Keomaka contended that "the legislative intent of Chapter 671-1 et. seq. [was] to protect patients,"[130] the court indicated that the legislative history was most consistent with the idea that Chapter 671 was originally passed to reduce the physician's duty of disclosure and to help the physician create a defense by complying with established standards.[131]

B. Superseding Cause

The court then examined the issue of superseding cause. The court noted that the trial court had instructed the jury that Keomaka had to prove that there was no superseding cause.[132] The trial court went on to define superseding cause as "an act of a third person or other force which . . . prevents the original actor from being liable for harm to another."[133] Keomaka contended that in the absence of any evidence of superseding cause, it was erroneous to instruct the jury on superseding cause.[134] The court agreed and held that in the absence of any evidence of superseding cause it was error for the trial court to give

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[127] HAW. REV. STAT. § 671-1(2) (1985).

[128] *Keomaka*, 8 Haw. App. at 527, 811 P.2d at 484 (quoting HAW. REV. STAT. § 671-1(2) (1985)).

[129] *Id.*

[130] Appellant's Opening Brief at 24, Keomaka v. Zakaib, 8 Haw. App. 526, 811 P.2d 478, 483 (1991) (No. 86-0450(2)).

[131] *Id.* at 528, 811 P.2d at 485. The court pointed out that HAW. REV. STAT. ch. 671 was prompted by a national medical malpractice crisis that was reflected in Hawai'i by only one insurer providing malpractice coverage and substantial increases in malpractice premiums. In addition to providing for the establishment of standards for informed consent, it also provided other reforms, such as the elimination of the "ad damnum" clause and the establishment of a patient's compensation fund. *Id.*

[132] *Id.* at 529, 811 P.2d at 485.

[133] *Id.* at 530, 811 P.2d at 485.

[134] *Id.*

instructions on superseding cause.[135] The court acknowledged Zakaib's argument that Keomaka had injured himself while swimming.[136] However, the court noted that because Zakaib alleged that Keomaka had injured himself, the correct principle to invoke was that of avoidable consequences, which addresses damages that occur after the legal wrong has occurred, but which could have been avoided.[137]

C. Contributory Negligence

The last issue the court addressed may, in the end, turn out to be the most important. That issue is whether a patient can be contributorily negligent when a physician attempts to obtain informed consent.[138] The *Keomaka* court held, in firm and unequivocal language, that "contributory negligence has no place in an action for failure to obtain informed consent."[139]

The court began its analysis of this issue by reviewing the printed consent form that Keomaka signed, noting that the document itself only described the condition necessitating the operation and a general description of the operation.[140] Beneath that, the form stated the following:

> I AGREE THAT MY PHYSICIAN HAS INFORMED ME OF THE:
> a) DIAGNOSIS OR PROBABLE DIAGNOSIS.
> b) NATURE OF THE TREATMENT OR PROCEDURES RECOMMENDED
> c) RISKS OR COMPLICATIONS INVOLVED IN SUCH TREATMENT OR PROCEDURES.

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[135] *Id.* The court stated that although the plaintiff must prove that no other cause is a superseding cause (material element five), the burden arises only when the defendant produces sufficient evidence to raise the issue. *Id.*

[136] *Id.*

[137] *Id.*

[138] Hawai'i has adopted a comparative negligence standard. HAW. REV. STAT. § 663-31 (1985). The statute states that contributory negligence will not bar recovery, as long as it is not greater than the negligence of the person or persons against whom recovery is sought. However, damages will be reduced by the percentage of contributory negligence attributable to the person for whom recovery is being sought. *Id.* § 663-31(a).

[139] *Keomaka*, 8 Haw. App. at 532, 811 P.2d at 486 (quoting Alexander M. Capron, *Informed Consent in Catastrophic Disease Research and Treatment*, 123 U. PA. L. REV. 340, 410 (1974)).

[140] *Id.* at 531, 811 P.2d at 486.

d) ALTERNATIVE FORMS OF TREATMENT, INCLUDING NON-TREATMENT, AVAILABLE.
e) ANTICIPATED RESULTS OF THE TREATMENT.[141]

The court stated that the argument that Keomaka's failure to read the form was contributory negligence was without merit.[142] In developing its rationale, the court pointed out that the concept of contributory negligence requires that the plaintiff's conduct fall below that to which "he is required to conform for his own protection."[143] However, the court, citing supporting case law and authority, reasoned that the duty to inform rests with the physician.[144] The court held that:

> because of the superior knowledge of the doctor with his expertise in medical matters and the generally limited ability of the patient to ascertain the existence of certain risks and dangers that inhere in certain medical treatments. It would be unfair and illogical to impose on the patient the duty of inquiry or other affirmative duty with respect to informed consent.[145]

To further drive home the point regarding the physician's duty, the court specifically stated that the mere signing of a printed consent form does not fulfill the physician's duty and "is not a substitute for the required disclosure by the physician."[146] As the court noted, "there

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[141] *Id.*

[142] *Id.*

[143] *Id.* (quoting PROSSER AND KEETON, *supra* note 22, § 65, at 451). *Prosser and Keeton* goes on to point out that the "defense is one of the plaintiff's disability, rather than the defendant's innocence." PROSSER AND KEETON, *supra* note 22, § 65, at 452.

[144] *Keomaka*, 8 Haw. App. at 532, 811 P.2d at 486. The court referred to Cunningham v. Parikh, 472 So. 2d 746, 748 (Fla. 1985) (holding that informed consent "is an affirmative duty requiring an affirmative act").

[145] *Keomaka*, 8 Haw. App. at 532, 811 P.2d at 486 (quoting Morrison v. MacNamara, 407 A.2d 555, 567 (D.C. Cir. 1979)). The *Keomaka* court extracted the phrase "the superior knowledge of the doctor with his expertise in medical matters and the general limited ability of the patient to ascertain the existence of certain risks and dangers that inhere in certain medical treatments . . . ." *Morrison*, 407 A.2d at 567. The context of this quote, however, was not one of contributory negligence, but rather assumption of risk, an altogether different legal defense. The end result, however, is the same, according to the *Morrison* court, because "save for exceptional circumstances, a patient cannot assume the risk of negligent treatment." *Id.* at 568. In Hawai'i, failure to obtain informed consent is, by statutory definition, negligence, and thus a risk that the patient cannot assume. *See* HAW. REV. STAT. § 671-1(2) (1985).

[146] *Keomaka*, at 532, 811 P.2d at 486. The court did not discuss whether or not the physician's duty could be carried out through affirmative acts of other hospital

was nothing on the form concerning the possible effects or risks of the August 1, 1984 surgery or alternative forms of treatment . . . ."[147] Therefore, on the face of it, the form did not meet the statutory requirements for informed consent.[148] It is unclear, however, whether a properly constructed form—i.e., one that in plain and understandable English listed all the necessary information regarding risks, benefits, and alternative treatments—if actually read, understood, and signed by a patient, would constitute a binding acknowledgment by the patient that he or she was in fact adequately informed about an upcoming procedure and had in fact provided informed consent to that procedure.

V. IMPACT

In *Keomaka*[149] the court reaffirmed its adoption of the *Leyson* definition of the tort of a physician's failure to disclose the risks of harm.[150] *Keomaka* recognizes the patient's right to have information related to his or her treatment.[151] *Keomaka* also affirms the patient's right to make a treatment decision based on what is important to that particular patient, limited only by the requirement that he or she act "rationally and reasonably."[152] Because the issue was not directly raised in *Keomaka*, the court did not address the standard of disclosure required of the physician.[153]

The court rejected Keomaka's argument that it was error to require Keomaka to prove that he would not have undergone the surgery had he been properly informed.[154] The impact of this is to reinforce the

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personnel, such as nurses or pharmacists, and if so, what the physician's duty was to make sure that the information had been understood by the patient. The point is of more than academic interest because many hospitals now use nurses or pharmacists to provide patient education regarding disease and treatment. *See infra* notes 162, 166, 168 and accompanying text.

[147] *Keomaka*, 8 Haw. App. at 533, 811 P.2d at 487.

[148] *Id.*

[149] 8 Haw. App. 518, 811 P.2d 478 (1991).

[150] Leyson v. Steuermann, 6 Haw. App. 504, 516-17, 705 P.2d 37, 47 (1985); *see supra* note 94 and accompanying text.

[151] *Keomaka*, 8 Haw. App. at 523, 811 P.2d at 482.

[152] *Id.* at 524-25, 811 P.2d at 483.

[153] *Id.* at 524, 811 P.2d at 482.

[154] *Id.* at 526-28, 811 P.2d at 484-85.

concept that failure to obtain informed consent is a tort to be tried in negligence and not battery.[155]

Keomaka also reaffirmed the traditional requirement of proving that the failure to provide information was a proximate cause of the alleged injury.[156] While acknowledging the importance of looking at each patient's right to determine what happens to his or her body, the court nonetheless recognized that the informed consent legislation actually grew out of a concern for a perceived "national crisis in the area of medical malpractice."[157] In addition, the court set an outer limit to the concept of patient autonomy, indicating how far the court would go to protect it.[158] The decision meant that the court remained faithful to the intent behind the original informed consent legislation.[159]

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[155] One of the required elements in negligence is proof of actual damages. "Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred." *See* PROSSER AND KEETON, *supra* note 22, § 30 at 165; *see also infra*, note 158 (discussing allowance of an action for battery when there was no informed consent, even if the sharing of risk information would have still resulted in the same outcome).

[156] *Keomaka*, 8 Haw. App. at 527, 881 P.2d at 484.

[157] *Id.* at 528, 811 P.2d at 484. Act 219 states:

> SECTION 1. Legislative findings and purposes.(a) The legislature finds that:
> (1) The national crisis in the area of medical malpractice affects Hawaii to the potential disadvantage of all recipients of health care;
> (2) There is only one insurance carrier that is actively providing medical malpractice coverage in the state;
> (3) Premium rates for medical malpractice insurance have increased substantially and are expected to continue to increase under existing conditions, both for physicians and surgeons and for hospitals;
> . . . .
> (b) the purposes of this Act are to:
> (1) Stabilize the medical malpractice insurance situation by reintroducing some principles of predictability and spreading of risk;

Act 219, 8th Leg., 2nd Sess. (1976), *reprinted in* 1976 Haw. Sess. Laws 523.

[158] *Keomaka*, 8 Haw. App. at 526-28, 811 P.2d at 484-85. Crisp has forcefully argued for allowing an action for battery. The essence of the argument is that when a patient is deprived of the right to make a choice (even if it would have resulted in the same outcome) there has been a violation of the patient's ability to exercise his or her right to make a decision, and thus a violation of autonomy. This violation is viewed as harmful in and of itself, and worthy of legal action. *See* Roger Crisp, *Medical Negligence, Assault, Informed Consent, and Autonomy*, 17 J. L. & Soc'y 77 (1990). *See also* Alan Weisbard, *Informed Consent: The Law's Uneasy Compromise With Ethical Theory*, 65 Neb. L. Rev. 749, 763 (1986) (discussing a new tort of failure to facilitate the patient's exercise of a "right to participate in medical decision on an informed, understanding, and voluntary basis").

[159] *Keomaka*, 8 Haw. App. at 529, 811 P.2d at 485.

This requirement to prove that the failure to disclose information would lead to a different decision, combined with the earlier *Mroczkowski* rule requiring expert testimony to establish that a risk associated with the procedure in fact existed,[160] will have an impact on the process and outcome of future informed consent cases. *Keomaka* maintains and reinforces the barriers that a plaintiff must overcome to proceed in a negligence action based on failure to obtain informed consent. This makes a successful suit less likely. The plaintiff will have to find expert testimony that the risk of an adverse outcome in fact existed and that the adverse outcome occurred. After that, the plaintiff must still convince the fact finder that he or she would not have undergone the procedure or therapy had the proper information been provided. These particular barriers may reduce the amount of informed consent litigation.

The impact of the *Keomaka* court's holding on superseding cause may have just the opposite effect. It establishes that the defendant must present evidence regarding superseding cause before the plaintiff is obligated to prove that no other cause is a superseding cause.[161] Just as the court's holding regarding risk and injury requires the plaintiff to present evidence to support its allegations, this holding requires the defendant to present evidence supporting its allegations regarding superseding cause. Given the countervailing effects of these holdings, it is difficult to predict whether or not they will result in any significant change in the volume or outcome of informed consent suits.

The *Keomaka* court's ruling on the role of contributory negligence in informed consent cases will probably have the biggest impact, and that impact will be on patient care. *Keomaka* establishes that the routine consent forms that patients often sign on entering a facility have no legal significance in the absence of evidence that the physician actually performed his duty to disclose risk and alternative treatment information. It probably also signifies a move away from the "paper consent" documentation via various forms, and an increased focus on physician documentation of actual discussions with their patients. Directors of quality assurance programs in hospitals are likely to focus more attention in this particular area.[162]

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[160] Mroczkowski v. Straub, 6 Haw. App. 605, 610, 732 P.2d 1257, 1259 (1987). "Mroczkowski was required to prove by proper evidence that the harm he is complaining about was a probable risk of the . . . operation *and* that Straub knew or should have known of that fact." *Id.* (emphasis added).

[161] *Keomaka*, 8 Haw. App. at 530, 811 P.2d at 485.

[162] Telephone Interview with Linda Schladermundt, Quality Assurance Consultant,

In addition to changing how informed consent documentation is handled, *Keomaka* might also improve patient care. It will force physicians to more clearly justify their clinical interventions, rather than to rely on the old saw that "it's the usual procedure." This might reduce the number of invasive or high risk procedures. For example, a program at Dartmouth Medical School documented that after viewing a video that gave information on continued medical observation versus surgery for benign prostatic hypertrophy,[163] one third of the patients that had favored surgery changed their minds.[164] The provision of additional information resulted in an increase in the number of patients choosing the less expensive medical treatment option.[165]

Finally, because informing patients is often a time consuming process of education about diseases, treatments, and procedures, it is likely that other professionals will become involved. For example, critical-care nurses are intimately involved in the ongoing daily care and education of their patients. One commentator noted that intensive care patients have multiple physicians that see them intermittently and address only discrete aspects of care.[166] This often leads to the patient having fragmented information. The nurse, however, is with the patient for extended periods of time and is able to help the patient by answering questions, integrating information, and providing direction for further questions.[167] Similarly, pharmacists, are involved in educating patients about medications and side-effects.[168] The pharmacists' activities involve both voluntary group education experiences as well as hospital mandated patient education sessions for particular medication regimes.[169]

Hawaii State Hospital (Sept. 25, 1991). Schladermundt indicated that quality assurance staff would examine the progress note section of the medical record. They would look for separate physician documentation that the physician discussed specific risks and alternative treatments with the patient. *Id.*

[163] Benign prostatic hypertrophy is a common disease involving the enlargement of the prostate gland in men over 45. Surgery is required in five to ten percent of men affected. *See* STANLEY ROBBINS, PATHOLOGIC BASIS OF DISEASE 1192 (1974).

[164] Spencer Vibbert, *Better-Informed Patients Choose Medical Over Surgical Treatments*, 19 MED. UTILIZATION REV. No. 17, at 1 (1991).

[165] *Id.*

[166] Ann M. Schoepfle, Comment, *Critical-Care Nurses—Involved in the Informed Consent Process*, 19 U. TOL. L. REV. 135 (1987) [hereinafter *Critical-Care Nurses*].

[167] *Id.* at 147.

[168] Telephone Interview with Carol Omura, Registered Pharmacist, The Queen's Medical Center, Honolulu, Haw. (Sept. 30, 1991).

[169] *Id.*

However, hospitals might negate these gains if they interpreted the *Keomaka* court's holding on the physician's duty to provide informed consent as insulating the hospitals from any liability for failure to obtain informed consent. It would be ironic indeed if, in attempting to protect patient autonomy, the court's holding negatively impacted the move towards increased professional autonomy and responsibility (and resultant increased patient contact and education) for nurses and pharmacists.

In order to further strengthen the process of informed consent, the legislature might choose to examine the role of the hospital in informed consent liability. Various commentators have examined the question of hospital liability for failure to obtain informed consent, and generally agree that, excepting special circumstances, hospitals have not been held liable by courts in informed consent cases.[170] *Keomaka*, by placing the duty to inform squarely on the physician, seems to be consistent with this view.

Recently however, there has been the suggestion that medical malpractice, including informed consent torts, should be viewed as enterprise liability.[171] Under this theory, hospitals would become liable for the torts of the physicians on their medical staffs. Physicians would be exculpated from liability and the hospital would assume liability and either obtain insurance or self-insure. This would leave the patient's entitlement to recover for injuries untouched but change the responsible party.[172] Given the increasingly accepted view of a "healthcare team"[173] and its various members' involvement in the informed consent process, it would seem quite reasonable for the legal system to focus on institutional liability and prevention.

> The best vehicle for identifying and dealing with such incidents is the organization in which the doctor practices. The memory of the institution

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[170] *See* Dale H. Cowan & Eva Bertsch, *Innovative Therapy: The Responsibility of Hospitals*, 5 J. LEG. MED. 219 (1984), *reprinted in* 33 DEF. L. J. 623 (1984); Carole A. Tillotson, *Hospitals and Informed Consent: Physician's Duty Alone?*, 39 FED'N INS. & CORP. COUNS. Q. 292 (1989); *Critical-Care Nurses, supra* note 166, at 135; Steven R. Conlin, Note, *Hospital Corporate Negligence Based Upon a Lack of Informed Consent*, 19 SUFFOLK U. L. REV. 835 (1985); Mary L. Malone, Note, *Informed Consent and Hospital Consent Forms: Paper Chasing in a Video World*, J. URB. L. 105 (1983).

[171] AMERICAN LAW INSTITUTE, REPORTERS STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991).

[172] AMERICAN LAW INSTITUTE, 2 REPORTERS STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 114-15 (1991) [hereinafter A.L.I., 2 REPORTERS STUDY].

[173] *Critical-Care Nurses, supra* note 166, at 111.

> can serve to record and piece together patterns in a host of apparently idiosyncratic incidents. The collective wisdom of the hospital team can be pooled to devise feasible procedures and technologies for guarding against the ever present risk of occasional human failure by even the best doctors. . . . Not only does the organization have a greater capacity to establish such quality assurance programs, but is also more likely to be influenced to do so by the incentives created by tort liability.[174]

The practical impact of this system under the facts of *Keomaka* would be to still allow Mr. Keomaka to file suit. The suit, however would have been against the facility where Dr. Zakaib performed the surgery. The facility would then have had a vested interest in assuring that Dr. Zakaib adequately performed his duty of obtaining informed consent. Through its quality assurance procedures and its professional nursing staff it could develop procedures to ensure that such an operation did not proceed without Mr. Keomaka's informed consent.

The *Keomaka* court's holding still leaves some unresolved issues. The guidelines regarding exactly what is to be disclosed, and by what standard, remain ambiguous. *Nishi* seems to suggest a professional standard for disclosure of risk information.[175] Yet in *Mroczkowski*, the court stated that "we do not answer the question of whether the seriousness of the risk is to be answered from the point of view of the patient, the physician, or otherwise."[176]

Because of this ambiguity, physicians may overreact to the situation. If physicians give too much information they expose their patients to at least two possible risks. The first is that excessive information will confuse patients or numb them to the most salient of the risks and alternatives, and they will just reflexively agree to whatever the physician proposes, on the theory that it is all too complex for them.[177] On the other hand, since all procedures and treatments have very rare but potentially life-threatening risks, physicians may find themselves inadvertently scaring patients away from treatments that would be of significant benefit to the patient.[178]

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[174] ALI, 2 REPORTERS STUDY, *supra* note 172, at 123.

[175] Nishi v. Hartwell, 52 Haw. 188, 195-97, 473 P.2d 116, 121 (1970).

[176] Mroczkowski v. Straub Clinic & Hosp., 6 Haw. App. 605, 609, 732 P.2d 1255, 1259 (1987).

[177] Alan J. Weisbard, *Informed Consent: The Law's Uneasy Compromise With Ethical Theory*, 65 NEB. L. REV. 749, 756 (1986).

[178] *See* Jon F. Mertz & Baruch Fischhoff, *Informed Consent Does Not Mean Rational Consent*, 11 J. LEGAL MED. 321 (1990) (providing additional discussion of this issue).

VI. CONCLUSION

Keomaka v. Zakaib[179] is the most recent informed consent decision from the Intermediate Court of Appeals. In its first case the court updated the definition of the tort of failure to disclose risk information.[180] It then clarified its position regarding proof of risk.[181] *Keomaka* addressed proof of causality,[182] the appropriate handling of superseding cause,[183] and the affirmative nature of the duty to provide risk information.[184] The court held that to prove causality the plaintiff must show not only the role of the treatment in causing the injury but also that the disclosure of risk would have resulted in the plaintiff rejecting the treatment.[185] The court also clarified the defense of superseding cause and held that in the absence of any evidence of a superseding cause the trial court should not instruct the jury on superseding cause.[186]

The court's handling in *Keomaka* of the relative roles and responsibilities of the physician and of the patient open up areas of broader policy. The *Keomaka* court was clear and unambiguous in its language establishing that the physician has an affirmative duty to obtain informed consent and that by the very nature of patienthood the patient could not be contributorily negligent.[187] The aim was to protect patient autonomy and to ensure that medical choices were made from an informed position. However, the nature of the litigation—an action against a physician—kept the court from addressing broader questions

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Psychiatric medicine has been trying to deal with this problem for a number of years. *See* R. Simon, CLINICAL PSYCHIATRY AND THE LAW, ch. 7 at 100-31. When a patient is considered to be legally competent but their psychiatric disease causes them to focus on information differently than they do when healthy, the psychiatrist is walking a tightrope in trying to provide information that is both adequate to the patient's needs and as free as possible from the effects of cognitive distortion due to the patient's illness. Simon discusses the problem of a depressed patient who, seeing his future as bleak and hopeless, declines to give permission for treatment because "there is no point in treating a man about to die." *Id.* at 100-01.

[179] 8 Haw. App. 518, 811 P.2d 478 (1991).

[180] Leyson v. Steuermann, 5 Haw. App. 504, 705 P.2d 37 (1985); *see also supra* notes 89-99 and accompanying text.

[181] Mroczkowski v. Straub Clinic & Hosp., 6 Haw. App. 605, 732 P.2d 1255 (1987).

[182] 8 Haw. App. at 525-29, 811 P.2d at 484-85.

[183] *Id.* at 529-30, 811 P.2d at 485.

[184] *Id.* at 532-33, 811 P.2d at 486.

[185] *Id.* at 527, 811 P.2d at 484-85.

[186] *Id.* at 530, 811 P.2d at 485.

[187] *Id.* at 533, 811 P.2d at 486-87.

relating to how patients actually get information about their medical treatment, and whether that should be reflected in our system of tort liability.

George D. Bussey

Johnston v. KFC National Management Co.: Employer Social-Host Liability for Torts of Intoxicated Employees

I. INTRODUCTION

Over the years, the Hawaii State Legislature "has demonstrated an active and ongoing interest in enacting heavier punishment for alcohol abusers and drunk drivers."[1] Indeed, society has become increasingly aware of the dangers of mixing gasoline and liquor.[2] Furthermore, the catastrophic personal and economic impacts incident to accidents resulting from drinking and driving "are a profoundly disturbing social phenomena of our time."[3]

While the intoxicated driver generally bears the responsibility for injuries caused in alcohol-related vehicular accidents, society has at-

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[1] Johnston v. KFC Nat'l Management Co., 71 Haw. 229, 233, 788 P.2d 159, 163 (1990).

[2] Burkhart v. Harrod, 755 P.2d 759, 766 (Wash. 1988) (Utter J., concurring) ("It is beyond question that a foreseeable result of 'mixing gasoline and liquor' is, at the least, some driving error, or at the most a tragic accident.") (quotations original); McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 145-46 (Mass. 1986) ("The trend towards imposing liability [on the social host] is no doubt a response to the greater concern of society in recent years regarding the problems of drunken driving."); Mary M. French et al., Project, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058, 1059 (1985) [hereinafter French et al.] ("Public awareness of the problem of drinking and driving has increased dramatically in recent years.").

[3] Coulter v. Superior Court of San Mateo County, 577 P.2d 669, 675 (Cal. 1978), *superseded by statute*, CAL. BUS. & PROF. CODE § 25602 (West 1985) (prohibiting the recovery of damages by a third party against any commercial or non-commercial provider of alcohol on the basis that the third parties' injuries are proximately caused by the *consumption*, rather than the provision of alcohol).

tempted to impose blame on the driver's liquor furnisher(s) as well.[4] Today, "social host liability remains a controversial tool for reducing the incidence of drunk driving."[5]

Johnston v. KFC Nat'l Management Co.[6] is the most recent Hawai'i case dealing with the issue of social host liability. In *Johnston*, the Hawaii Supreme Court held that social hosts owed no duty of care to protect a third party against risks of injury caused by an intoxicated guest.[7]

This casenote addresses the issue of social host liability where the social host is the employer of the intoxicated driver, and discusses various theories of social host liability. It concludes with a discussion of the impact of the *Johnston* holding on future litigants.

II. Facts

On December 19, 1986, the employees of the 'Aiea branch of KFC (formerly Kentucky Fried Chicken) planned an after-hours Christmas party for themselves.[8] KFC management gave approval for the party to be held on the premises and allowed the participants to eat leftover chicken on KFC paper goods.[9] However, all alcoholic beverages were supplied *solely* by the participants.[10]

Sandra Joan Parks, an employee from another KFC branch, attended the party as a guest of the 'Aiea KFC manager.[11] Sometime during the evening, Parks, Andrea Cui, a nineteen-year-old 'Aiea KFC employee, and Cui's friends left to "continue the Christmas party" at Cui's home.[12] When Parks left the party, she was allegedly "visibly intoxicated."[13]

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[4] *See, e.g.*, Comment, *Noncommercial Liquor Vendor Liability: Social Host and Employer-Host Liability in Minnesota:* Holmquist v. Miller, *367 N.W.2d 468 (Minn. 1985);* Meany v. Newell, *367 N.W.2d 472 (Minn. 1985)*, 9 Hamline L. Rev. 223 (1986) [hereinafter *Noncommercial Liquor Vendor Liability*].

[5] French et al., *supra* note 2, at 1062.

[6] 71 Haw. 229, 788 P.2d 159 (1990).

[7] *Id.* at 234, 788 P.2d at 164.

[8] *Id.* at 230, 788 P.2d at 160.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

When the group reached Cui's residence, Cui brought out an ice chest containing beer which Parks helped to consume.[14] This "party" continued outside the Cui residence while Cui's parents were asleep in their bedroom.[15]

On the early morning of December 20, 1986, Parks drove to her Ward Avenue home in Honolulu to shower and change clothes.[16] She then proceeded to drive her friend home, at which time she crashed into a moped driven by Donna Johnston.[17] Johnston was permanently injured as a result of the accident.[18]

Johnston brought suit against several defendants,[19] including KFC, for damages relating to the accident.[20] With regard to KFC, Johnston alleged that KFC was negligent in (1) permitting alcoholic beverages to be consumed on their premises, (2) failing to prevent Parks from becoming intoxicated, and (3) failing to prevent Parks from driving while intoxicated.[21] KFC prevailed on its motion for summary judgment, and Johnston appealed.[22] The Hawaii Supreme Court affirmed the lower court's findings, stating that KFC was not a "host" since it did not provide or serve any alcohol to Parks.[23]

III. History

Under traditional common law, a supplier of alcohol was not liable for injuries caused by a person who drank the liquor.[24] The premise of this theory was that a person who consumes liquor of his own volition was responsible for his own actions and thus, was the proximate cause

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 230-31, 788 P.2d at 160-61.

[18] *Id.* at 231, 788 P.2d at 161.

[19] *Id.* Other defendants named in the suit were Andrea Cui and Andrea Cui's parents. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* (stating that at common law, the person consuming the liquor was deemed to be the "sole proximate cause" of any injuries he inflicted on a third party as a result of his intoxication); *see also* Ono v. Applegate, 62 Haw. 131, 135, 612 P.2d 533, 537 (1980) ("Under the old common law rule, an injured third party could not recover against a supplier of liquor for injuries suffered as a result of the tavern patron's intoxication.").

of the harm.[25] Even if the sale or service of alcohol was found to have caused the drinker's intoxication, the third party's injuries were thought to be an unforeseeable result of the furnishing of the alcohol.[26] This rule was based on the supposition that even if one is furnished with liquor, he would not become intoxicated if he does not drink it.[27]

The modern trend, however, has been to allocate liability for the harm between the intoxicated driver and the *furnisher* of the liquor.[28] In the case of an employer who gratuitously furnishes alcohol in a social host situation, courts have generally applied the following theories when addressing the liability issue: (1) extension of state dram shop acts to encompass noncommercial alcohol suppliers,[29] (2) statutory violations of existing beverage control statutes,[30] (3) common law principles of ordinary negligence, and (4) principles of vicarious liability.[31]

A. Recovery Under Dram Shop Acts

1. Elements

Dram shop acts impose civil liability on sellers and/or givers of alcoholic beverages who "cause" the intoxication of a person by giving away liquor.[32] Generally, to establish a cause of action under a dram

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[25] Johnston v. KFC Nat'l Management Co., 71 Haw. 229, 231, 788 P.2d 159, 161 (1990); Ono v. Applegate, 62 Haw. 131, 135, 612 P.2d 533, 537 (1980); *see also* David M. Holliday, Annotation, *Intoxicating Liquors: Employer's Liability For Furnishing or Permitting Liquor on Social Occasion*, 51 A.L.R. 4th 1048 (1987) [hereinafter Holliday]; Edward L. Raymond, Jr., Annotation, *Social Host's Liability for Injuries Incurred by Third Parties as a Result of Intoxicated Guest's Negligence*, 62 A.L.R. 4th 16 (1987).

[26] *Ono*, 62 Haw. at 135, 612 P.2d at 537.

[27] Baird v. Roach, Inc., 462 N.E.2d 1229, 1232 (Ohio Ct. App. 1983).

[28] *Ono*, 62 Haw. at 135, 612 P.2d at 537; *see also* Burkhart v. Harrod, 755 P.2d 759 (Wash. 1988) (holding commercial furnishers of alcohol liable for damages); Dickinson v. Edwards, 716 P.2d 814 (Wash. 1986) (furnishing of liquor is the proximate cause of the injury; employer may be held liable).

[29] *See infra* text accompanying notes 32-42.

[30] *See infra* text accompanying notes 43-67.

[31] *See* Costa v. Able Distributors, Inc., 3 Haw. App. 486, 490, 653 P.2d 101, 105 (1982). Principles of vicarious liability include the doctrine of respondeat superior, ratification, and the negligent failure of the employer to control his employee's actions. *Id.*; *see also infra* text accompanying notes 80-105.

[32] French et al., *supra* note 2, at 1067. Dram shop acts did not concentrate on reforming the individual drinker, but rather, sought to create a *disincentive* to supply

shop act, the plaintiff must usually prove the following elements:

(1) That an intoxicating liquor was involved;
(2) That the defendant transferred the liquor;
(3) That the [intoxicated party] consumed the liquor;
(4) That the [intoxicated party] became intoxicated, or that the drink contributed to an existing state of intoxication;
(5) That the [intoxicated party] caused an actionable injury to the plaintiff;
(6) That the intoxication had a causal connection to the plaintiff's injury; and
(7) That the furnishing of liquor was unlawful.[33]

However, most courts have held that dram shop acts were not intended to apply to the furnishing of intoxicating liquors in a social setting.[34]

2. Employer-social host liability

Most courts have held that dram shop acts do not apply to social hosts[35] or employers who gratuitously provide alcohol to an employee.[36] The rationale behind these holdings is usually one of three things: (1) that the legislature did not intend to include the social host within the scope of the act, that is, the dram shop acts apply only to commercial vendors of intoxicants,[37] (2) that extending the scope of the statute would open a "virtual Pandora's Box to a wide range of numerous

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liquor, thereby affecting its availability. *Id.* at 1066.

Hawai'i does not have a dram shop statute, but Ono v. Applegate, 62 Haw. 131, 612 P.2d 533 (1980), created a common law dram shop cause of action. Under *Ono*, third parties may recover from the tavern that provided the alcohol under HAW. REV. STAT. § 281-78(a)(2)(B). *Id.* at 133-34, 612 P.2d at 535-36; *see also infra* text accompanying notes 43-67.

[33] French et al., *supra* note 2, at 1070 (citing 12 AM. JUR. TRIALS *Dram Shop Litigation* 729, 738 (1966)).

[34] Holliday, *supra* note 25, at 1054.

[35] French et al., *supra* note 2, at 1071; John R. Erickson et al., Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013, 1016 (1983) [hereinafter Erickson et al.].

[36] Holliday, *supra* note 25, at 1054; Erickson et al., *supra* note 35, at 1016.

[37] *See* Miller v. Owens-Illinois Glass Co., 199 N.E.2d 300, 306 (Ill. App. Ct. 1964); Meany v. Newell, 367 N.W.2d 472, 474 (Minn. 1985); Edgar v. Kajet, 375 N.Y.S.2d 548, 552 (N.Y. Sup. Ct. 1975), *aff'd*, 389 N.Y.S.2d 631 (N.Y. App. Div. 1975); *see also* Keckonen v. Robles, 705 P.2d 945, 947 (Ariz. 1985) (noting that in states with dram shop acts, courts generally refuse to extend liability to the social host on the ground that any extension of liability should be imposed by the legislature).

potential defendants,"[38] or (3) that the act was penal, not remedial or compensatory, in nature.[39] In refusing to apply dram shop acts to social hosts, some courts hold that even though the acts themselves imposed liability on a seller *or* giver of intoxicating liquor,[40] the acts were aimed only at those engaged in the liquor traffic.[41] Courts that imposed liability on the social host through dram shop acts subsequently found their decisions statutorily reversed by the legislature, which enacted statutes to bar causes of action against nonlicensees.[42]

B. Recovery Under Beverage Control Statutes

Violation of beverage control statutes is one of two negligence-based theories of liability. Beverage control statutes generally provide a cause of action against commercial vendors for sales or gifts of alcohol to minors and/or intoxicated persons.[43]

1. Creation of common law dram shop action in Hawai'i: Ono v. Applegate[44]

The Hawaii Supreme Court created a common law dram shop action against commercial vendors of liquor in *Ono v. Applegate*.[45] In *Ono*,

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[38] *Edgar*, 375 N.Y.S.2d at 552.

[39] *Miller*, 199 N.E.2d at 305; *see also* French et al., *supra* note 2, at 1071.

[40] French et al., *supra* note 2, at 1071.

[41] *See, e.g.*, *Miller*, 199 N.E.2d at 305, 306; *Meany*, 367 N.W.2d at 474; *Edgar*, 375 N.Y.S.2d at 551.

[42] *See* Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972), *superseded by statute*, IOWA CODE ANN. § 123.92 (West 1987) (limiting liability to liquor licensees and permittees), *overruled by* Lewis v. Iowa, 256 N.W.2d 181 (Iowa 1977); Ross v. Ross, 200 N.W.2d 149 (1972), *superseded by statute*, MINN. STAT. ANN. § 340A.801 (West 1990) (limiting liability to commercial vendors); Coulter v. Superior Court of San Mateo County, 577 P.2d 669 (Cal. 1978), *superseded by statute*, CAL. BUS. & PROF. CODE § 25602 (West 1985) (prohibiting liability of both commercial and non-commercial providers of alcohol).

[43] French et al., *supra* note 2, at 1066. The relevant provision in HAW. REV. STAT. states, in pertinent part:

> (a) At no time under any circumstances shall any liquor:
>
> . . . .
>
> (2) Be sold or furnished by *any licensee* to:
>
> . . . .
>
> (B) Any person at the time under the influence of liquor . . . .

HAW. REV. STAT. § 281-78(a)(2)(B) (1976) (emphasis added). "Licensee" is defined as including "all agents, servants and employees of the holder of a license." *Id.* § 281-1 (1976).

[44] 62 Haw. 131, 612 P.2d 533 (1980).

[45] *Id.* at 137, 612 P.2d at 538.

plaintiff Masaichi Ono was one of several passengers in a car which collided head-on with another car driven by Samantha Scritchfield.[46] Prior to the collision, Scritchfield had been drinking alcoholic beverages at her apartment and at a bar called the Sand Trap.[47] Plaintiff brought suit against Scritchfield's estate and H. Jon Applegate doing business as the Sand Trap.[48] Plaintiffs alleged that the Sand Trap violated *Hawaii Revised Statutes* section 281-78(a)(2)(B)[49] by (1) negligently supplying alcohol to Scritchfield who was already inebriated upon entering the bar and (2) negligently allowing Scritchfield to leave the bar in an intoxicated condition.[50] The court found that under common law negligence principles[51] violation of Hawai'i's beverage control act could be used to establish breach of duty[52] and that a tavern's sale or service of alcohol to an inebriated automobile driver could be the proximate cause of injuries inflicted upon a third party by the driver.[53] Overall, imposition of liability on the commercial vendor of alcohol was justified on the grounds that the consequences of serving liquor to an intoxicated motorist were foreseeable in light of the increasing frequency of accidents involving drunk drivers.[54]

2. *Employer-social host liability*

Proponents of social host liability argue that violation of a beverage control act constitutes either a presumption of negligence, or negligence

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[46] *Id.* at 134, 612 P.2d at 536 (Scritchfield was killed in the collision).

[47] *Id.*

[48] *Id.*

[49] *See supra* note 43.

[50] *Ono*, 62 Haw. at 134, 612 P.2d at 536.

[51] *Id.* at 136-37, 612 P.2d at 538-39. The court found that in order for plaintiffs to recover, they needed to prove: (1) existence of a duty, (2) breach of duty, (3) "[a] reasonable [sic] close causal connection between the conduct and the resulting injury," and (4) actual losses or damages. *Id.*

[52] *Id.* at 137, 612 P.2d at 539.

[53] *Id.* at 138, 612 P.2d at 540 (citing Deeds v. United States, 306 F. Supp. 348, 361 (D. Mont. 1959); Lewis v. Iowa, 256 N.W.2d 181, 191-92 (Iowa 1977); Vesely v. Sager, 486 P.2d 151, 159 (Cal. 1971)).

[54] *Id.* at 138, 612 P.2d at 540.

Generally, intervening acts do not relieve a negligent actor of liability to the injured party if such acts are reasonably foreseeable. *Id.* In this case, "the consumption [of alcohol], resulting inebriation and injurious conduct" were found to be foreseeable intervening acts which did not relieve the tavern owner of liability. *Id.* at 138-39, 612 P.2d at 540-41.

per se on the part of the social host.[55] Courts more readily recognize violations of beverage control acts as a basis for actions against licensees rather than against social hosts.[56] Courts adopting a beverage control act as the standard of due care for commercial vendors generally base their decisions on one or more of the following policy grounds.

(1) The legislature enacted the beverage control statute to protect members of the general public from injuries resulting from the excessive use of intoxicating liquor, thus, a presumption of negligence arises when the statute provisions are violated.[57]

(2) Civil liability of licensees will decrease the crime and injury traceable to alcohol abuse by encouraging the licensee to monitor the intoxication level of patrons.[58]

(3) It is equitable to hold the licensee liable when the licensee derives direct benefits from the enterprise.[59]

There are many reasons why courts are reluctant to impose a beverage control statute standard of care upon social hosts. Most prevalent is the rationale that the issue of social host liability is best left to the legislature.[60] Absent specific statutory reference to social hosts, courts are reluctant to impose liability.[61] Courts have also held

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[55] French et al., *supra* note 2, at 1076.

[56] *Id.* at 1071.

[57] Chastain v. Litton Systems, Inc., 694 F.2d 957, 961 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1982).

[58] French et al., *supra* note 2, at 1081; *see also* Alesna v. LeGrue, 614 P.2d 1387, 1390 (Alaska 1980) ("A licensee's liability to the public for statutory violations creates an incentive to see that the establishment is conducted lawfully so that members of the public are not harmed.").

[59] *Alesna*, 614 P.2d at 1391. Here, the court mentioned that in a business "so fraught with public interests," a licensee should not be able to derive benefits from the enterprise, while at the same time, be able to relieve himself of his responsibilities. *Id.*

[60] *See* Hulse v. Driver, 524 P.2d 255, 258 (Wash. Ct. App. 1974) (citations omitted) (holding that the issue of social host liability is a policy question that the legislature should address "after full investigation, debate and examination of the relative merits of the conflicting positions"); *see also* Burkhart v. Harrod, 755 P.2d 759, 762 (Wash. 1988) (citing numerous cases in which courts have deferred to the legislature on the issue of social host liability).

[61] Erickson et al., *supra* note 35, at 1017.

Courts have also held generally that the injured third party is not a member of the class protected by the beverage control act. For example, in Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, the Oregon Supreme Court held that the purpose of the beverage control act was to protect minors from the vices of alcoholic beverages, not to protect third parties from injuries resulting from the acts of intoxicated minors. 485 P.2d 18, 21 (Or. 1971).

that the social host should not be found liable because the consumption of liquor is merely "a supervening cause in the chain of events leading to a third party's injury."[62] Finally, courts have stated that a noncommercial person such as an employer, does not furnish alcohol for remuneration, and thus does not reap any benefit from the provision of alcohol.[63] However, in *Kelly v. Gwinnell*,[64] the court rejected the profit motive distinction and held that liability should be premised upon "control of the liquor supply" since, "[w]hatever the motive behind making alcohol available to those who will subsequently drive, the provider has a duty to the public not to create foreseeable, unreasonable risks."[65]

On the other hand, the minority of jurisdictions who have imposed a beverage control statute standard of care on social hosts do so on the premise that the legislature enacted the statute to protect the general public.[66] As such, a violation of the beverage control statute "is presumptive evidence of the social host's negligence."[67]

C. Recovery Under Common Law Principles of Negligence

1. Elements

Common law negligence principles form the basis of the second negligence-based theory of liability. Negligence actions under common law are comprised of four elements: (1) duty, (2) breach of duty, (3) nexus between breach of duty and injury, and (4) actual injury or resulting harm.[68] A claim based on common law negligence differs from a claim based on violation of a beverage control act only in that

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[62] French et al., *supra* note 2, at 1085.

[63] *Burkhart*, 755 P.2d at 761; Manning v. Andy, 310 A.2d 75, 76 (Pa. 1973).

[64] 476 A.2d 1219 (N.J. 1984), *superseded by statute*, N.J. STAT. ANN. § 2A:15-5.7 (West Supp. 1991). The statute exempts the social host from liability if the intoxicated guest is of legal age: "No social host shall be held liable to a person who has attained the legal age to purchase and consume alcoholic beverages for damages suffered as a result of the social host's negligent provision of alcoholic beverages to that person." N.J. STAT. ANN. § 2A:15-5.7 (West Supp. 1991).

[65] *Kelly*, 476 A.2d at 1224.

[66] Chastain v. Litton Systems, Inc., 694 F.2d 957, 961 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1982); French et al., *supra* note 2, at 1082.

[67] French et al., *supra* note 2, at 1085.

[68] RESTATEMENT (SECOND) OF TORTS § 281 (1965).

the standard of due care is defined as that of a reasonable person under like circumstances.[69]

2. Employer-social host liability

As a general rule, employers are regarded as social hosts, and courts have traditionally declined to subject social hosts to liability for the gratuitous furnishing of alcohol.[70] The reluctance to impose liability on a social host can be attributed to several factors.

First, the social host has no pecuniary motives in furnishing liquor to a guest.[71] Because the commercial supplier has a profit motive in providing a customer with alcohol, and often has liability insurance,[72] he should be expected to exercise greater supervision over alcohol consumption than the non-commercial supplier.[73] Second, commercial and quasi-commercial suppliers of alcohol are "more capable" than social hosts in monitoring a person's alcohol consumption,[74] are usually better able to control patrons,[75] and are in a better financial position

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[69] French et al., *supra* note 2, at 1086. Under a claim based on violation of a beverage control act, the beverage control act defines the standard of due care. *Id.* at 1085-86.

[70] Erickson et al., *supra* note 35, at 1023.

[71] *See* Burkhart v. Harrod, 755 P.2d 759, 760, 761 (Wash. 1988); Keckonen v. Robles, 705 P.2d 945, 947 (Ariz. Ct. App. 1985).

[72] *Noncommercial Liquor Vendor Liability*, *supra* note 4, at 234; Erickson et al., *supra* note 35, at 1044; *see also* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 144 (Mass. 1986) (stating that "licensed operators can be expected to have insurance against loss").

[73] *Keckonen*, 705 P.2d at 947 (citing Settlemyer v. Wilmington Veteran's Post No. 49, American Legion, Inc., 464 N.E.2d 521 (Ohio 1984)). Also, even though most employers have liability insurance, an employer providing alcohol at a company function lacks (1) the expertise to judge degrees of intoxication, and (2) the ability to control the guest's liquor consumption. Erickson et al., *supra* note 35, at 1017.

[74] *Burkhart*, 755 P.2d at 761.

This argument is premised on the assumption that, "by virtue of experience, a commercial proprietor is more familiar with his customers and their habits and capacities." *Keckonen*, 705 P.2d at 947 (citing Settlemyer v. Wilmington Veteran's Post No. 49, American Legion, Inc., 464 N.E.2d 521 (Ohio 1984)). Since the commercial vendors are in the business of supplying liquor, there exists an assumption that they encounter intoxicated customers daily, and thus, have more expertise in detecting intoxication of their customers. *Noncommercial Liquor Vendor Liability*, *supra* note 4, at 236.

[75] *Keckonen*, 705 P.2d at 947 (citing Settlemyer v. Wilmington Veteran's Post No. 49, American Legion, Inc., 464 N.E.2d 521 (Ohio 1984)).

to do so.[76] Third, courts have held that imposing liability on a social host is a matter best left to the legislature:[77]

> [S]ince the ratification of the Twenty-first Amendment to the United States Constitution virtually every aspect of the manufacture, sale and distribution of alcoholic beverages has been regulated by the legislature and any policy modifications which are designed to encompass the potential liability of social providers of intoxicating beverages should be left to the sound discretion of the legislature.[78]

Courts that have imposed liability on social hosts under ordinary negligence principles have done so based on the principle that intoxication resulting from consumption of liquor "and the guest's driving while intoxicated are all reasonably foreseeable at the time of the social host's furnishing of the liquor."[79]

D. Recovery Under Vicarious Liability Theories

In cases where the intoxicated driver was drinking at a company party or on company premises, plaintiffs may assert one or more of three theories of vicarious liability as a basis for recovery: (1) respondeat superior, (2) ratification, and (3) negligent failure of the employer to control the employee.[80]

1. Respondeat superior

A plaintiff may recover from an employer under the doctrine of respondeat superior "if he proves that the act complained of was within the employee's scope of employment."[81] "Within the scope of employ-

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[76] *Id.*

[77] *Burkhart*, 755 P.2d at 761.

[78] *Keckonen*, 705 P.2d at 947 (citing Settlemyer v. Wilmington Veteran's Post No. 49, American Legion, Inc., 464 N.E.2d 521 (Ohio 1984)).

[79] French et. al., *supra* note 2, at 1091; *see also* Baird v. Roach, Inc., 462 N.E.2d 1229, 1233 (Ohio Ct. App. 1983) (serving liquor to an obviously intoxicated person who will be operating a motor vehicle on the highway creates a "reasonably foreseeable risk of injury to others using the highway").

[80] *See, e.g.*, Costa v. Able Distributors, Inc., 3 Haw. App. 486, 490, 653 P.2d 101, 105 (1982); Abraham v. Onorato Garages, 50 Haw. 628, 632, 633-34, 446 P.2d 821, 825, 826-27; Erickson et al., *supra* note 35, at 1014.

[81] *Costa*, 3 Haw. App. at 490, 653 P.2d at 105 (citing Abraham v. Onorato Garages, 50 Haw. 628, 632, 446 P.2d 821, 825 (1968)); *see also Baird*, 462 N.E.2d at 1233 (employer not liable if employee not acting within the scope of his employment).

ment'' has been defined as an action that brings some direct benefit to the employer.[82] There must also be evidence that the employee intended to act in the employer's interest.[83]

2. Ratification

Under the ratification theory, the act complained of must have been done on behalf or under the authority of the employer, ''and there must be clear evidence of the employer's approval of the wrongful conduct.''[84] ''Mere continuance of employment after the accident is insufficient to show the approval necessary to trigger liability.''[85]

3. Negligent failure of employer to control employee's actions

Finally, plaintiffs may allege the negligent failure of the employer to control his employee's actions. Under this theory, plaintiffs must prove ''the acts complained of are so connected in time and place with the employment as to give the employer a special opportunity to control the employee.''[86]

4. Employer-social host liability

The mere fact that an employer serves alcohol to employees at an off-premises function does not automatically render the employer liable for the negligent acts of its employees.[87] However, liability has been imposed on employers who served alcoholic beverages to an intoxicated employee at a company social function where the court found that the employers' business interests were advanced by the function.[88]

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[82] *Costa*, 3 Haw. App. at 490, 653 P.2d at 105 (citing Beard v. Brown, 616 P.2d 726 (Wyo. 1980)).

[83] *Id.* (citing Matsumura v. County of Hawaii, 19 Haw. 496 (1909)).

[84] *Id.*

[85] *Id.* (citing Abraham v. Onorato Garages, 50 Haw. 628, 635, 446 P.2d 821, 828 (1968)).

[86] *Id.* Under certain circumstances, this theory of recovery may be applicable even if the employee was acting outside the scope of his employment. RESTATEMENT (SECOND) OF TORTS § 317, cmt. b (1965).

[87] *See* Rowe v. Colwell, 241 N.W.2d 284, 288 (Mich. Ct. App. 1976) (employer not liable for third party's injury occurring after off-duty social party); Baird v. Roach, 462 N.E.2d 1229, 1233 (Ohio Ct. App. 1983) (employee who engaged in drag racing after company picnic not acting within his scope of employment).

[88] *See infra* text accompanying notes 89-105.

In *Boynton v. McKales*,[89] an intoxicated employee was involved in an accident while driving home from a company sponsored party.[90] The court imposed liability on the employer, holding that the employer's banquet was an official company function with close relation to its sales program.[91] The court rejected the general rule that an employee is not within the scope of employment while going to or coming from work.[92] Instead, it invoked the "special errand" exception, which applies if the employee is on a "special errand" for his employer while going to or from work.[93]

> If the employee is . . . coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons.[94]

The court went on to state that although the attendance at a social function is not a "normal" duty of the employee, such attendance may come under the "special errand" rule if "the function or the attendance was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend."[95] In holding the employer liable, the court found that the banquet was an official company function intended to benefit the company by increasing the continuity of employment.[96] Thus, the employee was found to be acting within the scope of his employment

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[89] 294 P.2d 733 (Cal. Ct. App. 1956).

[90] *Id.* at 740.

[91] *Id.* at 742.

[92] *See, e.g.*, Dickinson v. Edwards, 716 P.2d 814, 819 (Wash. 1986) (citing Aloha Lumber Corp. v. Department of Labor & Indus., 466 P.2d 151, 154 (Wash. 1970)); Superior Asphalt & Concrete Co. v. Department of Labor & Indus., 578 P.2d 59, 61 (Wash. Ct. App. 1978)).

[93] *Boynton*, 294 P.2d at 740; *see also Dickinson*, 716 P.2d at 819.

[94] *Boynton*, 294 P.2d at 740.

[95] *Id.* at 741.

[96] *Id.* at 742. The evidence in this case showed that the banquet was an *annual* banquet offered by the employer to honor employees who had been employed with the company for five years or more. Only one or two of the invited employees failed to attend. Members of the families of employees were not invited, and the banquet was booked on the employer's wholesale expense account. *Id.* at 741. Finally, on the facts, the court found that "attendance was *at least* expected from the employees." *Id.* at 742 (emphasis added).

at the time of the accident, even though he had already left the banquet.[97]

Similarly, in *Harris v. Trojan Fireworks Co.*,[98] the court applied the respondeat superior doctrine, allowing plaintiffs a cause of action against an employer whose allegedly intoxicated employee got into an accident on the way home from a company Christmas party.[99] The court found that even though the employee was returning home at the time of the accident, the doctrine of respondeat superior still applied since (1) the party was held for the benefit of the employer, (2) the party was held at work during work hours, and (3) the employee was being paid to attend.[100] Further, the circumstances implied that by providing alcohol, the employer intended for the employee to consume alcohol.[101] As a result, the court concluded that the employee's presence at the party, as well as his resulting intoxication, occurred within the scope of his employment.[102]

Conversely, employers have been excused from liability where the social function does not advance their business interests. In *Rowe v. Colwell*,[103] a bank employee's automobile struck a third party after the employee had been to a social gathering at his supervisor's home.[104] The court declined to impose liability on the employer, holding that the supervisor's party was not arranged or sponsored by the bank, there was no business conducted, the employee was not required to attend, and the employee did not attend the party during normal working hours.[105]

In summary, the courts are generally split on whether or not to hold an employer vicariously liable for injuries to third parties caused by his intoxicated employee-guest. This existing split of authority shows that social host liability is still a viable and important issue. In light of the *Johnston* holding, further discussion of social host liability in Hawai'i is required.

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[97] *Id.* at 740-42.
[98] 174 Cal. Rptr. 452 (1981).
[99] *Id.* at 454-56.
[100] *Id.* at 456.
[101] *Id.*
[102] *Id.* at 457.
[103] 241 N.W.2d 284 (Mich. Ct. App. 1976).
[104] *Id.* at 286.
[105] *Id.* at 287.

IV. ANALYSIS

A. *Social Host Liability in Hawai'i*

Ono v. Applegate[106] established a common law dram shop action in Hawai'i. *Ono* has not been overruled by either the legislature or the courts, although its holding was discussed most recently in *Johnston v. KFC Nat'l Management Co.*[107]

In *Johnston*, the Hawaii Supreme Court declined to impose liability upon KFC, a non-commercial, social-host supplier of alcohol.[108] Johnston sustained injuries when a moped she was riding was struck by a car driven by defendant Sandra Parks.[109] Parks had been drinking at a KFC employee party, as well as at the home of a fellow KFC employee.[110] Johnston argued that KFC should be held liable for her injuries, alleging that KFC was negligent in (1) permitting alcoholic beverages to be consumed on their premises, (2) failing to prevent Parks from becoming intoxicated, and (3) failing to prevent Parks from driving while intoxicated.[111] KFC prevailed on its motion for summary judgment on the grounds that KFC owed no duty to Johnston.[112]

In affirming the motion for summary judgment in favor of KFC, the Hawaii Supreme Court first found that KFC was not a "host" in the sense that it neither provided nor served any alcohol to Parks.[113] Further, in the absence of "cogent reasons and inescapable logic,"[114] the court refused to expand liability under *Ono v. Applegate*.[115]

In *Johnston*, the court reasoned that although *Ono* allowed a third party injured in an alcohol-related automobile accident to recover against a commercial supplier, there was no clear judicial trend towards imposing liability on a social host.[116] In fact, the court stated that there

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[106] 62 Haw. 131, 612 P.2d 533 (1980).

[107] 71 Haw. 229, 788 P.2d 159 (1990).

[108] *Id.* at 230-31, 788 P.2d at 160-61.

[109] *Id.*

[110] *Id.* at 230, 788 P.2d at 160.

[111] *Id.* at 231, 788 P.2d at 161.

[112] *Id.*

[113] *Id.*

[114] *Id.* (quoting Ely v. Murphy, 540 A.2d 54, 57 (Conn. 1988) (quoting Herald Publishing Co. v. Bill, 111 A.2d 4, 8 (Conn. 1955); Ozyck v. D'Atri, 538 A.2d 697, 702 (1988 Conn.) (Healey, J., concurring))).

[115] *Id.* at 234, 788 P.2d at 164; *see supra* text accompanying notes 45-54.

[116] *Id.* at 232, 788 P.2d at 162.

was a clear trend *against* imposing such liability, since New Jersey and Massachusetts have been the only states to impose some sort of duty of care on the social host.[117]

B. Liability of KFC

1. Application of out-of-state law

The New Jersey case of *Kelly v. Gwinnell*[118] dealt with a social host's active, as opposed to a passive, involvement in creating a risk to the injured third party.[119] The *Kelly* court held the social host liable because he continued to serve liquor to his *visibly* intoxicated guest, knowing that the guest would have to drive in order to get home.[120] *Kelly* has since been abrogated by the New Jersey legislature to restrict the liability of social hosts to minors only.[121] However, even if *Kelly* had not been statutorily superseded, New Jersey courts would probably decline to impose liability on KFC since KFC did not actually "serve" alcoholic beverages to Parks.[122]

In *McGuiggan v. New England Tel. & Tel. Co.*,[123] the Massachusetts Supreme Court held that a social host may be found liable for a third party's injuries if the social host *served* a guest, *or permitted* a guest to take an alcoholic drink and *knew or should have known* that his guest was intoxicated.[124] In Massachusetts, therefore, on the facts of *Johnston*, there would probably arise a question of fact as to whether KFC knew or should have known that Parks was intoxicated. On the other hand, since the Hawaii Supreme Court held that KFC was not a "host" in the sense that it did not "serve" liquor to Parks, KFC may not be liable even under Massachusetts law.

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[117] *Id.* However, *Kelly* was statutorily superseded in 1987 when the New Jersey legislature restricted the liability of a social host to injuries caused by intoxicated *minor* guests only. This arguably leaves open the issue of whether a social host in Hawai'i would be held liable for the negligent driving of an intoxicated minor guest.

[118] 476 A.2d 1219 (N.J. 1984), *superseded by statute*, N.J. STAT. ANN. § 2A:15-5.7 (West Supp. 1991).

[119] *Id.* at 1221-22.

[120] *Id.*

[121] See *supra* note 64 for text of the statute.

[122] *See* Johnston v. KFC Nat'l Management Co., 71 Haw. 229, 331, 788 P.2d 159, 161 (1990).

[123] 496 N.E.2d 141 (Mass. 1986).

[124] *Id.* at 146.

2. Legislative deference

An attempt by the California Supreme Court to impose liability on the social host was expressly abrogated by the legislature.[125] Iowa and Minnesota courts held the social host liable under their dram shop acts, but these actions, too, were subsequently abrogated by their legislatures.[126]

In deference to the Hawaii State Legislature, the *Johnston* court made two points. First, the judiciary is not capable of deciding the merits of social host liability since imposition of such liability would entail a balancing of the costs and benefits for society as a whole, not just the parties of a particular case.[127] In general, the court noted that imposition of social host liability affects both social and economic aspects of society.[128] On the social side, the court stated that "consumption of alcohol is a pervasive and deeply rooted part of our social life."[129] On the economic side, the court was concerned with the effect that imposition of social host liability would have on homeowners' and renters' insurance rates, and the possible economic impact on those who, for some reason, did not acquire such insurance.[130]

Second, although the Hawaii State Legislature has taken a more active interest in enacting heavier punishment for drunk drivers, it has not enacted any statute imposing liability on the social host.[131] As a result, the court declined to "'impose a change in the law which has the power to so deeply affect social and business relations.'"[132]

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[125] *See* Coulter v. Superior Court of San Mateo County, 577 P.2d 669 (Cal. 1978), *superseded by statute*, CAL. BUS. & PROF. CODE § 25602 (West 1985).

[126] *See* Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972), *superseded by statute*, IOWA CODE ANN. § 123.92 (West 1987), *overruled by* Lewis v. Iowa, 256 N.W.2d 181 (Iowa 1977); Ross v. Ross, 200 N.W.2d 149 (1972), *superseded by statute*, MINN. STAT. ANN. § 340A.801 (West 1990).

[127] Johnston v. KFC Nat'l Management Co., 71 Haw. 229, 233, 788 P.2d 159, 163 (1990).

[128] *Id.*

[129] *Id.* Although the court does not elaborate further on this point, perhaps an inference may be made that the imposition of civil liability on social hosts may have a "tempering effect on 'the spirit of conviviality at some social occasions.'" French et al., *supra* note 2, at 1091 (quoting Coulter v. Superior Court of San Mateo County, 577 P.2d 669, 675 (Cal. 1978), *superseded by statute*, CAL. BUS. & PROF. CODE § 25602 (West 1985)).

[130] Johnston v. KFC, 71 Haw. at 234, 788 P.2d at 164.

[131] *Id.* at 233, 788 P.2d at 163.

[132] *Id.* (quoting Garren v. Cummings & McCrady, 345 S.E.2d 508, 510 (S.C. App. 1986) (citing Miller v. Moran, 41 N.E.2d 1046, 1049 (Ill. App. Ct. 1981))).

Finally, the court declined to impose liability on the social host because of the fear that to do so may cause the social host to incur "unnecessary" litigation expenses.[133]

3. Negligence-based theories of liability

This section discusses the application of various theories of liability to the facts as stated in *Johnston*.[134] As Hawai'i does not have a dram shop act, dram shop acts as a premise of KFC's liability will not be discussed in detail here. In general, a majority of courts have held that dram shop acts apply only to commercial vendors,[135] and courts that have attempted to impose social host liability under dram shop acts have met with resistance from the legislature.[136]

a. Beverage control statutes

Ono v. Applegate[137] addressed the issue of using a beverage control statute as a standard for duty of care in Hawai'i.[138] It is clear that as to the commercial supplier, a violation of the beverage control statute[139] constitutes a breach of duty, thus creating liability of a commercial supplier to an injured third party.[140] After *Johnston*, however, it is evident that the court is unwilling to extend liability under beverage control statutes to social hosts, and in fact, this is the majority view.[141] As in *Johnston*, most courts hold that the issue of social host liability is best left to the legislature.[142] Thus, absent specific reference to social

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[133] *Id.* at 234, 788 P.2d at 164. That is, the court felt that the imposition of social host liability may give rise to civil suits for damages brought by third persons who are injured in a car accident involving "a friend, invitee, or guest of the host, thus incurring additional litigation expenses." *Id.*

[134] 71 Haw. 229, 788 P.2d 159 (1990).

[135] *See supra* text accompanying notes 32-42.

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

[137] 62 Haw. 131, 612 P.2d 533 (1980).

[138] *See supra* text accompanying notes 45-54.

[139] HAW. REV. STAT. § 281-78(a)(2)(B) (1976).

[140] *See Noncommercial Liquor Vendor Liability*, *supra* note 4, at 238 (citing cases in which beverage control statutes were used as a basis for imposing civil liability).

[141] *See id.* at 249 ("Most courts are hesitant to extend the scope of alcoholic beverage control [statutes] to encompass civil actions involving noncommercial vendors."); *see also supra* text accompanying notes 60-65.

[142] *See supra* note 60 and accompanying text.

hosts in the beverage control acts, courts are generally reluctant to impose such liability.[143]

b. Common law negligence

Proponents of social host liability also propose holding social hosts liable under common law negligence principles. In general, the *Johnston* court rejected any notion of an existence of duty of the social host to the injured third party.[144] The *Johnston* court stated that although "'changing social conditions lead constantly to the recognition of new duties,'"[145] taking society's social and human relationships into account, there were no "logical, sound or compelling reasons" to impose a new duty of care on a social host.[146]

The existence of duty is ultimately a question of fairness.[147] The inquiry of whether a duty exists involves weighing the relationship between the parties, "'the nature of the risk, and the public interest in the proposed solution.'"[148] In *Kelly v. Gwinnell*,[149] one of the only cases to impose liability upon a social host, the court held that, all things considered, it was fair to impose liability upon a social host where the host *knew* that his guest was intoxicated and *knew* that the guest would subsequently be operating a motor vehicle.[150] The court also found that imposing a duty on the social host was both consistent with and supportive of the social goal of reducing the incidence of

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[143] *See supra* note 61 and accompanying text.

Of course, one can always make the argument that beverage control statutes were enacted to protect the general public, and thus, violation of such statute should constitute presumptive evidence of the social host's negligence. French et al., *supra* note 2, at 1085.

[144] Johnston v. KFC Nat'l Management Co., 71 Haw. 229, 234, 788 P.2d 159, 164 (1990).

[145] *Id.* at 231, 788 P.2d at 161 (citing PROSSER & KEETON, THE LAW OF TORTS § 53 at 359 (5th ed. 1984)).

[146] *Id.* (quoting Goldberg v. Housing Auth. of Newark, 186 A.2d 291, 296 (N.J. 1962)).

[147] Kelly v. Gwinnell, 476 A.2d 1219, 1222 (N.J. 1984), *superseded by statute*, N.J. STAT. ANN. § 2A:15-5.7 (West Supp. 1991).

[148] *Id.*

[149] 476 A.2d 1219 (N.J. 1984), *superseded by statute*, N.J. STAT. ANN. § 2A:15-5.7 (West Supp. 1991) (social host not liable for injuries to third parties if intoxicated guest is of legal age).

[150] *Id.* at 1222.

drunken driving, a goal "that is practically unanimously accepted by society."[151]

However, *Johnston* is more in accord with the majority of courts, which hold that the duty of the tavern keeper should not be imposed on the social host.[152] As a general rule, the courts generally state that it is unfair to hold social hosts liable for injuries to third parties because (1) the host would be subject to substantial financial liability that would be "'almost limitless,'"[153] and (2) the social host is too inexperienced at judging the extent to which others become intoxicated.[154]

c. Vicarious liability theories

The court in *Johnston* did not address any principles of vicarious liability.[155] However, the application of these principles should be mentioned since Parks was an employee of KFC, and the KFC party was held on KFC premises with management approval.[156]

(i) doctrine of respondeat superior

Under the doctrine of respondeat superior, Johnston had to prove that Parks was acting within the scope of her employment as a KFC employee at the time of the accident.[157] However, on the facts in *Johnston*, Parks was not acting within the scope of her employment as an employee at the time of the accident for several reasons. First, the Christmas party was after work hours so Parks was not "working" at the time of her ingestion of alcoholic beverages on the KFC premises.[158]

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[151] *Id.*

[152] Erickson et al., *supra* note 35, at 1023; *see also* Keckonen v. Robles, 705 P.2d 945, 949 (Ariz. 1985); Burkhart v. Harrod, 755 P.2d 759, 763-64 (Wash. 1988).

[153] *See, e.g., Burkhart*, 755 P.2d at 760 (quoting Edgar v. Kajet, 375 N.Y.S.2d 548, 552 (N.Y. Sup. Ct. 1975), *aff'd*, 389 N.Y.S.2d 631 (N.Y. App. Div. 1975)).

[154] *Id.*; *see also supra* text accompanying notes 71-76. However, one can always argue that since the social host knows his guest personally, he is in a better position to judge whether his guest is acting "normally" or in an intoxicated manner.

[155] For example, the court did not discuss theories such as the doctrine of respondeat superior, ratification, and the negligent failure of the employer to control his employee's actions. *See supra* text accompanying notes 80-86.

[156] Johnston v. KFC Nat'l Management Co., 71 Haw. 229, 230, 788 P.2d 159, 160 (1990).

[157] *See supra* text accompanying notes 81-83 and 98-102.

[158] *Johnston*, 71 Haw. at 230, 788 P.2d at 160; *see* Rowe v. Colwell, 241 N.W.2d 284, 287, 290 (1976) (employer not liable where party was held after working hours and the employer did not arrange or sponsor the party).

Second, the record is void of any evidence that Parks was *required* to attend the party.[159] Next, not only was the party after working hours, but it is important to note that Parks attended another party after leaving KFC.[160] Attending the second party did not constitute acting within the scope of employment.[161] Finally, Parks was presumably not being paid to attend the party since (1) the record is void of any evidence to the contrary, and (2) the party was held after normal closing hours.[162] In sum, it is likely that had the court considered the doctrine of respondeat superior, it would still have refused to impute liability to KFC.

(ii) ratification

In order for Johnston to have recovered from KFC under the ratification theory, she would have had to prove that Parks was driving while intoxicated on behalf of or under the authority of KFC.[163] Additionally, there must be *clear evidence* of KFC's approval of Parks' conduct.[164]

In *Johnston*, there was arguably no evidence of ratification since attendance at the Christmas party was not intended to materially benefit KFC.[165] Second, the record is void of evidence showing that KFC encouraged or approved of Parks' drinking.[166] Finally, KFC did not

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[159] *See Johnston*, 71 Haw. at 230-31, 788 P.2d at 160-61. Courts have held that employer-social hosts may be held liable where the party was held for the benefit of relations between employer and employees and the employee was *at least expected* to attend. *See, e.g.*, Boynton v. McKales, 294 P.2d 733, 741-42 (Cal. Ct. App. 1956).

[160] *Johnston*, 71 Haw. at 230, 788 P.2d at 160.

[161] *See* Baird v. Roach, Inc., 462 N.E.2d 1229, 1233 (Ohio Ct. App. 1983) (holding that employees who "left the company picnic for the express purpose of engaging in activity of their own" before the accident were not acting within the scope of their employment at the time of the accident); Erickson et al., *supra* note 35, at 1025 ("employers are not responsible for injuries resulting from the negligent acts of employees who . . . have departed on frolics or detours of their own").

[162] *Johnston*, 71 Haw. at 230, 788 P.2d at 160; *see* Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 161-62 (1981) (holding that party was held during work hours and employee was paid to attend, so "employee's attendance at the party and state of intoxication occurred within the scope of his employment").

[163] *See supra* text accompanying notes 84-85.

[164] *Id.*

[165] *See* Boynton v. McKales, 294 P.2d 733, 741, 742 (1956) (holding that the employer may be held liable since party was company-sponsored and employer expected its employees to attend).

[166] *See Johnston*, 71 Haw. at 230-31, 788 P.2d at 760-61.

request or expect their employees to attend the Christmas party.[167] As a result, it is likely that KFC would also not be liable under the ratification theory.

(iii) negligent failure of employer to control employee's actions

Finally, Johnston could have argued the negligent failure of KFC to control Parks' actions. Under this theory, Johnston had to prove that Parks' driving while intoxicated was so connected in time and space with her employment at KFC, that KFC had a special opportunity to control Parks' behavior.[168] In *Johnston*, once again, the Christmas party was after work hours,[169] so Parks was not "working" at the time of her ingestion of alcoholic beverages on the KFC premises, nor was she acting within the scope of her employment at the time of the accident.[170] As a result, KFC did not have any special opportunity to control Parks' ingestion of alcohol, and would not have been held liable for failure to control its employee.

V. Impact

Johnston was one of the first cases to address the issue of social host liability in Hawai'i. It sets a high standard of proof, refusing to expand liability without a "most cogent reason" or "inescapable logic."[171] In light of the current trend towards refusing to impose liability on social hosts for harms caused from accidents of their intoxicated guests, it is likely that Hawai'i courts will continue to uphold the theories imposed in *Johnston*. However, *Johnston* did not address the issues of vicarious liability that may arise in cases involving employer social-hosts, nor did it address the issue of an employer social-host's liability to a minor. Thus, in cases involving these fact patterns, it is difficult to predict how the Hawai'i courts will rule in the future.

VI. Conclusion

In general, social host liability seems to be an area where there are no ascertainable "right" or "wrong" answers. However, as drunk

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[167] *Id.*

[168] *See supra* text accompanying note 86.

[169] *Johnston*, 71 Haw. at 230, 788 P.2d at 160.

[170] *See supra* notes 158-62 and accompanying text.

[171] *Johnston*, 71 Haw. at 231, 788 P.2d at 161.

driving continues to cause death and mayhem to "innocent victims" on our roads and highways, the imposition of social host liability may become increasingly more attractive.

Perhaps one of the most persuasive arguments to be made in favor of social host liability is that the third party injured in the alcohol-related accident did not subject himself to the "harm" of the intoxicated driver and, thus, is an "*innocent*" victim of another person's irresponsibility or indifference to possible consequences. Accordingly, the injured party should be able to recover against all defendants who may have contributed to the proximate cause of the harm, including the person who furnished the alcohol.

There are countless examples of broken homes, financial stress, abused families, and crime traced to the use and abuse of alcohol, and the presence of intoxicated drivers on the highway has been proven to be a serious hazard to the lives of the public at large. As drunk driving fatalities increase, the need for deterrence becomes stronger, and society will most likely seek to apportion the "blame" among a greater number of parties. Because the negative impacts of alcohol ingestion are so substantial, there is more of a need for deterrence, and thus, a greater need to hold more people accountable for any resulting injuries. Should the incidents of drunken driving become more numerous, the courts may find a need to reverse the current trend, and hold in favor of finding liability on the part of social hosts.

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Hawai'i's New Administrative Driver's License Revocation Law: A Preliminary Due Process Inquiry

Our privileges can be no greater than our obligations. The protection of our rights can endure no longer than the performance of our responsibilities.[1]

I. Introduction

Nearly two million people have died on our nation's highways since 1941—about half of them in alcohol-related traffic accidents.[2] Over 45,000 are killed, 500,000 hospitalized, and 4.8 million injured annually.[3] The total economic cost of alcohol-related crashes approaches an astonishing forty-nine billion dollars each year.[4] While the nation mourned the loss of 367 Americans killed during the six months or so of Operation Desert Storm, about 12,000 people died in the United States in alcohol-related crashes during the same period.[5]

Nine-hundred-and-sixty-six persons lost their lives in Hawai'i traffic accidents between 1982 and 1988.[6] Alcohol played a part in 552 of those fatalities, or 57% of the total.[7] More recently, another eighty-

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[1] John F. Kennedy, Address, Vanderbilt University, Nashville, Tenn. (May 18, 1963), *in* The International Thesaurus of Quotations 546 (Thomas Y. Crowell Co., 1970).

[2] John Yoshinige, *MADD Seeking Public's Help With Drunk-Driving Law*, Honolulu Advertiser, May 28, 1991, at A5.

[3] Christine Russell, *Who Gets Injured and How*, Wash. Post, Oct. 17, 1989, at Z16; *see also*, Keith Schneider, *Stopping Drunken Drivers Before the Next Wreck*, N.Y. Times, Jan. 30, 1991, at A16.

[4] *Id.*

[5] Yoshinige, *supra* note 2.

[6] Attorney General, Drunk Driving In Hawaii: A Special Report 2 (1989).

[7] *Id.*

eight Hawai'i residents died in alcohol-related crashes on the state's highways in 1990.[8]

Mounting frustration over the criminal justice system's inability to curb the ravages of drunk driving has compelled many states to enact new, harsher civil and administrative laws designed to deter people from taking the wheel while intoxicated and to remove those who drive drunk from the public highways.[9] The most effective of the new wave of anti-drunk driving legislation are administrative driver's license revocation laws. These laws provide for the expeditious revocation of

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[8] Linda Hosek, *Oahu Dodges Holiday Alcohol-Related Traffic Deaths*, HONOLULU STAR BULL. & ADVERTISER, Dec. 28, 1990, at A2.

[9] *See, e.g.*, Act 188, § 2, 15th Leg., Reg. Sess. (1990), *reprinted in*, 1990 Haw. Sess. Laws 399, wherein the Hawaii State Legislature declared:

> Too many traffic fatalities and injuries are caused by drunk drivers in Hawaii despite the stiff criminal penalties for driving under the influence of alcohol provided in section 291-4 of the Hawaii Revised Statutes. Even with vigorous enforcement by county police and prosecutors, alcohol-related driving offenses and injuries continue to increase while, ironically, guilty parties, including the most serious repeat offenders, go on driving until they are found guilty in a court of law. Since criminal prosecution may take several months or longer due to crowded court calendars and other factors, dangerous and irresponsible drivers, who have been caught and arrested, continue to jeapordize our citizenry while awaiting trial. Accordingly, the legislature finds that driving under the influence of alcohol poses a very real and serious danger to the safety and welfare of the people of this State and requires stronger measures to ensure that people who drink do not drive and that those who do are taken off the road promptly. Therefore, the purposes of this act are to:
>
> (1) Provide safety for all persons using the highways of this State by quickly revoking the driving privilege of those persons who have shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies or who have refused to submit to testing for the presence of alcohol in their bodies;
>
> (2) Guard against the potential for an erroneous deprivation of the driving privilege by providing an opportunity for an administrative hearing which shall commence prior to the effective date of the revocation and an opportunity for judicial review after the revocation becomes effective;
>
> (3) Prevent any relicensing of a person following the revocation period until the person has applied for and met the requirements for issuance of a new license; and
>
> (4) Provide under certain circumstances that a person adjudicated for driving under the influence of intoxicating liquor attach an ignition interlock system to the person's car to prevent the person from driving while under the influence.

Id.

a driver's license without the need for a criminal trial. Administrative revocation laws essentially enable police to immediately confiscate the license of a driver arrested for driving while intoxicated. In 1991 Hawai'i became the twenty-ninth state, plus the District of Columbia, to enact some form of administrative license revocation legislation.[10]

The possible consequences of drunk driving are indeed tragic. The cost in human suffering is apalling. Concerned community groups have understandably become more vocal in urging lawmakers to take severe action against those who drink and drive. Vigilante witch-hunting, however, cannot be tolerated. Our protection to be free as individuals from oppressive governmental backlash resides principally in the Due Process Clause.[11] This note evaluates the due process adequacy of Hawai'i's new administrative license revocation procedure.

Part II of this note briefly develops the history and bases of summary revocation legislation. Part III describes the key provisions of Hawai'i's new administrative revocation statute. Part IV focuses on the due process issues raised by summary revocation and examines the United States Supreme Court's decisions addressing the constitutionality of similar procedures. Finally, Part V compares the new Hawai'i statute

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[10] Andy Yamaguchi, *How Drunk-Driving License Revocation Works*, HONOLULU ADVERTISER, July 31, 1991, at A-4.

The federal government has played a significant part in promoting state adoption of comprehensive drunk driving prevention programs incorporating administrative revocation laws. The National Highway Traffic Safety Administration (NHTSA), under authority of the Department of Transportation, endorses these measures by offering incentive grants to states adopting and implementing administrative revocation legislation. Hawai'i would qualify for an incentive grant of $1.3 million over five years, since any state implementing a 30-day expedited license suspension or revocation system in compliance with federal criteria may qualify for an incentive grant of 20% of that state's 23 U.S.C. § 402 apportionment for fiscal 1989. 23 C.F.R. § 1313.5(b) (1991). Implementation of a 15-day system may qualify the state for a grant of 30% of its fiscal 1989 apportionment. 23 C.F.R. § 1313.5(a) (1991).

Federal incentives, together with the encouraging results reported by those jurisdictions having previously enacted administrative license revocation laws have, in the past two years, encouraged more states to consider adopting such legislation.

[11] U.S. CONST. amend. XIV, § 4:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

with the Court's due process timing and adequacy standards to determine whether the new law, if challenged, would pass constitutional muster.

This note concludes that the new Hawai'i statute exceeds the minimal constitutional requirements developed by the United States Supreme Court. Hawai'i's administrative license revocation law adequately respects the individual's constitutional right to due process.

II. DUI Enforcement: An Historical Perspective

How to effectively curtail the incidence of driving while under the influence of intoxicating liquor (DUI) is a problem that has confounded American law enforcement officials for more than fifty years. The task of prosecuting offenders has been problematic ever since New York and California first criminalized drunk driving in 1910 and 1911.[12] Proving guilt was difficult, as there was no objective, reliable evidentiary test for DUI.[13] Criminal prosecutors had to rely on the mere observations of lay witnesses or police officers to show that the defendant was intoxicated, and often found this evidence inadequate to prove guilt in a court of law.[14]

The development of chemical tests that could be used to measure the amount of alcohol in a person's blood helped to allay this evidentiary problem in the late 1930s.[15] These chemical tests provided an objective measurement of a driver's blood-alcohol content level, or "blood alcohol count" (BAC).[16] The test results were added to the total evidence

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[12] R. Jean Wilson & Robert E. Mann, Drinking And Driving: Advances In Research And Prevention 117-18 (Howard T. Blane & Thomas R. Kosten eds., 1990) [hereinafter Wilson & Mann].

[13] D.C. Barrett, Annotation, *Suspension or Revocation of Driver's License for Refusal to Take Sobriety Test*, 88 A.L.R.2d 1064, 1066 (1963) [hereinafter Barrett].

[14] *Id.*

[15] *Id.* The development of chemical testing was supported by empirical studies identifying the relationship between alcohol-induced impairment of motor skills and the amount of alcohol in a person's blood. In 1938, the National Safety Council (NSC) and the American Medical Association (AMA) jointly reached the conclusion that a person with over 0.15% of alcohol in his blood was probably under the influence of alcohol to such a degree that it would materially affect that person's ability to drive a vehicle safely. Stop DWI 6-7 (Dennis Foley ed., 1986) [hereinafter Stop DWI].

[16] BAC can be loosely defined as the volume of alcohol in an individual's bloodstream, expressed as a percentage, and usually determined by either a blood test or by use of a breath analysis device. The term refers to the standard measure for legal

proffered against the accused drunk driver.[17] The courts accepted these new scientific test results as competent evidence, and state legislatures soon enacted laws providing for chemical blood testing of drivers arrested on suspicion of DUI.[18] Some of these laws went a significant step further by providing that test results showing certain specified BAC levels (usually 0.15% or greater) constituted presumptive evidence of intoxication.[19] Proving intoxication beyond a reasonable doubt was still difficult—a significant amount of corroborating proof was still needed and an expert toxicologist was often required to explain to the jury how BAC ordinarily affected the body[20]—but the burden had shifted so that the accused was now forced to offer competent evidence to rebut the chemical test data or lose his case.[21]

The practical difficulties inherent in administering blood tests to suspected drunk drivers were largely remedied by the development of inexpensive chemical breath-testing devices in the 1950s.[22] Robert Borkenstein's *Breathalyzer*, introduced in 1952,[23] made it easy for police to rapidly test individuals for blood-alcohol level without the need to

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intoxication under state DUI laws. BLACK'S LAW DICTIONARY 172 (6th ed. 1990).

Hawai'i defines "blood alcohol concentration" as "either grams of alcohol per one hundred milliliters or cubic centimeters of blood or grams of alcohol per two hundred ten liters of breath." HAW. REV. STAT. § 286-251 (Supp. 1991).

[17] WILSON & MANN, *supra* note 12, at 119.

[18] *Id.* Indiana was the first state to adopt chemical testing legislation in 1939. Maine, New York, and Oregon soon followed. *Id.*

[19] *Id.* In 1944, the Uniform Vehicle Code introduced a model statutory system incorporating presumptions of intoxication based on BAC levels, and by 1958 more than 30 states had enacted statutes allowing a jury to presume that a driver was intoxicated if his BAC was 0.15% or greater. Stephen G. Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301, 316 (1983). In 1960, committees of the NSC and the AMA recommended that the limit of 0.15% be lowered to 0.10%. STOP DWI, *supra* note 15, at 7 (Dennis Foley ed., 1986). The Uniform Vehicle Code was amended to reflect the 0.10% standard in 1962. Thompson, *supra*, at 316.

[20] Jennifer L. Pariser, Comment, *In Vino Veritas: The Truth About Blood Alcohol Presumptions In State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 143 (1989) [hereinafter Pariser].

[21] WILSON & MANN, *supra* note 12, at 119.

[22] *See id.*

[23] *See* STOP DWI, *supra* note 15, at 6. The *Drunkometer*, which had been developed in 1938, was actually the first breath analysis device. Thompson, *supra* note 19, at 315. It was the *Breathalyzer*, however, that achieved the lower cost and higher level of reliability that was necessary to promote greater use of the technology. *See* STOP DWI, *supra* note 15.

summon a police surgeon to extract blood.[24] This newfound convenience helped promote widescale adoption of chemical sobriety testing by the decade's end.[25]

Of course, motorists who had been stopped or arrested on suspicion of DUI were understandably reluctant to submit to blood-alcohol testing, since the results could supply the prosecution with the evidence necessary to convict them. Some early court decisions in fact took the view that blood-alcohol test results were inadmissible as evidence where the person whose sobriety was in question had not voluntarily agreed to be tested.[26] Two important events occurred in 1966 that served to embolden a strong response by state lawmakers.

In 1966, the United States Supreme Court addressed the issue of whether a state could require drivers to submit to chemical testing. In the landmark case of *Schmerber v. California*,[27] the Court held that the federal constitution does not bar police from having the authority, under limited circumstances, to forcibly withdraw a blood sample from an individual arrested on suspicion of drunk driving.[28]

Schmerber opened the way for states to adopt legislation providing for the non-consensual, if not forcible, taking of blood samples for chemical testing. Blood testing by physical compulsion, however, was, for most lawmakers, an odious proposition.[29] A more politically palatable solution

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[24] WILSON & MANN, *supra* note 12, at 119-20.

[25] *See id.*

[26] *See* Barrett, *supra* note 13, at 1066.

[27] 384 U.S. 757 (1966).

[28] *Id.* at 772. The *Schmerber* Court held that the defendant's constitutional right to due process, privilege against self-incrimination, right to counsel, and right to be free from unreasonable searches and seizures were not violated when the police directed a physician to take a blood sample over the defendant's refusal. Justice Brennan, writing for the Court, reasoned that probable cause leading to arrest on suspicion of intoxication justified requiring the defendant to submit to a blood-alcohol test as an appropriate incident to a lawful arrest. Because BAC diminishes shortly after drinking stops, the taking of a blood sample without a search warrant was justified as responsive to an "emergency" in which the delay required to obtain a warrant would have threatened destruction of the evidence. *Id.* at 768-71. The Court was not troubled by the arguably intrusive nature of extracting a blood sample from the defendant, as "[s]uch tests are a commonplace . . . the quantity of blood extracted is minimal, and . . . the procedure involves virtually no risk, trauma, or pain." *Id.* at 771; *see generally*, Vitauts M. Gulbis, Annotation, *Admissibility in Criminal Case of Blood-Alcohol Test Where Blood Was Taken Despite Defendant's Objection or Refusal to Submit to Test*, 14 A.L.R.4th 690 (1982) (collecting state and federal cases).

[29] *See* WILSON & MANN, *supra* note 12, at 119.

was available. The year's second important event, enactment of the National Highway Safety Act of 1966, encouraged the majority of states to enact "implied consent" laws.[30] Implied consent laws typically

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[30] *See* Julie Vacura, Note, *Drunk Driving and Talking the Fine Line in Oregon:* Moore v. Motor Vehicles Division, 19 WILLAMETTE L. REV. 803, 804-07 (1983); WILSON & MANN, *supra* note 12, at 120.

Highway Safety Standard No. 8, 23 C.F.R. § 1204.4 (1980), of the National Highway Safety Act of 1966 required states to enact implied consent statutes in order to receive full federal funding for highways. Implied consent had actually been incorporated into the Uniform Vehicle Code four years prior to *Schmerber*. Vacura, *supra*, at 807.

For the early development of Hawai'i's implied consent law, see State v. Tengan, 67 Haw. 451, 455-57, 691 P.2d 365, 368-69 (1984) (finding implied consent the 'linchpin' of the state's legislative program to discourage drunk driving). Some progressive states had enacted implied consent legislation more than a decade before *Schmerber*. New York has been cited as the first state to have enacted summary license suspension laws based upon an implied consent statute. Barrett, *supra* note 13, at 1066. The New York statute pre-dated *Schmerber* by more than 12 years. The early New York statute, as amended to meet judicial criticism, remains typical of this type of legislation. *See* Schutt v. Macduff, 127 N.Y.S.2d 116 (1954) (holding that the statute as originally enacted was violative of due process, but that the theory behind it was fundamentally sound, and if it were written to permit revocation only pursuant to a lawful arrest, while providing the driver with an opportunity for a hearing on demand with only a temporary suspension of license pending the hearing, then the statute would be approved without hesitation). *See also*, Ballou v. Kelly, 176 N.Y.S.2d 1005 (1958) (upholding the constitutionality of the New York statute as amended, giving effect to the implied consent provision of the statute as a reasonable condition to the right to drive upon the state's highways).

The early New York statute as amended read in pertinent part:

> Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition or, while his ability to operate such motor vehicle or motorcycle was impaired by the consumption of alcohol, and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any non-resident operating privilege; provided, however, the commissioner shall grant such person an opportunity to be heard but a license, permit or non-resident operating privilege may, upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition or, while his ability to operate

provide that anyone who applies for a license to drive on the state's public highways is deemed to have agreed to take a blood-alcohol test if ever arrested on suspicion of DUI.[31] If the driver refuses, police are not permitted to force compliance. The driver's license can, however, be revoked for noncompliance by provision of an "implied consent penalty." A driver arrested on suspicion of DUI thus faced a classic Hobson's choice: if he agreed to take a blood-alcohol test, he took the risk that an unfavorable result would aid in his criminal conviction; if he refused, his license could be summarily revoked.[32]

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such motor vehicle or motorcycle was impaired by the consumption of alcohol, and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing.

Barrett, *supra* note 13, at 1066 n.7 (citing N.Y. VEHICLE & TRAFFIC LAW § 1194 (substance transferred from former § 71-a)).

[31] Gulbis, *supra* note 28, at 695. Courts articulate two principal alternative rationales in sustaining the constitutional validity of implied consent laws. 4 RICHARD E. ERWIN, DEFENSE OF DRUNK DRIVING CASES, CRIMINAL-CIVIL § 33.02[2] (3d ed. 1992) [hereinafter ERWIN].

The more popularly embraced theory essentially holds that driving upon the public highways is not a right but rather a privilege granted by the state and thus subject to reasonable state-imposed limitations and conditions. *Id.* Under *Schmerber*, 384 U.S. 757, implied consent laws do not necessarily implicate any constitutional rights. Neither do such laws impose any affirmative duty upon an arrestee, since under *Schmerber* a driver lawfully arrested on suspicion of DUI does not have a constitutional right to refuse to submit to a sobriety test. States adopting implied consent laws accordingly have granted arrestees a *statutory option* to refuse to submit to a blood test. One may choose to exercise that option, and thus deprive the state of competent evidence tending to show that he was DUI, in exchange for forfeiture of his driver's license. *See* ERWIN, *supra*, at § 33.02[2].

The second theory holds that implied consent laws are reasonable health and safety regulations, pursuant to the state's police power, regulating the act of driving. Under this theory, such regulations must also comport fully with the requirements of due process. *Id.*

[32] For an important postscript to *Schmerber*, see South Dakota v. Neville, 459 U.S. 553 (1983). In *Neville*, the State of South Dakota had chosen not to force arrestees to submit to blood-alcohol tests but rather chose to encourage compliance through license revocation and admission of refusals into evidence at trial. The *Neville* Court reasoned that because, under *Schmerber*, a state could legitimately compel an arrestee to accede to a blood-alcohol test against his will, the state had the option to not exercise that power and to instead offer the arrestee a choice between taking the test or having a refusal admitted against him to the trier of fact. *Id.* at 559-60. Thus, a refusal to take a blood test after the police have lawfully requested one "is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.* at 564.

All fifty states have enacted implied consent laws.[33] Revocation of a driver's license under state implied consent laws is considered a civil penalty, independent and separate from criminal DUI sanctions, in almost all jurisdictions.[34]

Implied consent laws have certainly fulfilled their function of helping law enforcement officials peaceably obtain evidence useful in criminal DUI prosecutions.[35] Although the reliability of breath-testing devices

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[33] *See* ALA. CODE § 32-5-192 (1989 Repl.); ALASKA STAT. § 28.35.031 (1989); ARIZ. REV. STAT. ANN. § 28-691 (Cum. Supp. 1991); ARK. CODE ANN. § 5-65-202 (Michie Cum. Supp. 1991); CAL. VEH. CODE § 23157 (West Cum. Supp. 1992); COLO. REV. STAT. § 42-4-1202 (Cum. Supp. 1991); CONN. GEN. STAT. ANN. § 14-227b (West Cum. Supp. 1991); DEL. CODE ANN. tit. 21, § 2740 (1985 Repl.); D.C. CODE ANN. §§ 40-502, 40-505 (1990 Repl.); FLA. STAT. ANN. § 316.1932 (West 1990); GA. CODE ANN. § 40-5-55 (1991); HAW. REV. STAT. § 286-151 (Supp. 1991); IDAHO CODE § 18-8002 (Cum. Supp. 1991); ILL. ANN. STAT. ch. 95 1/2, para. 11-501.1 (Smith-Hurd Cum. Supp. 1991); IND. CODE ANN. § 9-30-6-1 (West 1991 Repl.); IOWA CODE ANN. § 321J.6 (West Cum. Supp. 1991); KAN. STAT. ANN. § 8-1001 (Cum. Supp. 1991); 1991 KY. REV. STAT. & R. SERV. (Baldwin 1990) (to be codified at KY. REV. STAT. ANN. § 189A.103); LA. REV. STAT. ANN. § 32:661 (West 1989); ME. REV. STAT. ANN. tit. 29, § 1312 (West Supp. 1991); MD. TRANSP. CODE ANN. § 16-205.1 (Cum. Supp. 1991); MASS. GEN LAWS ANN. ch. 90, § 24(f) (1989); MICH. COMP. LAWS § 257.625 (1990); MINN. STAT. ANN. § 169.123 (West Cum. Supp. 1992); MISS. CODE ANN. § 63-11-5 (Cum. Supp. 1991); MO. ANN. STAT. § 577.020 (West Cum. Supp. 1992); MONT. CODE ANN. § 61-8-402 (1991); NEB. REV. STAT. § 39-669.08 (Cum. Supp. 1990); NEV. REV. STAT. § 484.382 (1991); N.H. REV. STAT. ANN. § 265:84 (Cum. Supp. 1991); N.J. STAT. ANN. § 39:4:50.2 (West 1990); N.M. STAT. ANN. § 66-8-107 (1987 Repl.); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Cum. Supp. 1992); N.C. GEN STAT. § 20-16.2 (Cum. Supp. 1991); N.D. CENT. CODE § 39-20-01 (Supp. 1991); OHIO REV. CODE ANN. § 4511.191 (Supp. 1990); OKLA. STAT. ANN. tit. 47, § 751 (1988); OR. REV. STAT. § 813.100 (1991); 75 PA. CONS. STAT. ANN. § 1547(a) (West Cum. Supp. 1991); R.I. GEN. LAWS § 31-27-2.1(a) (Cum. Supp. 1991); S.C. CODE ANN. § 56-5-2950 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 32-23-10 (Supp. 1991); TENN. CODE ANN. § 55-10-406 (1989); TEX. REV. CIV. STAT. ANN. art. 6701*l*-5 (West Cum. Supp. 1992); UTAH CODE ANN. § 41-6-44.10 (Cum. Supp. 1991); VT. STAT. ANN. tit. 23 § 1202 (Cum. Supp. 1991); VA. CODE § 18.2-268 (Cum. Supp. 1991); WASH. REV. CODE ANN. § 46.20.308 (Cum. Supp. 1991); W. VA. CODE § 17C-5-4 (1991); WIS. STAT. ANN. § 343.305 (West 1991); WYO. STAT. ANN. § 31-6-102 (1989).

[34] While most states have opted to encourage submission to blood-alcohol testing by imposing civil penalties for refusal, two states, Alaska and Nebraska, have made refusal to submit to a chemical test when under arrest for DUI a separate misdemeanor crime with penalties identical to those imposed under criminal DUI charges. D. Bernard Zaleha, *Alaska's Criminalization of Refusal to Take a Breath Test: Is it a Permissible Warrantless Search Under the Fourth Amendment?*, 5 ALASKA L. REV. 263 (1988).

[35] *See Neville*, 459 U.S. at 559 (stating that one of the purposes of implied consent

and the legitimacy of chemical blood-testing methodology continues to be challenged,[36] the results of such tests are presently by statute admissible as evidence in criminal DUI proceedings in all fifty states.[37]

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laws is to avoid violent confrontations between arrestees and the police); *see also*, Rossell v. City & Cty. of Honolulu, 59 Haw 173, 181-82, 579 P.2d 663, 669 (1978) (noting that threat of revocation under an implied consent penalty is an alternative to the use of force and provides police with an instrument of enforcement "not involving physical compulsion").

[36] See, e.g., Paul Schop, Comment, *Is DWI DOA?: Admissibility of Breath Testing Evidence in the Wake of Recent Challenges to Breath Testing Devices*, 20 SW. U. L. REV. 247, 253-61 (1991) for a discussion of recent challenges; Pariser, *supra* note 20 (questioning the constitutionality of the presumption that an arrestee's BAC at time of driving is equal to or higher than his BAC at time of testing); Thompson, *supra* note 19 (arguing that presumptions of intoxication based on chemical testing are unconstitutional).

[37] *See* ALA. CODE § 32-5A-194 (Cum. Supp. 1991); ALASKA STAT. § 28.35.033 (1989); ARIZ. REV. STAT. ANN. §§ 28-692, 28-692.03 (Cum. Supp. 1991); ARK. CODE ANN. § 5-65-206 (Cum. Supp. 1991); CAL. VEH. CODE § 23155 (West Cum. Supp. 1992); COLO. REV. STAT. § 42-4-1202 (Cum. Supp. 1991); CONN. GEN. STAT. ANN. § 14-227a (West Cum. Supp. 1991); DEL. CODE ANN. tit. 21, § 2750 (1985 Repl.); D.C. CODE ANN. § 40-717.2 1990 Repl.); FLA. STAT. ANN. § 316.1934 (West 1990); GA. CODE ANN. § 40-6-392 (1991); HAW. REV. STAT. § 291-5 (1985 Repl.) IDAHO CODE § 18-8004 (Cum. Supp. 1991); ILL. ANN. STAT. ch. 95 1/2 para. 11-501.1 (Smith-Hurd Cum. Supp. 1991); IND. CODE ANN. § 9-30-6-15 (West 1991 Repl.); IOWA CODE ANN. § 321J.15 (West Cum. Supp. 1991); KAN. STAT. ANN. § 8-1005 (Cum. Supp. 1991); KY. REV. STAT. ANN. § 189.520 (Baldwin 1991); LA. REV. STAT. ANN. § 32:662 (West 1989); ME. REV. STAT. ANN. tit. 29, § 1312 (West Supp. 1991); MD. CTS. & JUD. PROC. § 10-307 (Cum. Supp. 1991); MASS. GEN LAWS ANN. ch. 90, § 24 (1989); MICH. COMP. LAWS § 257.625a (1990); MINN. STAT. ANN. § 169.121 (West Cum. Supp. 1992); MISS. CODE ANN. § 63-11-30 (Cum. Supp. 1991); MO. ANN. STAT. § 577.037 (Cum. Supp. 1992); MONT. CODE ANN. § 61-8-404 (1991); NEB. REV. STAT. § 39-669.11 (Cum. Supp. 1990); NEV. REV. STAT. § 484.381 (1991); N.H. REV. STAT. ANN. § 265:89 (Cum. Supp. 1991); N.J. STAT. ANN. § 39:4:50.1 (West Cum. Supp. 1991) (repealed 1990); N.M. STAT. ANN. § 66-8-110 (1987 Repl.); N.Y. VEH. & TRAF. LAW § 1195 (McKinney Cum. Supp. 1992); N.C. GEN STAT. § 20-139.1 (West Cum. Supp. 1992) (effective Jan. 1, 1993); N.D. CENT. CODE § 39-20-07 (Supp. 1991); OHIO REV. CODE ANN. § 4511.19 (Supp. 1990); OKLA. STAT. ANN. tit. 47, § 756 (1988); OR. REV. STAT. § 813.300 (1991); 75 PA. CONS. STAT. ANN. § 1547(c) (West Cum. Supp. 1991); R.I. GEN. LAWS § 31-27-2 (Cum. Supp. 1991); S.C. CODE ANN. § 56-5-2950 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 32-23-7 (1989); TENN. CODE ANN. § 55-10-407 (1989); TEX. REV. CIV. STAT. ANN. art. 6701*l*-5 (West Cum. Supp. 1992); UTAH CODE ANN. § 41-6-44.5 (1988); VT. STAT. ANN. tit. 23, § 1204 (Cum. Supp. 1991); VA. CODE § 18.2-268 (Cum. Supp. 1991); WASH. REV. CODE ANN. § 46.61.506 (Cum. Supp. 1991); W. VA. CODE § 17C-5-8 (1991); WIS. STAT. ANN. § 343.305 (West 1991); WYO. STAT. ANN. § 31-5-233 (1989).

Most states have in fact elevated BAC to dispositive status by redefining the crime of DUI, to include the simple act of driving with a blood-alcohol level in excess of statutorily permitted limits, irrespective of the effect that alcohol has on the particular person.[38] Driving with a BAC of 0.10% or more is today per se illegal in most American jurisdictions.[39]

Almost in spite of their uncompromising anti-drunk driving efforts, legislators and law enforcement officials soon found themselves on the horns of a new dilemma. Many of the state implied consent laws provided for court-imposed revocation for refusal to take a blood-alcohol test. These laws required that a judicial hearing be held prior to revocation.[40] As crowded court dockets and defendants' dilatory

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[38] *See, e.g.*, HAW. REV. STAT. § 291-4(a) (Supp. 1991).

> A person commits the offense of driving under the influence of intoxicating liquor if:
>
> (1) The person operates or assumes control of the operation of any motor vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; or
>
> (2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

Id.

Under subsection (a)(2), the prosecution need only show that the defendant was driving and had a BAC of 0.10% or more. Rather than establishing a mere rebuttable presumption of intoxication, the statute defines the act of driving with a BAC of 0.10% or more as illegal per se. The actual degree of alcohol-induced impairment of the defendant's faculties, and any need to prove such impairment, is irrelevant under such per se statutes. *See generally*, Pariser, *supra* note 20, at 143. Subsection (a)(1) is retained to cover instances where a driver has a BAC less than 0.10% but is nevertheless subject to prosecution because of erratic driving or failure of a roadside sobriety test. *See generally*, Pariser, *supra* note 20, at n.20.

[39] For citations to the laws of each jurisdiction, see Schop, *supra* note 36, at 248. As of 1990, Hawai'i was one of 40 American jurisdictions using a BAC of 0.10% as the "triggering level" for DUI per se. Driving with a BAC of 0.08% or more is per se illegal in four state jurisdictions: Maine, Utah, Oregon, and California. Nine jurisdictions do not have per se laws, but use a BAC of 0.10% as prima facie evidence of DUI. *Id.*

The federal government again played a large role in the widescale adoption of per se laws. The National Driver Register Act, 23 U.S.C. §§ 401-409 (1982), was meant to reduce the incidence of DUI by providing federal funds for alcohol traffic safety programs only to those states that enacted per se laws at a BAC of 0.10%.

[40] *See, e.g.*, HAW. REV. STAT. § 286-155 (1985) (enacted 1967, repealed 1991)

tactics led to excessive delay in DUI proceedings,[41] the effectiveness of both criminal sanctions and court-imposed civil revocation as adequate deterrents to drunk driving was severely undermined.[42] Many state court systems were simply not equipped to manage the bulging docket.[43] Administration of the system had become unmanageable, but the pre-congestion efficacy of implied consent penalties nonetheless suggested that the basic concept was sound.

Beleaguered state lawmakers responded to the new problem by enacting expedited administrative license revocation laws. Administrative revocation statutes substitute administrative hearings and agency-imposed sanctions for the judicial hearings and court-imposed penalties provided for under traditional implied consent laws.[44] Forty-one states, plus the District of Columbia, now have statutory anti-drunk driving schemes employing, at least in part, some variation of administrative license revocation.[45]

(revocation of privilege to drive motor vehicle upon refusal to submit to testing), *infra* note 46.

[41] *See* WILSON & MANN, *supra* note 12, at 121.

[42] *See* H. LAURENCE ROSS, DETERRING THE DRINKING DRIVER (1982) [hereinafter Ross]. States initially responded to the failing deterrent value of criminal sanctions by increasing the severity of DUI penalties. Research indicates, however, that general deterrent effect is enhanced not so much by the severity of possible penalties, but more by the swiftness and certainty of being penalized. Since drivers charged under more severe laws are more likely to contest the legal action, systemic delay is increased and plea-bargaining is intensified, thus negating any purported gain in deterrent effect. *Id.*

[43] In Hawai'i, for example, there is presently a backlog of 1800 criminal DUI cases awaiting jury trial. Benjamin Seto, *Kaneshiro: Need More Judges for DUI Trials*, HONOLULU STAR-BULL. Feb. 14, 1992, at A3. The Honolulu City Prosecutor fears that at the current rate of disposition, clearing the backlog could take up to 30 years! *Id.*

[44] *See, e.g.*, HAW. REV. STAT. § 286-155.5 (Supp. 1991) (revocation of privilege to drive motor vehicle or moped upon refusal to submit to blood test).

> If a person under arrest refuses to submit to a breath or blood test, none shall be given, except as provided in section 286-163 [mandatory testing for drivers involved in accidents resulting in the injury or death of any person], but the person shall be subject to the procedures and sanctions under part XIV [HAW. REV. STAT. § 286-251 (Supp. 1991) (administrative revocation)].

Id.

[45] *See* ALA. CODE § 32-5-192(c) (1989 Repl.); ALASKA STAT. § 28.15.165 (1989); ARIZ. REV. STAT. ANN. § 28.691(D) (Cum. Supp. 1991); CAL. VEH. CODE § 13353 (West Supp. 1992); COLO. REV. STAT. § 42-2-122.1 (Cum. Supp. 1991); CONN. GEN. STAT. ANN. § 14-227b (West Cum. Supp. 1991); DEL. CODE ANN. tit. 21, § 2742 (1985 Repl.); D.C. CODE ANN. § 40-302 (Supp. 1991. 1990); FLA. STAT. ANN. §

III. HAWAI'I'S ADMINISTRATIVE REVOCATION LAW

Sponsors of Hawai'i's new administrative revocation law complained that traditional criminal sanctions and judicial license revocation under the state implied consent penalty enacted and in force since 1967[46] did

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322.2615 (West Cum. Supp. 1991); GA. CODE ANN. § 40-5-55 (1991); HAW. REV. STAT. § 286-251 (Supp. 1991); ILL. ANN. STAT. ch. 95 1/2, para. 11-501.1 (Smith-Hurd Cum. Supp. 1991); IOWA CODE ANN. § 321J.9 (West Cum. Supp. 1991); KAN. STAT. ANN. § 8-1002 (Supp. 1990); LA. REV. STAT. ANN. § 32:667 (West 1989); ME. REV. STAT. ANN. tit. 29, § 1312(2) (West Supp. 1991); MD. TRANSP. CODE ANN. § 16-205.1 (Cum. Supp. 1991); MASS. GEN. LAWS ANN. ch. 90, § 24(f) (1989); MINN. STAT. ANN. § 169.123(4) (West Cum. Supp. 1992); MISS. CODE ANN. § 63-11-21 (Cum. Supp. 1991); MO. REV. STAT. § 302.505 (Cum. Supp. 1992); MONT. CODE ANN. § 61-8-402(3) (1991); NEB. REV. STAT. § 39-669.08(4) (Cum. Supp. 1990); NEV. REV. STAT. § 483.460 (1991); N.H. REV. STAT. ANN. § 265:92 (Cum. Supp. 1991); N.M. STAT. ANN. § 66-8-111 (Michie Supp. 1991); N.Y. VEH. & TRAF. LAW § 1194(2)(b) (McKinney Supp. 1992); N.C. GEN. STAT. § 20-16.2(C) (Cum. Supp. 1991); N.D. CENT. CODE § 39-20-04 (Supp. 1991); OHIO REV. CODE ANN. § 4511.191(D) (Baldwin Supp. 1990) OKLA. STAT. ANN. tit. 47, § 753 (West Cum. Supp. 1991); OR. REV. STAT. § 813.410 (1991); 75 PA. CONS. STAT. ANN. § 1547(b) (West Cum. Supp. 1991); R.I. GEN. LAWS § 31-27-2.1 (Cum. Supp. 1991); S.C. CODE ANN. § 56-5-2950(d) (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 32-23-11 (1989); UTAH CODE ANN. § 41-6-44.10 (Cum. Supp. 1991); VT. STAT. ANN. tit. 23, § 1205 (Cum. Supp. 1991); WASH. REV. CODE ANN. § 46.20.308 (Cum. Supp. 1991); W. VA. CODE § 17C-5A-1 (1991); WIS. STAT. ANN. § 343.305 (West 1991); WYO. STAT. § 31-6-102 (1989).

[46] HAW. REV. STAT. § 286-155 (1985 Repl.) (enacted 1967, repealed 1991) (revocation of privilege to drive motor vehicle upon refusal to submit to testing). The 1967 implied consent penalty provided for revocation of a suspected drunk driver's license pursuant to a judicial hearing, based upon the arresting officer's sworn affidavit attesting to the driver's refusal to submit to a chemical test. *Id.* § 286-155(a). The affidavit was submitted to a district judge of the circuit in which the arrest was made. *Id.* A first-time offender lost his license for one year, while a repeat offender lost his license for not less than two, and not more than five years. *Id.* § 286-155(b). The district judge's order was appealable to the supreme court. *Id.* § 286-157. Crowded court dockets and low priority treatment obviated the swiftness and certainty of sanctions under this section. This section was triggered by HAW. REV. STAT. § 286-151 (implied consent).

Act 188, 1990 Haw. Sess. Laws 399 (codified as amended at HAW. REV. STAT. §§ 286-251 to 286-266) operated to repeal, inter alia, section 286-155 as of July 1, 1991, but the section was subsequently amended and revived as HAW. REV. STAT. § 286-155.5 (Supp. 1991) (revocation of privilege to drive motor vehicle or moped upon refusal to submit to breath or blood test). Act 1 § 1, 16th Leg., Sp. Sess., (1991) *reprinted in* 1991 Haw. Sess. Laws 1061. *See supra* note 44. Section 286-155.5 in effect replaces the 1967 implied consent penalty provision with a trigger for administrative revocation under HAW. REV. STAT. § 286-251 (Supp. 1991).

not provide for a swift and certain loss of license. Although a suspected drunk driver faced having his license revoked for at least a year if he refused to take a blood-alcohol test, the old revocation process required a pre-suspension district court hearing.[47] Proponents of expedited administrative revocation argued that swift and certain punishment, especially the loss of license, is the most effective deterrent to drunk driving.[48] They contended that driving is not a right, but is rather a privilege and a responsibility licensed by the state, and that the state should be able to summarily revoke that privilege if it is abused.[49]

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[47] HAW. REV. STAT. § 286-155 (1985 Repl.) (enacted 1967, repealed 1991).

[48] The experience of other states adopting administrative revocation laws supports this view. *See, e.g.*, H. Laurence Ross, *Administrative License Revocation in New Mexico: An Evaluation*, 9 LAW & POL'Y 5, 14-15 (1987) (finding deterrent consequences upon implementation of administrative revocation law in that state); Jay Mathews, *New Weapon Against Drunken Drivers*, WASH. POST, Sept. 16, 1991, at A12 (noting that alcohol-related traffic deaths dropped 41% in Nevada and 37% in North Dakota after adoption of revocation laws); Nanette Asimov, *Drunk-Driving Deaths Decrease, Authorities Attribute 10 Percent Drop to New Laws*, S.F. CHRON., July 4, 1990, at A1 (reporting alcohol-related traffic fatalities in California down 10%, and down 25% in Bay Area, during first five months of new revocation law); *see also, Deterrence of Drunk Driving & Role of Sobriety Check Points and Administrative License Revocation*, National Transportation Safety Board, Report SS 8401 (Apr. 1984).

[49] Early authority on the subject held that possession of a driver's license was a privilege, conferred upon an individual by the state, and subject to the state's reasonable conditions and regulations. *See, e.g.*, Lee v. State, 358 P.2d 765, 769 (1961). As a privilege, it was not protected by the Due Process Clause. "The operation of a motor vehicle . . . is not a right, but a privilege. Due process protects only [rights], and not privileges. Courts need not require fair hearings when nothing more than privileges are at stake." Daniel L. Hovland, Recent Cases, Constitutional Law—Due Process—*Suspension or Revocation of Driver's License Without Prior Hearing Deemed Constitutionally Adequate*, 54 N.D. L. REV. 274, 277 n.25 (1977).

The Supreme Court examined the "right/privilege" dichotomy in a line of cases culminating in the Court's "fully and finally reject[ing] the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972) (holding that procedural due process did not require that a hearing be given prior to nonrenewal of a nontenured state teacher's employment contract); *see also*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (holding that due process requires that an informal administrative hearing be given prior to parole revocation); Graham v. Richardson, 403 U.S. 365, 374 (1971) (holding state statutes that deny welfare benefits to aliens who have not resided in the United States for a specified number of years violative of the Equal Protection Clause); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (holding that procedural due process requires that an evidentiary hearing be given

Opponents of administrative revocation argued that a driver's license constitutes an important property interest that should not be taken away without a full and fair judicial hearing. They argued that administrative revocation turns the legal system on its head by assuming that people are guilty and denying them a fair opportunity to prove their innocence. Critics further charged that the threat of immediate administrative revocation was a thinly veiled attempt to illegitimately compel cooperation with the police.[50]

The Hawaii State Legislature debated these issues for seven years before producing an administrative license revocation law in 1990.[51] Act 188 provided for an expedited administrative revocation process to take effect on July 1, 1991.[52] The new law operated to supersede the judicial revocation procedure which had been in effect since 1967.[53] In what subsequently became a major controversy, Act 188 repealed and did not provide for reinstating the implied consent penalty language that triggered revocation in the first instance.[54] The intent, apparently, was to encourage arrestees to submit to blood-alcohol testing by imposing comparatively stiffer penalties on those who refused, but only

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before recipients' welfare subsistence benefits are terminated).

After *Goldberg* the relevant inquiry is not whether the interest sought to be protected is a "right" or a "privilege", but rather whether it is a "constitutionally protected property interest". The Supreme Court subsequently held that a driver's license, whether denominated a "right" or a "privilege", is a constitutionally protected property interest. Bell v. Burson, 402 U.S. 535, 539 (1971).

[50] For a judicial incarnation of the argument, see *infra* note 126 (discussing Mackey v. Montrym, 443 U.S. 1, 30 (Stewart, J., dissenting)).

[51] Act 188, 15th Leg., Reg. Sess. (1990), *reprinted in* 1990 Haw. Sess. Laws 399 (codified as amended at HAW. REV. STAT. §§ 286-251 to 286-266).

[52] *Id.*

[53] *See supra* note 46.

[54] HAW. REV. STAT. § 286-155 (1985 Repl.) (enacted 1967, repealed 1991) read, in pertinent part:

> (a) If a person under arrest refuses to submit to a breath or blood test, none shall be given, except as provided in section 286-163 [mandatory tesing for drivers involved in accidents resulting in the injury or death of any person], but the arresting officer shall, as soon as practicable, submit an affidavit to a district judge of the circuit in which the arrest was made . . . .
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> . . . .
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> (b) Upon receipt of the affidavit, the district judge shall hold a hearing . . . and shall determine whether the statements contained in the affidavit are true and correct. If the district judge finds the statements contained in the affidavit are true, the judge shall revoke the arrested person's license . . . .

Id.

if the DUI charge was eventually sustained in an administrative hearing.[55] Thus, a driver refusing to take a blood-alcohol test retained his license until he was found guilty of DUI by an administrative hearings officer. Some lawmakers felt that since it would be easier for police to seize a person's license under administrative revocation, repealing the automatic implied consent penalty would restore a good balance between getting drunk drivers off the road and protecting the civil liberties of the innocent.[56]

Community groups were outraged. The Hawaii Chapter of Mothers Against Drunk Driving, together with a broad coalition of law enforcement and public health officials, launched a sweeping public campaign pointing out the perceived flaw in the new law: without the threat of "automatic" loss of license, suspected drunk drivers would refuse to take the blood-alcohol test and thus deprive criminal prosecutors of their best evidence.[57] The Legislature, responding to the public outcry, convened in a rare special session on June 24, 1991, to "fix" Act 188 by restoring the implied consent penalty language.[58] Reinstatement of

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[55] *See* William Kresnak, *DUI Session Scheduled*, HONOLULU ADVERTISER, June 20, at A1.

[56] *See* William Kresnak, *DUI Bill Gets Tentative Fix*, HONOLULU ADVERTISER, June 25, 1991, at A1.

[57] *See* Becky Ashizawa, *DUI-Bill Veto Complicates Special Session*, HONOLULU ADVERTISER, June 22, 1991, at A3; William Kresnak, *DUI Session Scheduled*, HONOLULU ADVERTISER, June 20, 1991, at A1.

[58] *See* William Kresnak, *Lawmakers Ready to Begin Repair Work on DUI Law*, HONOLULU STAR BULL. & ADVERTISER, June 23, 1991, at A3.

Curiously, the implied consent penalty language at the center of the controversy appears to be, after all, mere surplusage. Administrative revocation for refusal to take a blood-alcohol test, under those provisions of Act 188 subsequently codified at HAW. REV. STAT. §§ 286-255 to 286-258 (Supp. 1991), is by plain language self-executing. Under the statute, a driver's license is seized upon his arrest, and immediate restoration is contemplated only if the arrestee takes and passes a blood-alcohol test. *See* HAW. REV. STAT. §§ 286-256 (Supp. 1991). Arrestees who refuse to take a test are subject to immediate revocation. *Id.* §§ 286-257(b) and 286-258(d).

Ironically, the anti-drunk driving advocates' cause may have been better served if the implied consent penalty language had not been reinstated. Because revocation for refusal to take a test is self-executing under the previously cited sections, the implied consent penalty language restored as § 286-155.5 serves only as a limitation on the police power, by operation of the language "[i]f a person under arrest refuses to submit to a breath or blood test, *none shall be given*." *Id.* § 286-155.5 (Supp. 1991) (emphasis added). Such a statute grants the arrestee an option to refuse and limits the otherwise broad police power available under *Schmerber*. *See supra* note 31 (discussing rationales for implied consent laws' police power provisions supported in *Schmerber*). If

the penalty mandates the immediate revocation of a suspected drunk driver's license if he refuses to take a blood-alcohol test. Governor Waihee signed the amended measures into law on June 29, 1991.[59]

Hawai'i's administrative revocation law took effect on August 1, 1991.[60] It operates to supersede the judicial revocation procedures of *Hawaii Revised Statutes* chapter 286 and subjects a suspected drunk driver to administrative revocation in addition to, rather than in lieu of, criminal sanctions under Hawai'i law.[61] Administrative revocation constitutes an independent and distinct proceeding from the criminal DUI charge and may run concurrently with a separate DUI prosecution

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this language had not been reincorporated into the Hawai'i law, the police would presumably have to be permitted to use reasonable force to compel uncooperative arrestees to accede to blood-alcohol tests. *Cf.* Rossell v. City & County of Honolulu, 59 Haw. 173, 179, 579 P.2d 663, 668 (1978) (stating that *Schmerber* was not intended to prevent states from legislatively providing narrower guidelines for police administration of sobriety tests).

[59] *See* William Kresnak, *DUI Session is Over—But the Debate Continues*, HONOLULU STAR BULL. & ADVERTISER, June 30, 1991, at A3.

[60] HAW. REV. STAT. §§ 286-251 to 286-266 (Supp. 1991). The effective date of the new law was delayed for 30 days due to the special legislative session convened to amend the law and reenact the implied consent penalty language. 1991 Haw. Sess. Laws 1072 (Sp. Sess.), Act I, § 20.

[61] HAW. REV. STAT. § 286-253(a) (Supp. 1991). An individual who prevails at the administrative hearing may still face a criminal DUI charge, even if no further offense is involved. Critics of this provision condemn it as akin to double jeopardy, whereas proponents argue that, in some cases, justice may require that a driver who wins the administrative phase on a "technicality" face the criminal charge anyway. *See DUI Law: Are They Going a Bit Too Far?*, HONOLULU ADVERTISER, June 26, 1991, at A12.

The State Legislature adopted "dual track" enforcement under the premise that revocation proceedings are civil in nature, and that the prompt revocation required to produce a maximum deterrent effect cannot be accomplished through procedures which are necessary to protect the rights of a person facing incarceration for a criminal offense. STAND. COMM. REP. No. 1071, 15th Leg., Reg. Sess. (1989), *reprinted in* 1989 HAW. H.R. J. 1229 (1989). For a discussion of "dual track" enforcement, see Stephen G. Norton, *The Proposed Administrative License Suspension Procedures in Vermont: How Much Process are Drunk Drivers Due?*, 11 VT. L REV. 75, 89 (1986).

The Hawaii Supreme Court approves of dual track DUI enforcement. *See, e.g.*, State v. Uehara, 68 Haw. 512, 515 721 P.2d 705, 706-07 (1986) (declaring that the implied consent penalty and the DUI statute are separate and distinct and should be enforced separately).

The administrative revocation law does provide that documentary and testimonial evidence provided by the driver during administrative proceedings is not admissible against the arrestee in any criminal DUI proceeding arising out of the same occurrence. HAW. REV. STAT. § 286-253(a) (Supp. 1991).

under *Hawaii Revised Statutes* section 291-4.[62] The administrative review and administrative hearing provisions of the revocation law are expressly excepted from the contested case requirements of the Hawaii Administrative Procedure Act, *Hawaii Revised Statutes* chapter 91.[63]

Hawai'i's administrative revocation law operates whenever a police officer makes an arrest upon probable cause of DUI.[64] The arresting officer takes possession of the driver's license, requests that the driver take a blood-alcohol test to determine his BAC, and informs the driver of the possible consequences of refusal.[65]

If the driver submits to testing and the results indicate a BAC of less than 0.10 percent, the driver's license is immediately returned and

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[62] HAW. REV. STAT. § 286-253(a) (Supp. 1991).

[63] *Id.* § 286-263. Note that in absence of express exception, all Hawai'i state and county boards, commissions, departments, or offices must conform to the requirements of the Hawaii Administrative Procedure Act (HAPA) when acting in either a rule making capacity or in the adjudication of a contested case. *See* Town v. Land Use Comm'n, 55 Haw. 538, 545, 524 P.2d 84, 89 (1974). Adjudication has been described as a determination of whether past conduct was unlawful, in a proceeding which may result in disciplinary action and characterized by an accusatory flavor. Shoreline Transportation, Inc., v. Robert's Tours and Transportation, Inc., 70 Haw. 585, 591, 779 P.2d 868, 872. A "contested case" is defined as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HAW. REV. STAT. § 91-1(5) (1985 Repl.).

For a brief overview of formal administrative adjudication, *see* AUDITOR, STATE OF HAWAII, REP. NO. 91-12, STUDY OF ADMINISTRATIVE ADJUDICATION IN HAWAII 3-8 (1991).

[64] HAW. REV. STAT. § 286-255 (Supp. 1991). For what constitutes probable cause to arrest an individual on suspicion of DUI, see State v. Wyatt, 67 Haw. 293, 305 n.10, 687 P.2d 544, 553 n.10 (1984) (holding that a field sobriety test indicating that a suspect may have been driving while intoxicated was sufficient to establish probable cause to arrest the driver and compel her to undergo chemical testing pursuant to the implied consent law). *See also*, State v. Kuba, 68 Haw. 184, 191, 706 P.2d 1305, 1310 (1985) ("Probable cause has been established when it can be said that a reasonable and prudent person viewing the evidence would have a strong suspicion that a crime had been committed."). *Compare* State v. Kim, 68 Haw. 286, 290, 711 P.2d 1291, 1294 (1985) (holding that "a police officer must have at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a car after a traffic stop").

In order to effect a lawful arrest, the police officer must establish not only that there existed probable cause to arrest the driver on suspicion of DUI but also that there was a reasonable suspicion to stop the driver's vehicle or, alternatively, that the driver had been stopped at an intoxication control roadblock. *See* HAW. REV. STAT. § 286-255(1) (Supp. 1991).

[65] HAW. REV. STAT. § 286-255 (Supp. 1991).

administrative revocation proceedings are terminated with prejudice.[66] If, however, the test indicates a BAC of 0.10 percent or more, the police retain the driver's license and immediately initiate administrative revocation proceedings.[67] The driver is given a notice of administrative revocation, which also serves as a thirty-day temporary driving permit.[68] If the driver refuses to be tested, the police likewise retain his license[69] and issue him a notice of administrative revocation and temporary driving permit.[70]

Once administrative revocation is initiated, an administrative review officer[71] automatically reviews the issuance of the notice of revocation within eight days from the date of arrest and notice.[72] The driver does not have the right to be present at this review, but he may demonstrate in writing why his license should not be revoked.[73] The review officer will revoke the driver's license if she finds that there existed a reasonable suspicion to justify the police stopping the driver (or that the driver had been stopped at an intoxication control roadblock), probable cause to arrest him, and either that the driver refused to be tested or that a preponderance of the evidence supports the conclusion that he was driving while intoxicated.[74] If, on the other hand, the evidence is inadequate to support administrative revocation, the review officer will terminate the revocation proceedings and return the driver's license.[75]

If the review officer sustains the revocation, she mails a written decision to the driver stating the reasons for revocation and informing him that he has five days from the date the decision is mailed to

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[66] *Id.* § 286-256.

[67] *Id.* § 286-257(a).

[68] *Id.* § 286-255.

[69] *Id.* § 286-257(b).

[70] *Id.* § 286-255.

[71] Responsibility for administering the revocation law is vested in the administrative director of the courts, and the director, or persons duly appointed by the director, conduct administrative reviews and preside over administrative hearings. *Id.* § 286-251. The director duly created a new Administrative Driver's License Revocation Office and appointed 10 hearings officers to administer the new law.

[72] *Id.* § 286-258(a).

[73] *See id.* § 286-258(b).

[74] *Id.* § 286-258(d). In making her determination, the review officer considers: (1) any sworn or unsworn statement or other evidence provided by the driver; (2) the chemical test results, if any, and; (3) the sworn affidavits of and other evidence provided by the arresting officials. *Id.* § 286-258(c).

[75] *Id.* § 286-258(e).

request an evidentiary administrative review hearing.[76] The hearing must be scheduled to commence no later than twenty-five days subsequent to the arrest and original notice of revocation.[77] The driver has the right to review and copy all documents considered at the administrative review prior to the hearing.[78] He also has the right to be represented by counsel,[79] to submit evidence, give testimony, and to present and cross-examine witnesses, including the arresting officer.[80]

The administrative hearings officer will affirm the revocation only if she finds that the police had reasonable grounds to stop the driver, probable cause justifying the arrest, and either that the driver refused to submit to a blood-alcohol test or that a preponderance of the evidence supports the conclusion that the driver was driving while intoxicated.[81] If the hearings officer reverses the revocation, she returns the driver's license and terminates the proceedings.[82] If she affirms, she mails a written decision indicating the duration of the revocation to the driver within five days of the hearing.[83]

If a driver had submitted to and failed a blood-alcohol test and the revocation of his license is sustained, he loses his license for (1) three months, if the driver had no prior alcohol enforcement contacts[84] during the five years preceding the date of arrest;[85] (2) one year, if the driver had one such contact in the previous five years;[86] (3) two years, if the driver had two such contacts in the previous seven years;[87] or, (4) life, if the driver had three or more such contacts in the previous ten years.[88]

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[76] *Id.* § 286-258(f).

[77] *Id.* § 286-259(a).

[78] *Id.* § 286-258(f).

[79] *Id.* § 286-259(c).

[80] *Id.* § 286-258(f). If the driver fails to request a hearing within the five days specified, the revocation takes effect for the period provided by law, upon expiration of the temporary permit. The driver may regain the right to a hearing by requesting one within 60 days of the arrest, but this does not stay the revocation taking effect upon expiration of the original, 30-day permit. *Id.* § 286-258(g).

[81] *Id.* § 286-259(e).

[82] *Id.* § 286-259(i).

[83] *Id.*

[84] "Alcohol enforcement contacts" are defined as any prior administrative license revocation, DUI conviction, or loss of license for refusal to take a blood-alcohol test. *Id.* § 286-251.

[85] *Id.* § 286-261(b)(1).

[86] *Id.* § 286-261(b)(2).

[87] *Id.* § 286-261(b)(3).

[88] *Id.* § 286-261(b)(4).

The driver faces significantly stiffer penalties if the revocation is sustained because he refused to take the blood-alcohol test; he loses his license for (1) one year if he is a first-time offender; (2) two years if he had one alcohol enforcement contact in the previous five years; and, (3) four years if he had two such contacts in the previous seven years.[89] If the driver is under the age of eighteen, his license would be revoked until his eighteenth birthday or for the appropriate revocation period otherwise provided for above, whichever is longer.[90]

An aggrieved driver may file a petition for judicial review within thirty days after the administrative hearing decision is mailed.[91] Judicial review is to be in the district court of the district in which the offense occurred.[92] The filing of the petition does not stay the administrative revocation, and the district court is expressly precluded from staying the revocation pending the outcome of judicial review.[93] Review is on the record of the administrative hearing, and no new testimony or evidence will be taken.[94] The sole issues for the court on review are whether the administrator exceeded constitutional or statutory authority, erroneously interpreted the law, acted in an arbitrary or capricious manner, committed an abuse of discretion, or made a determination that was unsupported by the evidence in the record.[95]

The Hawai'i statute makes hardship relief, in the form of a conditional driving permit, available to certain individuals after an initial thirty day "absolute revocation" period. The eligibility requirements are strict and the qualifying parameters narrow. Only a first-time offender, with no prior alcohol enforcement contacts, is eligible for hardship relief.[96] Such an individual must show either that he is gainfully employed in a position that requires driving and that he will be discharged if his driving privileges are revoked, or that he does not have access to alternative transportation and must therefore drive to work or to a substance abuse treatment facility or counselor.[97] Only a

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[89] *Id.* § 286-261(c).

[90] *Id.* § 286-261(b)(5). After a revocation period is over, the driver must prove that any and all conditions imposed under the revocation have been met before he is allowed to apply for a new driver's license. *Id.* § 286-265.

[91] *Id.* § 286-260(a).

[92] *Id.*

[93] *Id.*

[94] *Id.* § 286-260(b).

[95] *Id.* § 286-260(c).

[96] *Id.* § 286-260(a).

[97] *Id.* § 286-264.

person who has submitted to a blood-alcohol test is eligible for a conditional permit.[98] Accordingly, an individual whose license has been suspended because he refused to take a blood-alcohol test is not eligible for hardship relief.

IV. The Constitutionality of Administrative Revocation Laws—Due Process Analysis

The United States Supreme Court has held that an individual's interest in his driver's license is "property" that a state may not take away without observing the due process guarantee of the Fourteenth Amendment.[99] Revocation of a driver's license for statutorily defined

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[98] *Id.* § 286-264(a).

[99] Mackey v. Montrym, 443 U.S. 1 (1979); Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 535 (1971). Although *Bell* in 1971 represented the Court's first pronouncement on the issue, some state courts had begun to recognize a driver's license as an interest substantial enough to be protected by due process in the early 1950s. *See, e.g.*, Hecht v. Monaghan, 121 N.E. 2d 421, 423 (N.Y. 1954); Wignall v. Fletcher, 103 N.E.2d 728, 731 (N.Y. 1952); *see also*, Wall v. King, 206 F.2d 878, 882 (1st Cir. 1953).

The *Bell* Court, after determining that a driver's license constituted a protectible property interest, held that the Georgia Motor Vehicle Responsibility Act—which provided for automatic suspension of the license of any uninsured motorist involved in an accident, irrespective of fault, unless he posted security for the amount of damages claimed by an aggrieved party—was unconstitutional for its failure to provide a pre-deprivation hearing on liability. The Court declared that "it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell*, 402 U.S. at 542 (citations omitted).

For what constitutes an "emergency situation" for due process purposes, see Fuentes v. Shevin, 407 U.S. 67 (1972) (examining a state law authorizing the prehearing seizure of property upon the ex parte application of the individual's creditors). The Court in *Fuentes* established three requirements that had to be satisfied before deprivation of a protected property interest could be justified as falling within the "emergency exception" to the due process requirement of a prior hearing. First, the seizure had to be directly necessary to secure an important governmental or general public interest. Second, there must be a special need for very prompt action. Third, the person initiating the seizure must be a government official responsible for determining, under statutorily defined standards, that the seizure is necessary and justified under the particular instance. *Id.* at 91.

Before Mackey v. Montrym in 1979, the *Bell-Fuentes* emergency test was thought to control in cases examining the constitutionality of summary license revocation procedures. Courts applying the test often held that revocation procedures under implied

cause therefore constitutes the official deprivation of a constitutionally protected property interest. The question presented is whether the summary process employed affords the licensee constitutionally adequate due process protection against erroneous deprivation of that interest.

The Supreme Court has examined the constitutionality of a summary license suspension process by applying the administrative due process test first enunciated in *Mathews v. Eldridge*.[100] The Court applied the *Mathews* test against a summary suspension statute in the 1977 case of *Dixon v. Love*.[101] In *Love*, the Court upheld a statutory scheme which authorized the revocation of a driver's license based on that driver's accumulation of "points" assessed upon repeated convictions of certain traffic violations. The Illinois law permitted the revocation or suspension of a driver's license without a pre-suspension hearing.[102] The Court

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consent laws were not directly related to an emergency situation and were, therefore, unconstitutional under *Bell*. See, e.g., Holland v. Parker, 354 F. Supp. 196 (D.S.D. 1973), in which the district court held that South Dakota's revocation statute was unconstitutional, reasoning that since the law prescribed revocation of the license of only those drivers who refused to be tested, and not those who took the test and failed, the summary revocation procedure adopted was clearly not directly related to the State's need to keep drunk drivers off the road, and thus was not in response to an "emergency". *Id.* at 202; *see also infra* note 126 (discussing Mackey v. Montrym, 443 U.S. 1, 30 (Stewart, J. dissenting)).

[100] 424 U.S. 319 (1976) (holding that due process does not require a state administrative agency to hold an evidentiary hearing before terminating a recipient's Social Security disability payments). Justice Powell, writing for the *Mathews* Court, reviewed the Court's prior decisions and determined that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [but] is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (citations omitted).

[101] 431 U.S. 105 (1977). The Illinois District Court, relying on Bell v. Burson, 402 U.S. 535 (1971) (discussed *infra* note 99), had held that the statutory license revocation scheme at issue in *Love* was unconstitutional since it did not provide for a pre-deprivation hearing and did not fall within the emergency exception stated in *Bell*. *Love*, 431 U.S. at 111-12. The Supreme Court overturned, finding that its later decision in Mathews v. Eldridge, 424 U.S. 319 (1976) (discussed *infra* note 100), was controlling, and determined that the state's important interest in highway safety and the prompt removal of traffic safety hazards "fully distinguishes Bell v. Burson, where the 'only purpose' of the Georgia statute there under consideration was 'to obtain security from which to pay any judgments against the licensee resulting from the accident'[in which the licensee was involved]." *Love*, 431 U.S. at 114.

[102] *Id.* at 107 (citing ILL. REV. STAT. ch. 95 § 6-206 (1975)). The statute empowered the secretary of state to suspend or revoke a driver's license without a pre-suspension

examined the adequacy of the hearing provisions at issue by considering factors enumerated under the *Mathews* test. These factors were (1) the nature of the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and, (3) the government's interest, including the function involved and the fiscal or administrative burdens that additional or substitute procedural requirements would entail.[103] *Love* thus established that summary suspension of a driver's license for statutorily defined cause implicates a due process timing and adequacy inquiry which is to be resolved by application of the *Mathews* balancing test.

The Court compared a Massachusetts statute providing for the summary suspension of a driver's license for refusal to submit to an alcohol breath-analysis test against the *Mathews* standard two years later in *Mackey v. Montrym*.[104] The statutory scheme at issue in *Mackey*

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hearing, but provided for a full evidentiary administrative hearing subject to judicial review, if timely requested. The statute also made an important provision for the granting of restricted driving permits in hardship cases and for holders of commercial licenses. *Id.*

[103] *Love*, 431 U.S. at 112-13 (quoting Mathews v. Eldridge, 424 U.S. at 335); *see supra* note 100.

The *Love* Court held that: (1) a person's interest in a driver's license is generally not as vital and essential as, for example, the welfare subsistence payments suspended in Goldberg v. Kelly, 397 U.S. 254 (1970), noting with approval the Illinois statute's special provisions for hardship cases and commercial licensees, which protected those most likely to be seriously affected by suspension of driving privileges; (2) the risk of erroneous deprivation in the absence of a prior hearing was not great since, under the statute, suspension and revocation decisions were largely automatic, triggered by wholly objective criteria ("points" accumulated pursuant to valid traffic offense convictions); and, (3) the public's interest in promoting highway safety by promptly and efficiently removing hazardous drivers from the road was sufficient to uphold summary suspension without a prior hearing. *Love*, 431 U.S. at 113-15.

[104] 443 U.S. 1 (1979). The *Mackey* Court revisited what it had seen as the controlling distinction between Bell v. Burson (law unconstitutional) and Dixon v. Love (law constitutional) (*see supra* note 101 and accompanying text):

> Here, as in Love, the statute involved was enacted in aid of the Commonwealth's police function for the purpose of protecting the safety of its people. As we observed in Love, the paramount interest the Commonwealth has in preserving the safety of its public highways, standing alone, fully distinguishes this case from Bell v. Burson, on which Montrym and the District Court place principal reliance. We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in

mandated that the state's registrar of motor vehicles must, without a pre-suspension hearing, order a ninety-day license suspension upon the report of a licensee's refusal to submit to DUI testing pursuant to a lawful arrest.[105] The statute provided that an accused driver was entitled to an "immediate" post-suspension hearing.[106]

The *Mackey* Court first confirmed that the suspension of a driver's license for statutorily defined cause indeed implicates a "protectible property interest."[107] The Court then considered the nature of the private interest affected by the official action challenged and began by narrowing the definition of the driver's interest to that of continued possession and use of his license pending the outcome of the hearing due him.[108] That interest was recognized as "substantial," and the Court acknowledged that the state would "not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension review procedures."[109] Although the Massachusetts statute made no provision for hardship relief, the immediacy[110] of the post-suspension hearing weighed in favor of the statute's constitutionality.[111] The Court explained that the "duration of any potentially wrongful deprivation of a property interest is an important factor in assessing

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summarily seizing mislabeled drugs or destroying spoiled foodstuffs.
Id. at 17 (citations omitted).

The dissent in *Mackey* would not have applied the *Mathews* test, but rather found *Bell* indistinguishable and agreed with the Illinois court's assessment that the statute was not justified by the narrow "emergency exception." For a view in accord with the dissent, see Margaret L. Milroy, *North Carolina's License Revocation for Drunk Drivers: Minor Inconvenience or Unconstitutional Deprivation?*, 62 N.C. L. REV. 1149 (1984).

[105] *Mackey*, 443 U.S. at 3-4 (citing MASS. GEN. LAWS ANN., ch. 90, § 24(1)(f) (West Supp. 1979)).

[106] 443 U.S. at 7. The meaning of "immediate" was not defined by the Massachusetts statute. *See infra* note 110.

[107] 443 U.S. at 10.

[108] *Id.* at 11.

[109] *Id.* (*citing* Dixon v. Love, 431 U.S. 105, 113 (1977)).

[110] *Id.* at 7 n.5. The Massachusetts statute provided for an "immediate" post-suspension hearing, and the court found that in practice the aggrieved driver could obtain a decision from the hearing officer in between one to ten days. *Id.* By contrast, the Illinois statute challenged in *Love* provided only that the post-suspension hearing be *scheduled* within 20 days of the driver's request, and set for commencement "as early as practical." *Love*, 431 U.S. at 109-10.

[111] 443 U.S. at 12.

the impact of official action on the private interest involved"[112] and opined that the ninety-day maximum term on the suspension reduced the impact of the state action on the private interest involved.[113]

The Court then examined the risk of erroneous deprivation inherent in the Massachusetts scheme and began by stating that due process does not mandate that all governmental decision making comply with standards that preclude any possibility of error.[114] When prompt post-deprivation review is available for correction of administrative error, all that is generally required is that the pre-deprivation procedures used "be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be."[115]

In a significant part of the opinion, the Court noted that the predicates for license suspension under the Massachusetts scheme, namely arrest on suspicion of DUI and the driver's refusal to submit to a breath-analysis test, were objective facts which the arresting officer was best situated to observe and determine.[116] Because the arresting officer was a trained observer and investigator, he was by reason of his training and experience well-suited for the role afforded him under the Massachusetts statute.[117] The Court also noted that the arresting officer acted under personal exposure to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation and thus had strong incentive to "ascertain accurately and truthfully report the facts."[118] The Court consequently found that the risk of erroneous observation or deliberate misrepresentation, and thus the likelihood of erroneous deprivation in the ordinary case, seemed "insubstantial."[119] Because "immediate" post-suspension review was available, the minimal risk of error inherent in initial reliance on the arresting officer's report indicated that a pre-suspension evidentiary hearing was not needed.[120]

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[112] *Id.* (*citing* Fusari v. Steinberg, 419 U.S. 379, 389 (1975)) (rapidity of administrative review is a significant factor in assessing the constitutional adequacy of unemployment compensation eligibility review process).

[113] *Id.* at 12.

[114] *Id.* at 13.

[115] *Id.*

[116] *Id.* at 13-14. The Court noted that in fact the Massachusetts statute required that the driver's refusal to be tested be witnessed by at least two officers. *Id.* at 14.

[117] *Id.* at 14.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 15-17.

Proceeding then to the third prong of the *Mathews* test, the Court noted that summary suspension substantially served the state's interest in protecting the public from unsafe drivers in several ways.[121] The Court first determined that the summary nature of the sanction itself served as a deterrent to drunk driving.[122] It further found that the threat of summary suspension effectuated the state's interest in obtaining evidence for use in DUI proceedings by inducing drivers to submit to chemical tests and that summary suspension directly contributed to the safety of the public highways by promptly removing irresponsible drivers from the road.[123] The Court concluded that the summary character of the suspension sanction was "critical" to attainment of the state's objectives and that requiring a pre-suspension hearing would undermine the state's interest by giving drivers an incentive to refuse breath testing and to demand pre-suspension hearings as a dilatory tactic.[124] Such maneuvers, the Court noted, would result in substantial and unreasonable fiscal and administrative burdens on the state.[125]

By thus measuring Massachusetts's summary suspension statute against the *Mathews* test, a 5-4 majority held that the state's compelling interest in highway safety, coupled with the availability of a prompt post-suspension hearing, justified upholding Massachusetts' summary suspension process.[126]

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[121] *Id.* at 18.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 18 (citing Dixon v. Love, 431 U.S. 105 (1977)).

[126] *Id.* at 19. Chief Justice Burger wrote for the majority, joined by Justices White, Blackmun, Powell, and Rehnquist. Justice Stewart filed the dissenting opinion, in which Justices Brennan, Marshall, and Stevens joined.

The strong dissent reviewed the Court's prior decisions on procedural due process, including Bell v. Burson, 402 U.S. 535 (1971), and Dixon v. Love, 431 U.S. 105 (1977), and concluded that the Massachusetts statute at issue did not fall into "any recognized exception to the established protections of the Fourteenth Amendment." *Mackey*, 443 U.S. at 30 (Stewart, J., dissenting). The dissent found that "the critical fact that triggers the suspension is noncooperation with the police, not drunken driving," and that the "most elemental principles of due process forbid a State from extracting this penalty without first affording the driver an opportunity to be heard." *Id.* at 20 (Stewart, J., dissenting). Although the gravity of the state's interest in swiftly removing the drunk driver from the road could not be questioned, Justice Stewart opined that the Massachusetts procedure was plainly not designed to satisfy this interest. *Id.* at 25-26 (Stewart, J., dissenting). Under the statute, if the breath-analysis test was taken and failed, the motorist retained his license while criminal proceedings

Supreme Court jurisprudence consequently dictates a three-part inquiry that applies the *Mathews* test, as refined by *Mackey*, to evaluate the constitutionality of a summary license suspension procedure. First, the court must evaluate the suspension's impact on the individual by (1) determining the potential length of the pre-hearing suspension; (2) ascertaining the timeliness of a post-deprivation review; and, (3) determining whether hardship relief during the suspension period is available.[127]

Secondly, the court must evaluate the risk of error inherent in the procedures adopted by (1) appraising the likelihood of erroneous observation or deliberate misrepresentation on the part of the arresting officer; (2) determining the timeliness of independent review; and, (3)

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were pending. Only if the driver refused to take the test was his license summarily suspended. Justice Stewart thus characterized the state's motive not as one of removing irresponsible drivers from the roads but rather as one of deterring non-cooperation with the police. *Id.* at 26 (Stewart, J., dissenting). "A State is simply not free to manipulate Fourteenth Amendment procedural rights to coerce a person into compliance with its substantive rules, however important it may consider those rules to be." *Id.* at 26-27 (Stewart, J., dissenting).

The majority was not greatly troubled by Justice Stewart's concerns. It reasoned that the state "plainly has the right" to offer incentives for taking the breath-analysis test by electing not to summarily suspend the license of those drivers who choose to take it. *Id.* at 18-19. Due Process does not require a state, in exercising its police powers, to "adopt an 'all or nothing' approach to the acute safety hazards posed by drunken drivers." *Id.* at 19.

Any doubt about the Court's enmity toward drunk driving should be dispelled by a reading of its summary opinion in Illinois v. Batchelder, 463 U.S. 1112 (1983) (per curiam) (Stevens, Brennan & Marshall, JJ., dissenting on other grounds) (holding that due process does not require an arresting officer enforcing Illinois' implied consent statute to recite in his affidavit the circumstances leading to his reasonable belief that the arrestee was driving while intoxicated—the driver's right to a pre-suspension hearing affords him "all of, and probably more than, the process that the Federal Constitution assures"). The statute at issue in *Batchelder* required the arresting officer to state no more than that he had reasonable cause to believe the arrestee was driving while intoxicated. The Illinois Court of Appeals had held the requirement insufficient to comport with the protections of the Fourth and Fourteenth Amendments.

The Supreme Court reversed, noting that the Illinois court's opinion would have had a detrimental effect on that state's effort to halt the "carnage" of drunk driving. The Court found the appellate court's failure to apply the *Mackey* test "inexplicable". *Id.* at 1116. The case is remarkable in that the Court felt compelled to issue this substantive opinion despite the fact that appellee Batchelder, aside from submitting a letter requesting counsel be appointed to represent him, made absolutely no showing in support of his case. *Id.* at 1119-20 (Stevens, J., dissenting).

[127] *See supra* notes 108-12 and accompanying text.

considering the relative value and cost of alternative procedural safeguards.[128]

Lastly, the court determines whether the procedures adopted reasonably serve the state's interest in protecting the public from unsafe drivers.[129] If the procedures are deemed to so serve, only then is the state's interest weighed against the impact on the individual and the inherent risk of error.[130] This ultimate balancing of interests indicates whether the procedures at issue will be found to adequately observe the constitutional safeguards of procedural due process.

V. Measuring Hawai'i's Administrative Revocation Law Against The Mathews-Mackey Standard

The Court's *Mathews-Mackey* formulation provides the standard to be met when measuring the due process adequacy of Hawai'i's administrative revocation law against the requirements of the Fourteenth Amendment.[131] The initial task under *Mathews-Mackey* is to evaluate the Hawai'i statute's impact on the individual's constitutionally protected property interest in his driver's license. This involves determining the potential length of any pre-hearing suspension, the timely availability of a post-deprivation review, and the availability of hardship relief during the suspension period.[132]

Under the Hawai'i statute, a driver arrested for DUI and issued a notice of administrative revocation is given a thirty-day temporary driving permit.[133] Automatic administrative review is performed within eight days of the notice, and an administrative hearing, if requested, must be scheduled to commence within twenty-five days of the notice.[134] In the event that the hearing cannot be commenced or completed before the driver's temporary permit expires, the hearings officer may, with good cause and upon her own request, grant a continuance and

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[128] *See supra* notes 114-20 and accompanying text.

[129] *See supra* notes 121-25 and accompanying text.

[130] *Id.*

[131] *See* Illinois v. Batchelder, 463 U.S. 1112, 1116-17 (1983) (per curiam); *see generally*, John E. Ormond, Jr., Annotation, *Supreme Court's Views as to Propriety Under Federal Constitution's Due Process Guaranties of Summary Administrative Deprivation of Property Interest*, 69 L. Ed. 2d 1044 (1982).

[132] *See supra* note 127.

[133] Haw. Rev. Stat. § 286-255 (Supp. 1991).

[134] *See supra* notes 72-77 and accompanying text.

extend the validity of the driver's permit for a period not to exceed the period of the continuance.[135]

The value of a driver's license, and the individual's substantial interest in it, is the ability to avail oneself of the privilege of driving on the public highways. Although police retain the driver's license when they arrest him on suspicion of DUI, they instantly provide him with a temporary permit. Thus, as long as the statute's procedural timing provisions are adhered to, or the permit extension provision is invoked in cases of delay, the Hawai'i scheme does not deprive an individual of the ability to drive until he has been afforded the opportunity to appear at a hearing and defend his case.

Individuals whose interests may be more substantially affected by a loss of their driving privileges are recognized and afforded relief under the law's hardship provisions.[136] The fact that eligibility for hardship relief is limited to first-time offenders only[137] does no violence to the statute, as repeat or habitual DUI offenders as a class are a particular generator of the harm sought to be constrained by administrative revocation.

The "absolute revocation" provision is, however, potentially problematic. For example, if the offender shows that he simply cannot obtain alternative transportation to work or to counselling—or if the offender shows that he will be discharged from his job if his driving privileges are revoked—the weight of the individual interest affected increases substantially. Because "absolute revocation" is mandatory under the law in all cases, and only first-time offenders are eligible for a conditional permit at all, one may anticipate that the eventual extraordinary hardship case might require reexamining the "absolute revocation" provision to determine whether alternative measures, less onerous in the face of true hardship, should be adopted. With this one

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[135] HAW. REV. STAT. § 286-259(j) (Supp. 1991). The hearings officer will not extend the validity of the temporary permit if a continuance is granted upon the driver's request. *Id.*

[136] HAW. REV. STAT. § 286-264 allows a first-time offender to request a conditional permit if he can show (1) that he is gainfully employed in a position that requires driving and will be discharged if his driving privileges are administratively revoked or, (2) that he cannot obtain alternative transportation and therefore must drive to work or to substance abuse treatment or counselling. Only first-time offenders who have had no previous alcohol enforcement contacts are eligible for hardship relief. *Id.* All offenders, including demonstrated hardship cases, are subject to an initial mandatory thirty-day "absolute revocation" period. *Id.* § 286-264(a).

[137] *Id.* § 286-264(a).

exception to the contrary notwithstanding, the Hawai'i scheme fairly respects the individual's substantial interest in maintaining his driving privileges.

The second step under *Mathews-Mackey* is to evaluate the risk of error inherent in the Hawai'i scheme by determining the likelihood of erroneous observation or deliberate misrepresentation on the part of the arresting officer, the timeliness of independent review, and the relative value and cost of alternative procedural safeguards.[138]

Under the Hawai'i scheme, independent review of the arresting officer's actions occurs automatically within eight days of the arrest and issuance of notice of revocation.[139] Critics of the new law may argue that this paper review is virtually meaningless since the driver has no right to appear or to review the evidence entered against him. Such criticism would be well-founded. However, under *Mathews-Mackey* and within the context of the Hawai'i law taken as a whole, the automatic paper review is constitutionally superfluous.

The key is that Hawai'i's law allows the driver to request an evidentiary hearing which must commence, in the ordinary case, prior to expiration of the thirty-day temporary driving permit issued upon the arrest and notice of revocation.[140] The individual may continue to drive pending the outcome of the evidentiary hearing. The driver may attend the hearing, may be represented by counsel, have the opportunity to present and cross-examine witnesses including the arresting officer, and has the right to appeal an adverse decision to the district court.[141] Under *Mackey*, this is clearly adequate to satisfy the Fourteenth Amendment's due process requirements. The Hawai'i scheme would be adequate even if the eight-day paper review were entirely eliminated from the process.[142]

The presumption of expertise and the apparent discretion vested in the arresting officer is an aspect of administrative revocation that particularly troubles critics of the new law. The courts nonetheless emphatically hold that it is the arresting officer who is in the best position to observe those facts required to effect an administrative

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[138] *Id.* § 286-259(a).

[139] *Id.* § 286-258.

[140] *See supra* note 77 and accompanying text.

[141] *See supra* notes 78-80 and 91-92 and accompanying text.

[142] *See supra* notes 114-20 and accompanying text; *see generally*, Daniel E. Feld, Annotation, *Sufficiency of Notice and Hearing Before Revocation or Suspension of Motor Vehicle Driver's License*, 60 A.L.R. 3d 427 (1974).

license revocation, so long as timely independent review is available.[143] The eight-day automatic paper review provision, if it serves any useful function for purposes of due process analysis, weighs in favor of the revocation statute in that it provides an almost immediate, albeit extremely limited, independent review of the arresting officer's actions. Because misconduct by the police would expose the officer to personal liability[144] for any harm suffered by the arrestee, the likelihood of mischief or carelessness does indeed seem insubstantial in the ordinary case.

Since the Hawai'i scheme effectively provides opportunity for a hearing prior to administrative deprivation of the individual's driving privileges, the obvious remaining practical safeguard against erroneous deprivation would be to allow a driver's petition for judicial review to operate as a stay of the revocation. The value of such an additional safeguard would be to provide the greatest available measure of safety against error. The United States Supreme Court has, however, declared that "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error."[145] The measures adopted thus need only be adequate to limit the risk of error to a level acceptable under the circumstances, in light of the competing interests involved, subject to a "cost-benefit" approach.

The cost of imposing a stay provision requirement on Hawai'i's revocation law would be substantial. It would effectively negate the twofold purpose of the statute, which is to exact swift and certain revocation in order to remove irresponsible drivers from the highways, and to deter those who might otherwise drink and drive. Such a debilitating proviso would reduce the value of the new law to the unsatisfactory level of its predecessor judicial revocation and traditional criminal sanctions.[146] One may forcefully argue that the express preclusion of a stay provision[147] is directly necessary to realize the statute's stated purposes.

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[143] *See supra* notes 116-20 and accompanying text.

[144] *See supra* note 118 and accompanying text. The Supreme Court has consistently referred to potential personal tort liability as a constraint on administrative misconduct. *See, e.g.*, North Am. Cold Storage v. City of Chicago, 211 U.S. 306 (1908); Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950).

[145] Mackey v. Montrym, 443 U.S. 1, 13 (1979).

[146] *See* Ross, *supra* note 42.

[147] *See supra* note 93.

The final analysis under *Mathews-Mackey* is to determine whether the Hawai'i statute reasonably serves the state's substantial interest in protecting the public from unsafe drivers.[148] If it does, then the state's interest must be balanced against the impact on the individual's interest and the risk of error inherent in the procedures adopted in order to determine whether the Hawai'i administrative revocation statute passes constitutional muster.

The state's paramount interest in making its highways safer requires no further discussion here. Hawai'i's administrative revocation law is in part meant to serve that interest by swiftly removing DUI offenders from the public highways. By revoking the licenses of both those drivers who refuse to be tested as well as those who take the test and fail, the Hawai'i law avoids much of the *Mackey* dissent's criticism.[149]

Hawai'i's revocation law furthermore seeks to aid law enforcement officials in procuring evidence useful in subsequent criminal DUI proceedings. By imposing comparatively stiffer penalties on those who refuse to be tested, as opposed to those who take and fail the test,[150] the revocation law should effectively compel more arrested drunk drivers to submit to blood-alcohol testing. The Hawaii Supreme Court endorses the threat of license revocation as a valid means to compel submission to blood-alcohol testing.[151]

There is nothing to suggest that the court might take issue with the Legislature's finding that the new administrative revocation measures will directly improve highway safety.[152] The court will respect the reasoned judgment of the Legislature when the measures adopted reasonably further legitimate state interests.[153]

Measuring Hawai'i's new administrative driver's license revocation statute against the *Mathews-Mackey* standard leads to the conclusion that

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[148] *See supra* note 129.

[149] *See supra* note 126 (discussing Mackey v. Montrym, 443 U.S. 1, 30 (Stewart, J., dissenting)).

[150] *See* HAW. REV. STAT. § 286-261 (Supp. 1991).

[151] Rossell v. City & Cty. of Honolulu, 59 Haw 173, 182, 579 P.2d 663, 669 (1978) (stating that the threat of license revocation under the state's implied consent statute constitutes "a valid element of Hawaii's statutory scheme of encouraging submission to chemical sobriety testing").

[152] *See supra* notes 9, 48.

[153] *Cf.*, City & County of Honolulu v. Ariyoshi, 67 Haw. 412, 419, 689 P.2d 757, 763 (1984) (noting that every enactment of the legislature carries a presumption of constitutionality and must be judicially affirmed unless it has been shown beyond all reasonable doubt to be in violation of the constitution).

the statute certainly passes constitutional muster. The Hawai'i scheme is in fact more solicitous of due process than some of the statutory schemes approved by the United States Supreme Court. The Hawai'i statute adequately observes the due process requirements of the Fourteenth Amendment.

Assessing the constitutionality of Hawai'i's new administrative license revocation law finally requires a discussion of the due process requirements of the Hawaii Constitution. The Hawaii Supreme Court, in interpreting and enforcing the state constitution, will not hesitate to afford state citizens greater protections than those recognized under the "textually parallel provisions" of the Bill of Rights, if such a result is warranted by logic and a sound regard for the purposes of those protections.[154] Accordingly, due process protection under Article I, Section 5 of the Hawaii Constitution[155] is not necessarily limited to that which is provided by the Fourteenth Amendment to the federal constitution.[156]

The Hawaii Supreme Court has determined that independent consideration of the scope of due process protection under the state constitution is appropriate where the authority of interpretations of the Fourteenth Amendment by the United States Supreme Court is suspect.[157] The court takes as its guide the principle that "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[158]

The Hawaii Supreme Court should not find the *Mackey* analysis suspect. The court has in fact recently addressed a claim of procedural due process by employing a multi-step inquiry fairly analogous in form to the one employed by the Supreme Court in *Mackey*.[159] The *Mathews-Mackey* standard articulated in this comment particularizes that inquiry

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[154] *See* State v. Santiago, 53 Haw. 254, 265, 492 P.2d 657, 664 (1971). The court will interpret the state constitution "not in total disregard of federal interpretations of identical language, but with reference to the wisdom of adopting these interpretations for our state." State v. Texeira, 50 Haw. 138, 142 n.2, 433 P2d 594, 597 n.2 (1967).

[155] HAW. CONST. art. I, § 5 states: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

[156] State v. Huelsman, 60 Haw. 71, 88, 588 P.2d 394, 405 (1979).

[157] *Id.*

[158] *Id.*

[159] *See* Sandy Beach Defense Fund v. City Council 70 Haw. 361, 378, 773 P.2d 250, 261 (1989).

by developing those factors that the Court found dispositive of the due process issue in *Mackey*. By applying the same test, it is clear that Hawai'i's new administrative driver's license revocation law provides due process safeguards which are adequate to protect against the arbitrary or erroneous deprivation of an individual's substantial interest in his or her driver's license.

VI. Conclusion

Hawai'i's new administrative license revocation statute is a reasonable and constitutionally valid response to a public safety enforcement problem that has vexed law enforcement officers, public officials, and the community at large for many years. No one denies the gravity of the people's interest in making the state's highways safer for all. The problem has been how to do so while adequately protecting the individual's important interest in maintaining his driving privileges against deprivation by error. The community's patience with DUI offenders has grown justifiably thin. Hawai'i's administrative revocation law, forged by frustration and tempered by prudence and precedent, fairly strikes the precarious balance between requisite due process and necessary deterrent effect. Properly implemented, Hawai'i's administrative license revocation law should allow the state to share in some of the encouraging results realized in other jurisdictions.

Michael A. Medeiros

The Native Hawaiian Trusts Judicial Relief Act: The First Step in an Attempt to Provide Relief

I. Introduction

When the West reached out to the Hawaiian islands, the Native Hawaiians watched as the influence of foreign cultures slowly disrupted their native kingdom. In 1920, in response to the continuing deterioration of the Native Hawaiian culture and its people, Congress passed the Hawaiian Homes Commission Act (H.H.C.A.).[1] The stated purpose of the H.H.C.A. was to provide lands on which Native Hawaiians[2] could homestead at a nominal cost.[3] The hope was that by allowing

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[1] Hawaiian Homes Commission Act (Act 42 of July 9, 1921), Pub. L. No. 34, 42 Stat. 108 (1920). The Hawaiian Homes Commission Act was adopted by the State of Hawaii and incorporated into the state constitution when Hawai'i became a state in 1959. The Hawaiian Homes Commission Act can be found in art. XII, § 1 of the Hawaii State Constitution which provides that the people and the State of Hawaii accept the trust responsibility and agree "and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." Haw. Const. art. XII, § 2.

[2] This note uses the term Native Hawaiians to refer to those Native Hawaiians and Hawaiians who are eligible to sue under The Native Hawaiian Trusts Judicial Relief Act. The Hawaiian Homes Commission Act § 201(7) defines Native Hawaiian as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act (Act 42 of July 9, 1921), Pub. L. No. 34, 42 Stat. 108 (1920).

The Native Hawaiian Trusts Judicial Relief Act authorizes Native Hawaiians, as defined in the H.H.C.A., and Hawaiians, "defined as any person who is qualified to succeed to a homestead lease under section 209 of the Hawaiian Homes Commission Act 1920, as amended. . . ." to sue under the Act. Native Hawaiian Trusts Judicial Relief Act (Act 395) § 2, 14th Leg., Reg. Sess., (1988), *reprinted in* 1988 Haw. Sess. Laws 942, 943 (codified at Haw. Rev. Stat. § 673-2 (1988)).

[3] H.R. Rep. No. 839, 66th Cong., 2d Sess. 8 (1920).

Native Hawaiians to return to the land which had been taken from them, some of the misfortunes plaguing Native Hawaiians would be alleviated.[4] During the more than seventy years since its passage, many controversies have surrounded the administration of the Hawaiian homelands program.[5] However, virtually all parties concerned are in agreement that the H.H.C.A. has not yet achieved its purpose.

The State of Hawaii currently serves as "trustee" of the homelands, having assumed responsibility from the federal government upon becoming a state.[6] However, due to the "might makes right" judicial doctrine of sovereign immunity,[7] beneficiaries of the trust have been denied standing to sue to enforce the terms of the trust. As a result, the beneficiaries of the Hawaiian Home Lands Trust have had to stand by helplessly while the terms of the trust have been repeatedly violated.[8]

The Native Hawaiian Trusts Judicial Relief Act was passed in 1988.[9] After over thirty years of controversy resulting from the mismanage-

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[4] H.R. REP. No. 839, 66th Cong., 2d Sess. 7 (1920).

[5] *See* Alan T. Murakami, *The Hawaiian Homes Commission Act*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 57-61 (Melody Kapilialoha MacKenzie ed., 1991); *see also* Susan C. Faludi, *Broken Promise: How Everyone Got Hawaiians' Homelands Except the Hawaiians*, WALL ST. J., Sept. 9, 1991, at 2A [hereinafter Faludi]. Some of the controversial issues include: the inability of the state to put Native Hawaiians on Hawaiian homesteads, a correct calculation of the amount of rent charged to non-Hawaiian lessees of land trust property, the collection and allocation of that rent, and a correct inventory of the land held in each land trust. Faludi, *supra*.

[6] Hawaii Admission Act (Act of Mar. 18, 1959), Pub. L. No. 86-3, 73 Stat. 4 (1959) (codified as amended at 48 U.S.C. ch. 3 (1959)). Both the United States and the State of Hawaii have served as trustee of the Hawaiian Home Lands Trust. The United States served as trustee from 1898-1959. J. Res. 55, 55th Cong., 2d Sess., 30 Stat. 750 (1898). The trustee obligations were transferred to Hawai'i when Hawai'i became a state in 1959. Hawaii Admission Act (Act of Mar. 18, 1959), Pub. L. No. 86-3, 73 Stat. 4 (1959) (codified as amended at 48 U.S.C. ch. 3 (1959)).

[7] 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 61 (1988). The doctrine of sovereign immunity, generally regards a state, as a sovereign, as immune from liability and suit in its own courts or in any court without its consent and permission. *Id.*

[8] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 5, at 43. The Hawaiian Home Lands Trust consists of between 188,000 and 203,000 of the 1.75 million acres ceded to the Republic of Hawaii upon annexation. The State Department of Hawaiian Home Lands (D.H.H.L.) is responsible for the administration of the Hawaiian Homes Commission Act and the Hawaiian Home Lands Trust. HAW. REV. STAT. § 26-17 (1984). Within the D.H.H.L., the Hawaiian Homes Commission (Commission) is responsible for implementing the program. *Id.*

[9] Native Hawaiian Trusts Judicial Relief Act (Act 395), 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. Sess. Laws 942 (codified at HAW. REV. STAT. ch. 673 (Supp. 1991)).

ment of both land trusts[10], the Legislature finally presented a limited attempt to begin a process of trust rehabilitation to the Native Hawaiians. In this landmark piece of legislation, the State of Hawaii waived its immunity for breaches of the land trusts occurring after 1988,[11] thus providing beneficiaries with the right to bring suit to enforce the trust provisions.

This note discusses the possible use of the Native Hawaiian Trusts Judicial Relief Act by the beneficiaries of the Hawaiian Home Lands program to enforce the terms of the trust requiring that homelands be made available to Native Hawaiians. Part II describes the history surrounding the creation of the Native Hawaiian Trusts Judicial Relief Act. In Part III, this note explores the specific provisions of the Act and what they mean to Native Hawaiians. Part IV discusses the Governor's proposal for the resolution of controversies that arose between the period 1959 to 1988 and the legislative action taken with regard to the proposal. A discussion of the Act's impact on the Native Hawaiian community and the state agencies involved in its implementation is set out in Part V. Finally, Part VI concludes by offering an evaluation of the Act and how it proposes to resolve the controversies that have plagued the land trusts for over seventy years.

II. History Of The Native Hawaiian Trusts Judicial Relief Act

A. The Land Trusts

In 1898, the United States annexed the sovereign government of Hawai'i.[12] At this time, the federal government took legal title in the

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[10] Land trusts refers to both the Hawaiian Home Lands Trust and the Public Land Trust. *See* Sheryl M. Miyahara, *Hawaii's Ceded Lands*, 3 U. Haw. L. Rev. 101 (1981). The Public Land Trust consists of the approximately 1.75 million acres of land that were transferred to the Unites States upon annexation. Around 200,000 acres of these ceded lands comprise the Hawaiian Home Lands Trust. The remaining land comprises what is now the Public Land Trust. The ceded lands were originally placed under the control of the State Department of Land and Natural Resources. The Public Land Trust was formally created when the 1978 Constitutional Convention amended the state constitution to define the state's trust obligations. Haw. Const. art. XII, § 4.

[11] Native Hawaiian Trusts Judicial Relief Act (Act 395) § 3, 14th Leg., Reg. Sess. (1988) *reprinted in* 1988 Haw. Sess. Laws 942, 945 (codified at Haw. Rev. Stat. § 673-1 (Supp. 1991)).

[12] J. Res. 55, 55th Cong., 2d Sess., 30 Stat. 750 (1898).

Crown and Government lands that were reserved to the sovereign government of Hawai'i by the Great *Mahele*.[13] This was accomplished by the passage of a Joint Resolution of Annexation in 1898 which transferred the legal title to the Hawaiians' land from the Hawaiians to the United States. The Hawaiians, however, retained equitable title to these ceded lands.[14] One year later the federal government formally recognized that it had a responsibility to hold the land it had seized from the Hawaiians in trust for the benefit of the Hawaiians.[15] However, this declaration of responsibility did not stop the federal government from using and disposing of the land to its advantage.[16] This abuse of the lands and the resulting separation of the Hawaiian people from their native lifestyle and customs led to the deterioration of their culture.[17] By the turn of the century, there was a recognizable decrease in the population of Hawaiians.[18] In 1920, the federal government finally addressed the serious threat to the survival of the Hawaiian people and their culture by enacting the Hawaiian Homes Commission Act.[19] The H.H.C.A. set aside approximately 200,000 acres of ceded land to be held in trust by the United States government.[20] Further, the H.H.C.A. created the Hawaiian Homes Commission (Commission) to manage the Hawaiian Home Lands Trust.[21] The purpose of the Commission is to facilitate the return of Native Hawaiians to the

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[13] The acts of the *Mahele*, which means division, were recorded in Act of June 7, 1848, Hawaii Laws 22, *reprinted in* REV. LAWS HAWAII app. at 2152-76 (1925), and Act of Aug. 6, 1850, § 1, Hawaii Laws 202, *reprinted in* REV. LAWS HAWAII 1925 app. at 2141. The Great *Mahele* resulted in the division of the land between the King, the chiefs, and tenant farmers.

[14] J. Res. 55, 55th Cong., 2d Sess., 30 Stat. 750 (1898).

[15] 22 Op. Att'y Gen. 574 (1899). The United States Attorney General Griggs issued an opinion which stated that the United States had a trust obligation, requiring that funds from the disposition of Hawaiian lands be restricted accordingly. *Id.*

[16] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 5, at 26. The federal government set aside large tracts of land for military purposes. Between 1898 and 1959, the United States government set aside 287,078.44 acres of Hawai'i public lands for federal use. *Id.*

[17] *Id.* at 44.

[18] NATIVE HAWAIIAN STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS, AND CONCERNS OF NATIVE HAWAIIANS (Majority) 102-04 (1983). It is estimated that the Hawaiian population decreased at least 87% between 1778 and 1893. *Id.*

[19] *See supra* note 1 and accompanying text.

[20] Hawaii Admission Act (Act of Mar. 18, 1959), Pub. L. No. 8603, 73 Stat. 4 (1959) (codified as amended at 48 U.S.C. ch. 3 (1959)).

[21] Hawaiian Homes Commission Act (Act 42 of July 9, 1921) § 202(a), Pub. L. No. 34, 42 Stat. 108, 109 (1920).

Hawaiian Home Lands.[22] The Commission also has the responsibility of granting leases to Native Hawaiians for the right to use and occupy Hawaiian home land parcels for homesteading.[23]

When Hawai'i was granted statehood in 1959, the federal government transferred these trust responsibilities to the newly formed State of Hawaii.[24] The federal government gave the state the responsibility of managing both the ceded lands which were created by the Joint Resolution of Annexation[25] and the lands that were granted to the Native Hawaiians by the H.H.C.A.[26] The State of Hawaii incorporated these responsibilities into the state constitution.[27] However, the State only paid lip service to the provisions of the Admission Act, which mandated that the State of Hawaii manage the Public Land Trust for the benefit of the Native Hawaiian people.[28] The State of Hawaii also

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[22] H.R. REP. No. 839, 66th Cong., 2d Sess. 8 (1920).

[23] Hawaiian Homes Commission Act (Act 42 of July 9, 1921) § 207, Pub. L. No. 34, 42 Stat. 108, 110 (1920).

[24] Hawaii Admission Act (Act of Mar. 18, 1959) § 4, Pub. L. No. 86-3, 73 Stat. 4, 5 (1959) (codified as amended at 48 U.S.C. ch. 3 (1959)).

[25] *See supra* note 12.

[26] *See supra* note 10 and accompanying text and note 8.

[27] *See supra* note 10.

[28] Hawaii Admission Act (Act of Mar. 18, 1959) § 5(f), Pub. L. No. 86-3, 73 Stat. 4, 6 (1959) (codified as amended at 48 U.S.C. ch. 3 (1959)). The applicable provision, section 5(f) states:

> 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, as defined in the Hawaiian Homes Commission Act, 1920, as amended, 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. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other project shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Id.

undertook the responsibilities relegated to the Commission. The State Department of Hawaiian Home Lands (D.H.H.L.) administers the H.H.C.A., and the Commission implements the program.[29] The Commission under the State of Hawaii has also been the focus of controversies relating to favoritism in granting parcels to non-Hawaiians, and of maintaining a waiting list that only creates false hopes for beneficiaries.[30]

In 1978, the Hawaii Constitutional Convention amended the State Constitution to create the Office of Hawaiian Affairs (O.H.A.)[31] to manage the ceded lands which comprise the Public Land Trust. *Hawaii Revised Statutes* chapter 10 embodies the objectives of the amendments and states the purposes for which O.H.A. was created.[32] An important provision states that twenty percent of the funds derived from the public land trust must be held and used solely for the betterment of the conditions of Native Hawaiians.[33] This provision has been virtually ignored by the State of Hawaii, and funds derived from the lands of the Public Land Trust have not been expended in compliance with Chapter 10.

B. Access to the Courts

1. The federal courts

On several occasions, land trust beneficiaries have filed suits in federal and state courts in an attempt to obtain judicial validation of their claims that the State of Hawaii and the federal government had failed to comply with various provisions of the H.H.C.A. and the Public Land Trust.

The state did not follow the mandate of this provision and failed to appropriate any funds to finance the implementation of the H.H.C.A. until 1987. Prior to that, the D.H.H.L. and the Commission financed the program by leasing available land for commercial purposes instead of granting beneficiaries homesteads. *Id.*

[29] *See supra* note 10 and accompanying text.

[30] Faludi, *supra* note 5, at 8. Susan Faludi reports on the Commission's creation of an "X" file which contained the names of favored non-Hawaiians who were to get land before beneficiaries on the official waiting list. Out of the tens of thousands of families who are eligible, only around 3700 have been able to settle on homelands. *Id.* at 2.

[31] HAW. CONST. art. XII, § 5.

[32] HAW. REV. STAT. ch. 10 (1985).

[33] *Id.* § 10-13.5.

a. Keaukaha I[34]

In 1978, beneficiaries of the Hawaiian Home Lands Trust attempted to sue the State of Hawaii for its violation of various fiduciary duties under the Hawaii Admission Act of 1959.[35] The suit was brought in the federal District Court for the District of Hawaii.[36] The beneficiaries objected to the use of over twenty-five acres of homelands for the construction of a county flood control project without adequate compensation to the D.H.H.L.[37] The district court upheld the claims of the beneficiaries and ordered a land exchange to compensate the trust.[38] The Court of Appeals for the Ninth Circuit reversed this decision, however, and dismissed their claims.[39] The Court of Appeals dismissed their claims because it found that the federal Admission Act did not provide the beneficiaries with a private cause of action.[40] The Court

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[34] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission (Keaukaha I), 588 F.2d 1216 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979).

[35] *Keaukaha I*, 588 F.2d at 1219. The beneficiaries claimed that (1) the Commission violated its fiduciary duties by first agreeing to exchange lands for purposes not allowed by the H.H.C.A.; (2) the Commission was not allowed to permit the County of Hawaii to render homelands useless without first receiving title to the lands received in the exchange; (3) the Commission was obligated to obtain the permission of the Secretary of the Interior and the Governor before making the exchange; (4) the project was "illegal" because the Commission planned to use twice the amount of land they had originally approved; and (5) the Commission violated fiduciary duties imposed by §§ 4 and 5 of the Admission Act. *Id.*

[36] *Id.*

[37] *Id.* at 1219.

[38] *Id.* at 1220.

[39] *Id.* at 1227.

[40] *Id.* at 1224. The court held that the first question that needed to be addressed was whether the Admission Act created "an implied cause of action by which a private party may enforce the duties and obligations imposed by the Act." *Id.* at 1220. In applying the test from Cort v. Ash, 422 U.S. 66 (1975), the court held that the beneficiaries failed to prove that their claims against the Commission could be properly brought before a federal court. The court examined four factors:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . . Finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be

of Appeals also implied that the federal government alone has the right to sue the State of Hawaii in federal court for breaches of the land trusts.[41] The beneficiaries were denied access to the federal court system because the Ninth Circuit Court of Appeals would not allow the beneficiaries to enforce the State's trust obligations by suing under the federal statute that created their trust rights.

b. Keaukaha II[42]

In 1984, in *Keaukaha II*, the Court of Appeals for the Ninth Circuit allowed a claim to proceed to the merits when it heard the amended complaint of the *Keaukaha I* plaintiffs. The amended complaint alleged an action under 42 U.S.C. § 1983.[43] Although the district court

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inappropriate to infer a cause of action based solely on federal law?

Id. at 78. The first factor was satisfied by the beneficiaries who successfully claimed that they were part of class for whose special benefit the statute in question was enacted. The court held that the Hawaii Admission Act was intended to benefit the Native Hawaiian beneficiaries specifically. *Id.* at 1223. Looking at the second factor, the court examined the legislative intent of the Admission Act and whether the legislature intended to create a private cause of action. The court stated that there was no explicit or implicit intent to create a private cause of action under the Admission Act. *Id.* The third factor involved the question of whether an implied private cause of action was consonant with the general purpose of the statute. The court stated that the purpose of the Admission Act was to transfer the responsibility of management of the Hawaiian home lands to the State of Hawaii. Therefore, the creation of a private cause of action under this act was inconsistent with the intended purpose of the Act. *Id.* at 1224. Finally, the fourth factor dealt with the state's interest in the claims presented. The court stated that the claims of the beneficiaries were a matter of state concern better dealt with at the state level. *Id.* In conclusion, since the beneficiaries failed to satisfy three out of the four elements of the *Cort* test, the court could not find justification for finding an implied private cause of action in the Admission Act. *Id.* at 1221-24.

[41] *Id.* at 1223. The Ninth Circuit Court of Appeals stated, "[I]ndeed the rare references in the Committee reports to enforcement of section 5's trust provisions refer exclusively to the public cause of action." *Id.*; *see also* HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A BROKEN TRUST; THE HAWAIIAN HOMELANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE CIVIL RIGHTS OF NATIVE HAWAIIANS 8 (1991) [hereinafter A BROKEN TRUST].

[42] Keaukaha-Panaewa Community v. Hawaiian Homes (Keaukaha II), 739 F.2d 1467 (1984).

[43] *Id.* at 1468. The plaintiffs sued "for deprivation under color of state law of a federal right for loss of land held in trust for benefit of native Hawaiians." *Id.* Section

dismissed their claim, the Court of Appeals reversed, holding that while the beneficiaries were precluded from claiming a private right of action under the Admission Act in federal court,[44] they were still entitled to sue under 42 U.S.C. § 1983.[45] In upholding the complaint, the court stated that the Admission Act did not provide a sufficient enforcement scheme to preclude a section 1983 claim.[46] Although the Admission Act reserves a public right of the federal government to sue to enforce the trust obligations,[47] it does not allow *beneficiaries* to sue the State for enforcement of trust duties. As a result, the court allowed the section 1983 claim, holding that the statute denied the beneficiaries an adequate remedy.[48] This was only a small victory for the beneficiaries since their complaint did not ask for monetary damages from the State.[49] The court ordered declaratory and injunctive relief which did not restore the trust that had been abused by the State.[50]

c. Price v. State of Hawaii[51]

In 1985, a Native Hawaiian tribal body, the Hou Hawaiians, was able to obtain the federal subject matter jurisdiction that had prevented

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1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1979).

[44] *Keaukaha II*, 739 F.2d at 1470.

[45] *Id.* at 1472.

[46] *Id.* at 1471. The court applied the test from Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981): "whether 'the remedial devices provided in a particular Act are sufficiently comprehensive, [that] they may suffice to demonstrate Congressional intent to preclude' a section 1983 remedy." *Middlesex County* at 20.

[47] Hawaii Admission Act § 5(f), Pub. L. No. 8603, 73 Stat. 5, 6 (1959) (codified as amended at 48 U.S.C. § 491 (1959)).

[48] *Keaukaha II*, 739 F.2d at 1470.

[49] *Id.* at 1472.

[50] *Id.* The court stated that defendants were wrong in suggesting that the plaintiffs had brought a nominal action against state officials, while in fact the action was for damages against the state itself. The relief sought was declaratory and injunctive only. *Id.*

[51] 764 F.2d 623 (1985), *cert. denied*, 474 U.S. 1055 (1986), *rehearing denied*, 475 U.S. 1091 (1986).

Keaukaha I from proceeding to the merits.[52] While the court of appeals reiterated its holding in *Keaukaha I* that the plaintiffs could not claim a private cause of action under the Admission Act,[53] the court did find federal subject matter jurisdiction under 28 U.S.C. § 1331.[54] The plaintiffs in this case claimed that the State of Hawaii failed to apply the proceeds from the Hawaiian Home Lands Trust to the financing of the distribution of land to Native Hawaiians.[55] They claimed that under section 5(f) of the Hawaii Admission Act, the State of Hawaii has a duty to expend funds from the Hawaiian Home Lands Trust for the betterment of the conditions of Native Hawaiians.[56]

The court held that under section 1331, the claim presented a federal question.[57] Unfortunately, the court also held that beneficiaries of the land trusts could not sue the State of Hawaii because it had not expressly waived its sovereign immunity.[58] So, while the plaintiffs in this case were allowed access to a federal court, their rights were again left unprotected because the court failed to hold the State of Hawaii accountable for its abuse of the Hawaiian Home Lands Trust.

2. The state courts

In the past, beneficiaries have also encountered difficulties when they sought relief from the state courts. The Supreme Court of Hawaii has demonstrated a reluctance to enforce state and federal compliance with the provisions of the land trusts. The few cases that have reached the state supreme court level have shown that the court does not want to take a clear stand to protect the rights of Native Hawaiians.

a. Ahuna v. Department of Hawaiian Home Lands[59]

In a case involving the D.H.H.L.'s failure to lease available agricultural land to eligible Native Hawaiians, the Hawaii Supreme Court

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[52] *Id.* at 626, 629.

[53] *Id.* at 631. The court stated, "[O]ur holding in *Keaukaha I* that individual Hawaiians do not have an implied cause of action under the Admission Act, *see* 588 F.2d at 1223-24, applies with equal force to bar the Hou Hawaiians from claiming a cause of action." *Id.*

[54] *Id.* Section 1331 states, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1980).

[55] *Id.* at 625.

[56] *Id.*

[57] *Id.* at 625, 629.

[58] *Id.* at 629.

[59] 64 Haw. 327, 640 P.2d 1161 (1982).

found the D.H.H.L. owed a duty to the beneficiary to place him on available land.[60] After examining the trust duties accepted by the State, the court determined that the State was obligated (1) to administer the trust solely in the interest of the beneficiary and (2) to use reasonable skill and care to make the trust property productive.[61]

This determination was important because it set up a judicially endorsed standard by which to judge the management of the Hawaiian Home Lands Trust. While the court was presented with the issue of whether the beneficiaries would be able to sue for individual monetary or land damages without a waiver by the State of Hawaii of its sovereign immunity, it did not provide a ruling because the question was improperly presented on appeal.[62] The exclusion of this important issue took some of the weight out of the court's decision to uphold the State's obligation to return the Native Hawaiians to their land. Without a ruling on their ability to sue the State of Hawaii to enforce those obligations, the beneficiaries were left with a tenuous right at best.

b. Trustees of the Office of Hawaiian Affairs v. Yamasaki[63]

In 1987, trustees of O.H.A. brought suit against the State of Hawaii to retrieve land damages the state had received as the result of a suit against Molokai Ranch.[64] The State had sued Molokai Ranch for entering into a contract which allowed HC&D, Ltd. to engage in illegal sand mining operations on ceded land.[65] The trustees of O.H.A. turned to the courts and asked them to determine whether O.H.A. was entitled to twenty per cent of the damages received in the settlement with Molokai Ranch.[66] The Hawaii Supreme Court stated that the question should be left for the legislature and not the courts.[67]

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[60] *Id.* at 337, 640 P.2d at 1171.

[61] *Id.* at 335, 640 P.2d at 1169.

[62] *Id.* at 331 n.9, 640 P.2d at 1165 n.9. The court stated that the original order was not appealed and a decision regarding sovereign immunity would be a collateral attack on the original order. The court therefore chose not to consider the issue. *Id.*

[63] 69 Haw. 154, 737 P.2d 446 (1987).

[64] *Id.* at 166 n.14, 737 P.2d at 453 n.14.

[65] *Id.*

[66] *Id.* The plaintiffs asked the court to interpret two statutes. The first statute, HAW. REV. STAT. § 10-13.5, applied to the claim concerning the funds which derived from the state's settlement with Molokai Ranch. Section 10-13.5 provides, "Twenty per cent of all funds derived from the public land trust, described in section 10-3 shall be expended by the office, as defined in section 10-2 for the purposes of this chapter."

The court decided against providing an interpretation of the statute because it felt that there were no judicially discoverable and manageable standards that could be employed to resolve the controversial mandate of *Hawaii Revised Statutes* section 10-3.[68] The court held that the issue of whether the State was required to allocate twenty percent of *all* funds derived from the public land trust to O.H.A. was a political question.[69] Even though the Hawaii Supreme Court had the power to provide its own interpretation of the statutes presented to it, it chose not to deal with this sensitive issue.[70]

c. Ahia v. Department of Transportation[71]

In 1983, the Hawaiian Homes Commission issued a lease to the Department of Transportation (D.O.T.) for a boat-launching facility on Hawaiian homelands.[72] The beneficiaries of the Hawaiian Home Lands Trust objected to the leasing of trust lands to the D.O.T. because they claimed that (1) the Commission acted without authority and failed to comply with section 212 of the H.H.C.A., (2) the Commission did not give preference to Native Hawaiians in leasing Hawaiian homelands, and (3) the Commission was precluded from leasing the land to the D.O.T. because the land was needed for leasing to Native Hawaiians under section 207(a) of the H.H.C.A.[73] The

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Id.

The second statute, HAW. REV. STAT. § 261-5, raised the question of whether O.H.A. was entitled to twenty percent of the funds derived from certain harbor and airport land. Section 261-5 provides in pertinent part:

> (a) Except for that portion of the payments received by the department under a contract entered into as authorized by section 261-7 and deposited in the transportation use special fund pursuant to section 261D-1, all moneys received by the department from rents, fees, and other charges collected pursuant to this chapter, as well as all aviation fuel taxes paid pursuant to section 243-4(a)(2), shall be paid into the airport revenue fund created by section 248-8.

Id.

[67] *Yamasaki*, 69 Haw. at 173, 737 P.2d at 457.

[68] *Id.*

[69] *Id.* at 175, 737 P.2d at 458.

[70] Kellie M.N. Sekiya, Comment, The Trustees of the Office of Hawaiian Affairs v. Yamasaki: *The Application of the Political Question Doctrine to Hawaii's Public Land Trust Dispute*, 10 U. HAW. L. REV. 345, 363 (1988).

[71] 69 Haw. 538, 751 P.2d 81 (1988).

[72] *Id.* at 541, 751 P.2d at 84.

[73] *Id.* at 543, 751 P.2d at 85.

Commission had leased Hawaiian homelands to the D.O.T. before leasing them to Native Hawaiians who were waiting on a list to be placed on their land.[74] The beneficiaries felt that non-Hawaiians should not receive leases from the Commission until all eligible Native Hawaiians were placed on trust lands.[75]

The Hawaii Supreme Court held that the H.H.C.A. authorized the D.O.T. and the Commission to lease trust lands to other governmental agencies.[76] The court also found that state governmental agencies are not required to wait for negotiations with Native Hawaiians before receiving leases.[77] By so holding, the court chose to protect the rights of a governmental agency over the rights of the Native Hawaiians to be placed on Hawaiian homelands. This express disregard of the extensive waiting list of beneficiaries was an invalidation of the beneficiaries' rights to be returned to their lands.

C. 1983 Federal-State Task Force

In 1982, the federal government finally joined forces with the State of Hawaii and established a federal-state task force to review the H.H.C.A.[78] Its mission was to present findings and recommendations regarding the State's implementation of the H.H.C.A.[79] In 1983, the final report of the task force highlighted the problems that had plagued the land trusts and the Commission.[80] One of the 134 specific recommendations was that legislation be created that would provide beneficiaries with access to the courts.[81]

D. Passage of The Native Hawaiian Trusts Judicial Relief Act

The State of Hawaii began developing legislation that would allow beneficiaries to sue the State for breaches of its trust responsibilities.

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[74] *Id.* at 546, 751 P.2d at 89.

[75] *Id.*

[76] *Id.* at 543-550, 751 P.2d at 85-89. Section 204(2) of the Hawaiian Homes Commission Act provides for the disposition of Hawaiian Home Lands to the general public on the conditions applicable to the disposition of public lands. Hawaiian Homes Commission Act (Act 42 of July 9, 1921) 1920, Pub. L. No. 34, § 204(2), 42 Stat. 108 (1921).

[77] *Ahia*, 69 Haw. at 546-49, 751 P.2d at 87-88.

[78] A BROKEN TRUST, *supra* note 41, at 4; *see also* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 5, at 62.

[79] A BROKEN TRUST, *supra* note 41, at 4.

[80] *Id.*

[81] *Id.*

In 1987, the Native Hawaiian Trusts Judicial Relief Act was introduced in the state legislature.[82]

Characteristically, the Act was surrounded by much controversy. Representatives from the Native Hawaiian interest groups, as well as individuals, provided oral and written testimony before the legislature.[83] The testimony supported passage of the Native Hawaiian Trusts Judicial Relief Act as a satisfactory attempt to redress Native Hawaiians for the breaches of the land trusts.[84] Some testified that they objected to the requirement that a plaintiff post a bond or surety upon appeal.[85] They felt that this requirement would be seen as a financial penalty and would prevent beneficiaries from seeking and obtaining judicial review.[86] The general feeling, however, was one of satisfaction. The bill was welcomed as the beginning of an attempt to provide relief.[87]

On the other hand, the State of Hawaii was apprehensive about a bill that would open it up to lawsuits.[88] The foremost concern of state governmental agencies was the estimated costs the state would incur if Native Hawaiians were awarded land and/or monetary damages.[89] The Attorney General was concerned that a waiver of sovereign immunity would be dangerous to the State's economy.[90] The State of Hawaii Department of Budget and Finance further testified that The Native

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[82] H.R. 37, 14th Leg., Reg. Sess. (1987).

[83] Testimony was received on February 10, 1987, and March 11, 1987.

[84] *See, e.g., Hearings on [H.R. 37 (H.D. 1), Relating to the Right to Sue by Native Hawaiian Individuals and Organizations]*, 14th Leg., Reg. Sess. (1987) (testimony of: Dan Foley, ACLU; Haunani K. Trask, Professor of Hawaiian Studies, University of Hawaii, Manoa; Annette Mente; Dawn Farm-Ramsey, Association of Hawaiian Civic Clubs; and John Kekuhaupi'o Kamalani, Hawaiian Civic Political Action Committee).

[85] *Id.* (testimony of Lilikala Dorton, Assistant Professor of Hawaiian History, University of Hawaii, Manoa, and Ilima Piianaia, Chairman, Hawaiian Homes Commission).

[86] *Id.* This provision was later deleted.

[87] *See supra* note 84.

[88] *Hearings on [H.R. 37 (H.D. 1), Relating to the Right to Sue by Native Hawaiian Individuals and Organizations]*, 14th Leg., Reg. Sess. (1987) (testimony of the Honorable Warren Price, III, Attorney General of the State of Hawaii).

[89] *Id.* (testimony of the Honorable Yukio Takemoto, Director of the Hawaii Department of Budget and Finance).

[90] *Id.* (testimony of the Honorable Warren Price, III, Attorney General of the State of Hawaii).

Other groups expressed the state's concern that the waiver of immunity would be economically devastating. For example, the Construction Industry Legislative Organization testified that:

Hawaiian Trusts Judicial Relief Act would hurt the state financially by affecting future investments.[91] The Chamber of Commerce stated that it "[had] seen a number of estimates of losses that could result from the passage of this legislation, [and] all [the] estimates are in the millions."[92]

The Attorney General also advocated restricting the statute of limitations for bringing suit to two years.[93] He argued that this would conform to the State's waiver of its immunity in the State Tort Reform Act[94] and its waiver of immunity for contract claims in *Hawaii Revised Statutes* chapter 661.[95] The Attorney General also asked firmly for a clear statement that the waiver be prospective only.[96]

After hearing the testimony of concerned parties, the Legislature passed what was to be applauded as a compromise bill[97] that recognized

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In its present form, H.B. 37 could result in

- The state being liable for hundreds of millions of dollars in payments to Native Hawaiians;
- The state establishing a precedent to allow itself to be sued on other non-Hawaiian issues; and
- The beginnings of serious divisiveness within our community.

Id. (testimony of Wally Miura, President, Construction Industry Legislative Organization). This group also stated that if O.H.A. gets 20% of all proceeds and income from the sale, lease, and disposition of ceded lands, it could amount to hundreds of millions of dollars and it "[w]ould stagger the state's economy." *Id.*

[91] *Id.* (testimony of the Honorable Yukio Takemoto, Director of the Hawaii Department of Budget and Finance). In his written testimony, the director noted that the impact of the Act "[m]ay create uncertainties in the financial community providing long term tax exempt financing for projects situated on state lands." He also testified that "[the Act] may erode investor interest in state of Hawaii bonds . . . [it] could make the financing of future capital improvement undertakings difficult and . . . cause bonds issued by the state to drop to a lower class of bonds, incur higher interest rates, and increase expenditures." *Id.*

[92] *Id.* (testimony of Robert Robinson, Honolulu Chamber of Commerce).

[93] *Id.* (testimony of the Honorable Warren Price, III, Attorney General of the State of Hawaii).

[94] *See* HAW. REV. STAT. ch. 662 (1985). The provision referred to, HAW. REV. STAT. § 662-4, states: "A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply." *Id.*

[95] *See id.* § 661-1 (1985).

[96] *Hearings on [H.R. 37 (H.D. 1), Relating to the Right to Sue by Native Hawaiian Individuals and Organizations]*, 14th Leg., Reg. Sess. (1987) (testimony of the Honorable Warren Price, III, Attorney General of the State of Hawaii).

[97] SEN. STAND. COMM. REP. NO. 1123, 14th Leg., Reg. Sess. (1987) *reprinted in* 1987 HAW. SEN. J. 493, 494.

the concerns of both the beneficiaries and the State of Hawaii.[98] The Legislature enthusiastically recognized the purpose of the trust obligations of the State of Hawaii as a responsibility to protect the welfare of Native Hawaiians.[99]

State Representative Andrew Levin was instrumental in pushing the Legislature to finally approve a bill that allowed Native Hawaiians to seek judicial relief for their claims.[100] He described the difficulty of passing a bill that limited the waiver of immunity to prospective breaches only.[101] He recognized that many of the controversies that surrounded the trusts dated back to a time period not covered by the Native Hawaiian Trusts Judicial Relief Act.[102] He addressed this concern by discussing his faith in the Governor's ability to come up with a satisfactory resolution of past breaches of the trusts,[103] and he congratulated the Legislature in its efforts to begin a healing process.[104]

III. The Native Hawaiian Trusts Judicial Relief Act

The Native Hawaiian Trusts Judicial Relief Act is codified in Hawaii Revised Statutes as chapter 673. The chapter has ten sections that spell out the State's prospective waiver of its sovereign immunity and impose conditions on the rights of Native Hawaiians to bring their claims before a state circuit court.

A. The State's Waiver of Immunity

Hawaii Revised Statutes section 673-1 states that the State of Hawaii "waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the

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[98] H.R. 37, 14th Leg., Reg. Sess. (1988).

[99] Sen. Stand. Comm. Rep. No. 1123, 14th Leg., Reg. Sess. (1987) *reprinted in* 1987 Haw. Sen. J. 1390, 1390. The report states: "The purpose of this bill is to provide a means for Native Hawaiians and Hawaiians to sue for breaches of the trusts established under the Hawaii State Constitution, the Hawaiian Homes Commission Act, and the Hawaii Admission Act." *Id.*

[100] H.R. Conf. Com. Rep. No. 118-88, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. H.R. J. 647, 647.

[101] *Id.*, *reprinted in* 1988 Haw. H.R. J. at 649.

[102] *Id.*

[103] *Id.*, *reprinted in* 1988 Haw. H.R. J. at 648.

[104] *Id.*, *reprinted in* 1988 Haw. H.R. J. at 649.

management and disposition of trust funds and resources . . . ."[105]

This express waiver of its sovereign immunity is unique. In the past, the State has only allowed a waiver of immunity for tort[106] and contract actions[107] against the state. No other state in the country allows itself to be sued for breaches of its fiduciary duties.[108]

Hawaii Revised Statutes section 673-1 is limited in that it only provides for a *prospective* waiver of immunity by the State.[109] The State of Hawaii

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[105] HAW. REV. STAT. § 673-1 (Supp. 1991). This section reads in full:

(a) The State waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of:

(1) The Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii, implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4); and

(2) The native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act;

and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive damages.

(b) This waiver shall not apply to the following:

(1) The acts or omissions of the State's officers and employees, even though such acts or omissions may not realize maximum revenues to the Hawaiian home lands trust and native Hawaiian public trust, so long as each trust is administered in the sole interest of the beneficiaries, but only so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries;

(2) Any claim for which a remedy is provided elsewhere in the laws of the State; and

(3) Any claim arising out of the acts or omissions of the members of the board of trustees, officers and employees of the office of Hawaiian affairs, except as provided in section 10-16.

Id.

[106] *Id.* ch. 662 (1985).

[107] *Id.* § 661-1.

[108] VAN CLEVE, FEDERAL-STATE TASK FORCE ON THE HAWAIIAN HOMES COMMISSION ACT: REPORT TO UNITED STATES SECRETARY OF THE INTERIOR AND THE GOVERNOR OF THE STATE OF HAWAII, FEDERAL RESPONSIBILITIES 5 (1983) [hereinafter VAN CLEVE]. New Mexico has a similar trust responsibility. The Enabling Act of the State of New Mexico, 36 Stat. 565, contains language that permits the state of New Mexico or "any citizen thereof" to sue to enforce the trust. This statute allows the state and its citizens to sue the federal government for breaches of the land trusts, but does not allow actions against the state itself. VAN CLEVE, *supra*, at 5.

[109] Native Hawaiian Trusts Judicial Relief Act (Act 395) § 3, 14th Leg., Reg. Sess.

was very concerned about allowing a retroactive waiver of state sovereign immunity. Among some of the concerns expressed were (1) conforming the waiver to other instances when the State of Hawaii had waived its immunity[110] and (2) the possible economic impact of the waiver.[111]

B. Exhaustion of Administrative Remedies

Hawaii Revised Statutes section 673-3 states, "Before an action may be filed in circuit court under [chapter 673], the party filing suit shall have exhausted all administrative remedies available . . . ."[112] In order to exhaust the administrative remedies available, a claimant must follow the administrative procedures set out by the D.H.H.L.[113] The D.H.H.L. has adopted administrative rules for the filing of claims relating to breaches of the land trusts.[114] Beneficiaries of the Hawaiian Home Lands Trust must request a contested case hearing and file their claims with the D.H.H.L.[115] The D.H.H.L. will then initiate an investigation and submit a report and recommendation to the Commission.[116] The Commission decides whether the case is ripe for a hearing[117]. If the case is found ripe, a hearing officer[118] or the Commission[119] will preside over the contested case hearing and submit a recommended decision to the Commission.[120] Aggrieved parties may petition for reconsidera-

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(1988), *reprinted in* 1988 Haw. Sess. Laws 942, states: "This Act shall not apply to any cause of action which accrued, rights and duties that matured, penalties that were incurred, or proceedings that were begun, prior to July, 1988." *Id.* at 945.

[110] *See, e.g.*, HAW. REV. STAT. ch. 662 (1985); *id.* § 661-1.

[111] *See supra* notes 88-92 and accompanying text.

[112] HAW. REV. STAT. § 673-3 (Supp. 1991). This section states in full:

> Before any action may be filed in circuit court under his chapter, the party filing suit shall have exhausted all administrative remedies available, and shall have given not less than sixty days written notice prior to filing of the suit that unless appropriate remedial action is taken suit shall be filed. All executive branch departments shall adopt in accordance with chapter 91, such rules as may be necessary to specify the procedures for exhausting any remedies available.

Id.

[113] *Id.*

[114] HAW. ADMIN. R. ch. 10 (1981).

[115] *Id.* § 10-5-31.

[116] *Id.* § 10-5-31(c).

[117] *Id.* § 10-5-32(a)(2).

[118] *Id.* § 10-5-33.

[119] *Id.* § 10-5-39(a).

[120] *Id.* §§ 10-5-33(c)(10) and 10-5-41.

tion of a Commission decision,[121] or any final decision of the Commission may be appealed to a circuit court of the State of Hawaii.[122]

Under *Hawaii Revised Statutes* chapter 673,[123] adopted in 1988, this lengthy administrative process must be exhausted by all beneficiaries with a claim. The Commission rules allow beneficiaries access to the circuit courts only after the Commission has issued a final decision.[124] The Chapter 673 right to sue in circuit court after exhaustion of administrative remedies thus does not seem like a new provision as the beneficiaries had already been given access to the courts by Hawaii Administrative Rules section 10-5-43 in 1981. Thus, if an appeal to the circuit court is already provided for in the administrative rules of the D.H.H.L., Chapter 673 does not provide Native Hawaiians with any revolutionary access to the courts.

C. *Scope of Relief*

Hawaii Revised Statutes section 673-4(a) states, "In an action under [chapter 673] the court may only award land or monetary damages to restore the trust which has been depleted as a result of any breach of trust duty. . . ."[125] This provision allows beneficiaries to collect only actual damages.[126] Punitive damages are expressly prohibited by *Hawaii Revised Statutes* section 673-1(a), which states that the State "shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive dam-

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[121] *Id.* § 10-5-42(e).

[122] *Id.* § 10-5-43.

[123] *See supra* note 112.

[124] HAW. ADMIN. R. § 10-5-43.

[125] HAW. REV. STAT. § 673-4 (Supp. 1991). This section states in full:

(a) In an action under this chapter the court may only award land or monetary damages to restore the trust which has been depleted as a result of any breach of trust duty and no award shall be made directly to or for the individual benefit of any particular person not charged by law with the administration of the trust property; provided that actual damages may be awarded to a successful plaintiff.

(b) "Actual damages", as used in this section, means direct, monetary, out of pocket loss, excluding noneconomic damages as defined in section 663-8.5 and any consequential damages, sustained by a native Hawaiian or Hawaiian individually rather than the class generally.

Id.

[126] *Id.*

ages."[127] Consequential damages are also excluded from the definition of actual damages by *Hawaii Revised Statutes* section 673-4.[128]

These limitations of damages further restrict the Native Hawaiians' ability to sue the State of Hawaii for neglect of its fiduciary duty. The obviously egregious wrongs against the Native Hawaiians are diminished by this requirement. For years, the State and its executive officers knowingly failed to comply with the provisions of the land trusts that made them responsible for many Native Hawaiians' most valuable asset. In recompense, beneficiaries may only receive what they can prove as out-of-pocket losses.[129] Out-of-pocket losses do not include time spent waiting on a confusing waiting list or time spent waiting on land that is not improved. As a result, the restriction of damages to out-of-pocket losses may serve only to discourage Native Hawaiians from pursuing their claims.

D. Inapplicability to Share of Office of Hawaiian Affairs

Hawaii Revised Statutes section 673-9 states that the State of Hawaii's waiver of immunity will not apply to suits "in which the matters in controversy involve the proportionate share of ceded land or special fund revenues allocated to the office of Hawaiian affairs by the legislature."[130] The controversies referred to in this section deal with the definition of "funds derived from the public land trust"[131] and with the amount of money O.H.A. is obligated to provide for the benefit of Hawaiians.[132] In 1980, the amendment to *Hawaii Revised Statutes* chapter 10 stated that O.H.A. is authorized to expend twenty percent of all funds derived from the public land trust, for the betterment of the conditions of Native Hawaiians.[133] This authorization has led to inconsistent interpretations of the applicable section, *Hawaii Revised*

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[127] *Id.* § 673-1 (quoted *supra* note 105).

[128] *Id.* § 673-4 (quoted *supra* note 125).

[129] *Id.*

[130] *Id.* § 673-9 (Supp. 1991). This section states in full:

> This chapter shall not apply to suits in equity or law brought by or on behalf of the office of Hawaiian affairs in which the matters in controversy involve the proportionate share of ceded land or special fund revenues allocated to the office of Hawaiian affairs by the legislature.

Id.

[131] *Id.* § 10-2 (Supp. 1991).

[132] *Id.* ch. 10 (1985).

[133] *Id.* § 10-3.

Statutes section 10-13.5, and of what constitutes "funds derived from the public land trusts." For example in 1987, the Hawaii Supreme Court found that O.H.A. was not entitled to twenty percent of a monetary settlement that was reached by the State of Hawaii.[134] O.H.A. had asserted its right to the percentage of the value of the land exchange presenting the court with the issue of what O.H.A. was entitled to receive under *Hawaii Revised Statutes* chapter 10.[135] The court held the issue was nonjusticiable because there were no judicially manageable standards available.[136]

The exact amount of ceded land or special fund revenue which should be allocated to O.H.A. was finally determined in 1990 by Act 304.[137] The Legislature stated that the purpose of Act 304 was to clarify which lands were involved and what revenues were to be considered funds to be allocated for the betterment of the conditions of Native Hawaiians.[138] The term "public land trust" is now defined, and the definition specifies which lands are to be included in the trust.[139] The

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[134] Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 174, 737 P.2d 446, 458 (1987); *see supra* notes 63-70 and accompanying text.

[135] 69 Haw. at 165, 166, 737 P.2d at 453.

[136] *Id.* at 175, 737 P.2d at 458.

[137] Act 304 § 1, 15th Leg., Reg. Sess. (1990), *reprinted in* 1990 Haw. Sess. Laws 947.

[138] Act 304 § 1, states:

The purposes of this Act are to:

(1) Clarify the lands comprising the public land trust under chapter 10, Hawaii Revised Statutes;

(2) Clarify the revenues derived from the public land trust which shall be considered to establish the amount of funding to the office of Hawaiian affairs for the purpose of the betterment of the conditions of native Hawaiians; and

(3) Provide for a process to determine the actual amounts payable to the office under the clarified standards enacted and for the formulation of a plan for payment of that sum consistent with the restrictions and limitations under the existing federal and state laws and regulations, and bond and contractual obligations.

Id.

[139] HAW. REV. STAT. § 10-2 (1985) has been amended to include the following:

"Public land trust" means those lands:

(1) Which were 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 which were conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admission Act), (excluding therefrom lands and all proceeds

definition includes lands ceded to the United States by the annexation of Hawai'i in 1898 and which were conveyed to the State of Hawaii in 1959, and lands that were retained by the United States in 1959 and later conveyed to the State of Hawaii.[140] This was the Legislature's attempt to clarify what should be considered part of the public land trust. This clarification also helps to interpret *Hawaii Revised Statutes* section 10-13.5 because it describes the source of the funds to be allocated to O.H.A.

The definition of "funds derived from the public land trust" in *Hawaii Revised Statutes* section 10-13.5 was previously unclear. To remedy this, the Legislature amended *Hawaii Revised Statutes* section 10-2 to include a definition of "revenue."[141] This definition limits the funds available to O.H.A. to revenues that result from the "actual use of lands comprising the public land trust."[142]

The current controversy now involves the determination of what constitutes actual use of public trust lands. Two situations highlight the problem. The first involves a land exchange between land situated at Fort Shafter for land located on a runway.[143] The land on the runway can only be used for what it is constructed for—a runway for

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and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended);

(2) Retained by the United States under section 5(c) and 5(d) of the Act of March 18, 1959, and later conveyed to the State under section 5(e) of the Act of March 18, 1959; and

(3) Which were ceded to and retained by the United States under section 5(c) and 5(d) of the Act of March 18, 1959 and later conveyed to the State pursuant to the Act of December 23, 1963 (P.L. 88-233, 77 Stat. 472).

Id. § 10-2 (Supp. 1991).

[140] *Id.* § 10-2.

[141] Act 304 § 3, 15th Leg., Reg. Sess. (1990), *reprinted in* 1990 Haw. Sess. Laws 947, 949. HAW. REV. STAT. § 10-2 (1985) has been amended to read, in part:

"Revenue" means all proceeds, fees, charges, rents, or other income, or any portion thereof, derived from any sale lease, license, permit, or other similar proprietary disposition, permitted use, or activity, that is situated upon and results from the actual use of lands comprising the public land trust, and including any penalties or levies exacted as a result of a violation of the terms of any proprietary disposition.

Id. § 10-2 (Supp. 1991).

[142] *Id.* § 10-2.

[143] Interview with Alan T. Murakami, Attorney with the Native Hawaiian Legal Corporation, in Honolulu, Haw. (Oct. 29, 1991).

planes to use for take offs and landings.[144] This strict interpretation would deprive O.H.A. of any income earned from other businesses located near the runway and built for use by patrons of the runway, for example, gift shops, or restaurants.[145]

The second situation involves land on Maui which has been targeted for the development of affordable housing.[146] In order to build this affordable housing, the developer may have to install improvements on the land that will greatly enhance the value of the land.[147] If O.H.A. is entitled to revenue that results from the actual use of this land, it is possible that O.H.A. is entitled to receive revenue based on the enhanced value. The developers are disputing this interpretation because the cost to build on ceded land would be so high that the housing will no longer be affordable.[148] Alan T. Murakami, attorney for the Native Hawaii Legal Corporation, suggests that in the near future, the legislature will have to provide a clearer definition of what constitutes revenues so that these types of controversies may be resolved.[149]

E. Limitation on Actions

Hawaii Revised Statutes section 673-10 states that "[e]very claim arising under [chapter 673] shall forever be barred unless the action is commenced within two years after the cause of action first accrues. . . ."[150]

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[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* During the 1992 legislative session, S. 2485, Relating to the Office of Hawaiian Affairs, was introduced. This bill addresses the problem described by Alan T. Murakami. S. 2485 proposes an amendment to HAW. REV. STAT. ch. 10 and the definition of revenues. The amendment to the definition of revenues specifically includes money derived from public land transfered to the housing finance and development corporation for the purposes of developing housing projects. This bill states that the determination of how much money should be given to O.H.A. should be calculated by multiplying the fair market value of the land by twenty percent. S. 2485, 16th Leg., Reg. Sess. (1992).

[150] HAW. REV. STAT. § 673-10 (Supp. 1990). This section states in full:

> Every claim arising under this chapter shall forever be barred unless the action is commenced within two years after the cause of action first accrues; provided that this statute of limitations shall be tolled until July 1, 1990; provided further that the filing of the claim in an administrative proceeding pursuant to this chapter shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until ninety days after the date the decision is rendered in the administrative proceeding.

Id.

There are two important issues present in this limitation. The first involves the determination of when a cause of action accrues. With regard to tort actions against the State, the Hawaii Supreme Court stated that a cause of action first accrues when "the plaintiff knew or should have known that an actionable wrong has been committed."[151] The state Attorney General's intent to limit these actions to conform to the State Tort Reform Act[152] may suggest some similarity in the interpretation of how the actions should be limited. Thus it is likely that a court will enforce the clear legislative intent to limit actions brought under this statute to a period of two years.

If the statute of limitations is held to two years, a second issue arises, that of the potentially severe consequences of such a short statute of limitations. First, when the two-year period expires, the potential claimant loses both the right to bring the statutorily created cause of action and the right to the remedy allowed. The claims of Native Hawaiians to Hawaiian homelands have continuously been treated with both inaction and neglect. To suddenly treat these claims as if they are not be worthy of court action if they are not brought within two years after they accrue is to unfairly force potential claimants to begin questionable administrative proceedings. Beneficiaries will not be willing to bring their claims expediently to a state agency that has historically not been eager to process their claims. Potential claimants need time to get used to this breakthrough legislation and the idea that the state will take immediate action when claims of breach are brought under this statute. This two-year limitation will severely deter beneficiaries from pursuing their claims or prevent the resolution of many individual claims because two years is not enough time to bring an action for the State's breach of its fiduciary duty.

Finally, this statute of limitations should not be so quickly compared to the limitation in the State Tort Reform Act. The Tort Reform Act involves a cause of action that has been defined by both the common law and statutes.[153] In contrast, the Native Hawaiian Trusts Judicial

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[151] Waugh v. University of Hawaii, 63 Haw. 117, 126, 621 P.2d 957, 966 (1980).

[152] *See supra* note 93 and accompanying text.

[153] The State Tort Liability Act was first adopted by the Territory of Hawaii in 1957; *see* note 94 and accompanying text.

The common law doctrine regarding tort actions against the state was based on the idea that the king could do no wrong. It has developed into the idea that unless the state consents to the imposition of liability, the immunity offers complete protection. RESTATEMENT (SECOND) OF TORTS § 895B (1979).

Relief Act involves a cause of action that is unique. Although, the concept of fiduciary duty under the land trusts has existed for over seventy years, a cause of action for a breach of that duty has never been clearly defined. The difference between defining a tort and defining a breach of fiduciary duty to the Native Hawaiians is broad enough to justify a longer statute of limitations.

IV. The Governor's Proposal

The State of Hawaii was very adamant about limiting the State's waiver of immunity to prospective claims, excluding claims arising between August 21, 1959, and July 1, 1988.[154] The Legislature recognized the State's concerns and gave the Governor three years to come up with a proposal to resolve land trust controversies that arose during the excluded period.[155] During the 1991 legislative session, the

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[154] *See* note 96 and accompanying text.

[155] The Native Hawaiian Trusts Judicial Relief Act 395, §§ 3-5, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. Sess. Laws 942, 945 provide:

> Section 3. This Act shall not apply to any cause of action which accrued, rights and duties that matured, penalties that were incurred, or proceedings that were begun, prior to July 1, 1988.
>
> Section 4. No action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988.
>
> Section 5. The governor shall present a proposal to the legislature to resolve controversies which arose between August 21, 1959 and the date of this Act, relating to the Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4), and the native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act.
>
> If, (1) both of the following occur:
>
> (a) The governor fails to present a proposal to the legislature prior to the convening of the 1991 legislature in regular session; and
>
> (b) No other means of resolving such controversies is otherwise provided by law by July 1, 1991;
>
> or
>
> (2) All three of the following occur:
>
> (a) The governor presents a proposal;
>
> (b) A resolution calling for the rejection of the governor's proposal is adopted by two thirds vote of the house introducing such resolution; and

Governor presented *An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust* (Action Plan).[156] The Legislature found that this Action Plan satisfied the requirements of Section 5 of the Native Hawaiian Trusts Judicial Relief Act and thus adopted the plan. The Legislature interpreted Section 5 of the Act to mean that the Governor was ordered to propose a legislative process to attempt to resolve the controversies that occurred between 1959 and 1988. The Governor allegedly complied with the mandate because he proposed a legislative process that attempts to resolve the individual claims of beneficiaries of the Hawaiian Home Lands Trust. He supposedly addressed the remaining controversies by proposing that an interim legislative committee explore such issues as land exchanges and compensation and the retroactive allocation of revenues derived from the ceded lands.[157]

(c) No other means of resolving such controversies is otherwise provided by law, by July 1, 1991,

then in the event of the occurrence of either (1)(a) and (b) or (2)(a), (b) and (c), notwithstanding sections 3 and 4 of this Act, a claim for actual damages under this Act which accrued between August 21, 1959, and the date of this Act may be instituted no later than June 30, 1993, provided that the filing of a claim for actual damages in an administrative proceeding before June 30, 1993, shall toll the statute of limitations until ninety days after the date the decision is rendered in the administrative proceeding.

Id.

[156] Office of the Governor, *An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust* (1991) (unpublished report, on file with the *University of Hawai'i Law Review*). Sen. Con. Res. No. 185, 16th Leg., Reg. Sess. 2 (1991), states that the Governor submitted the Action Plan in a report to the Legislature. *Id. see*, SEN. REP. No. 1278, 16th Leg., Reg. Sess. (1991), *reprinted in* 1991 HAW. SEN. J. 1199. The Legislature held public hearings and allowed review and comment from beneficiaries and other parties concerned about the Action Plan. *Id.*

[157] *Id.* The interim legislative committee will be created by appointments by the President of the Senate from the Senate Committees on Housing and Hawaiian Programs and Ways and Means, and by the Speaker of the House of Representatives from the House Committees on Water, Land Use and Hawaiian Affairs and Finance. This committee will consult with O.H.A., D.H.H.L., the Office of State Planning, and other affected community groups. Furthermore, this committee is instructed to:

(1) Explore land exchanges, transfers, and return of ceded lands to the Department of Hawaiian Home Lands or the Office of Hawaiian Affairs, or both;

(2) Explore the issue of compensation for these land transfers, including the question of going beyond a value-for-value basis, the right of first refusal

It can be argued that the intention of the legislative mandate of section 5 of the Native Hawaiian Trusts Judicial Relief Act was that the Governor present a *resolution* of the controversies, and not a plan to resolve the controversies after numerous studies have been done.[158] The plan submitted by Governor Waihee is arguably insufficient because it merely proposes a *process* to resolve the controversies and not the resolutions themselves. Legislation that allows beneficiaries to bring individual claims before an administrative panel for any breaches that occurred between 1959 and 1988 is only the creation of a process and does not resolve any of the problems that continue to plague the land trusts.

Nor does the Governor's proposal resolve any of the controversies that had been left unaddressed by the Act. The proposal merely states that the controversies concerning land exchanges, transfers, compensation for these exchanges and transfers, and the allocation of revenues for the period 1959-1088 to the Hawaiian Home Lands Trust or O.H.A., will be *investigated.*[159] Instead of submitting a report that discusses how the State proposes to compensate the Hawaiian Home Lands Trust and O.H.A., conduct land exchanges and returns, and allocate the revenues owed to the Hawaiian Home Lands Trust and O.H.A., the Governor states that a report will be presented to the Legislature in 1992.[160]

This can be seen as a failure of the Governor to submit a proposal to resolve the controversies. Section 5 of the Native Hawaiian Trusts Judicial Relief Act provides that if the governor fails to submit a proposal to resolve the controversies, beneficiaries will have the right

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when lands are returned to the State, and the resulting impacts on the Hawaiian Home Lands Trust and the Public Land Trust;

(3) Explore the possibility of allocating twenty per cent of revenues derived from August 1959 to June 15, 1980 to either the Hawaiian Home Lands Trust or to the Office of Hawaiian Affairs if the federal government is required to pay to the State all revenues from leases, rents, and revocable permits from federally-controlled ceded lands;

(4) Prepare comprehensive legislation to implement the Governor's Action plan; and

(5) Propose legislation which would implement the findings of the interim committee.

Id. at 4.

[158] Interview with Alan T. Murakami, *supra* note 143.

[159] *See supra* note 156 and accompanying text.

[160] Sen. Con. Res. No. 185, 16th Leg., Reg. Sess. 4 (1991); *see* HAW. SEN. REP. No. 1278, 16th Leg., Reg. Sess. (1991), *reprinted in* 1991 HAW. SEN. J. 1199.

to take their claims for the period 1959 to 1988 straight to a circuit court of the State of Hawaii.[161]

A. Individual Claims Resolution Under the Hawaiian Home Lands Trust

In order to address the resolution of individual beneficiary claims involving breaches of the Hawaiian Home Lands Trust, the legislature set up a claims review panel in 1991.[162] Originally, the task of reviewing these claims was presented to the judiciary.[163] The Governor's Office had suggested that the judiciary develop a forum for alternative dispute resolution.[164] However, the judiciary rejected this responsibility,[165] and the executive and legislative branches created legislation to set up a process of accepting and reviewing these claims.[166] This resulted in Act 323,[167] which enables beneficiaries to file claims for actual damages with the Hawaiian Home Lands Trust individual claims review panel.[168]

Act 323 provides a limited retroactive waiver of sovereign immunity. It is limited in that beneficiaries may only bring claims for actual damages.[169] Like the Native Hawaiian Trusts Judicial Relief Act, this

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[161] The Native Hawaiian Trusts Judicial Relief Act (Act 395), § 5, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Hawaii Session Laws 942, states: "If . . . [n]o other means of resolving such controversies is otherwise provided by law, by July 1, 1991, then . . . a claim for actual damages under this Act which accrued between August 21, 1959 and the date of this Act may be instituted no later than June 30, 1993." *Id.* at 945.

[162] Sen. Con. Res. No. 185, 16th Leg., Reg. Sess. 4 (1991), provides that:

> a claims review panel accept, investigate, and develop advisory opinions on the merit and possible compensation of each individual beneficiary claim arising as a result of breaches of trust under the Hawaiian Homes Commission Act that occurred between August 21, 1959 and July 1, 1988 in a report for discussion by the State Legislature . . . .

Id.

[163] Interview with Mary Alice Evans, Planner, Office of State Planning, in Honolulu, Haw. (Oct. 17, 1991).

[164] *Id.*

[165] *Id.*

[166] Act 323, 16th Leg., Reg. Sess. (1991), *reprinted in* 1991 Haw. Sess. Laws 990.

[167] *Id.* (codified as HAW. REV. STAT. ch. 674 (Supp. 1991)).

[168] HAW. REV. STAT. ch. 674 (Supp. 1991).

[169] HAW. REV. STAT. §§ 674-1(2) states:

> By providing an individual beneficiary claimant the right to bring an action to recover actual damages for a breach of trust, in the circuit courts of the State of Hawaii, if the action taken by the 1993 and 1994 legislatures in regular session on each claim brought before the panel is not acceptable to an individual beneficiary claimant.

Id.; *see also id.* § 674-18 ("[i]n an action under this part the court may award actual damages to a successful claimant.").

piece of legislation prevents beneficiaries from receiving awards for punitive and consequential damages.[170]

The Hawaiian Home Lands Trust individual claims review panel will be composed of five panel members to be appointed by the governor.[171] The panel will be placed within the Department of Commerce and Consumer Affairs.[172] The governor will appoint the chairperson who must be a former judge or licensed attorney.[173] Native Hawaiian organizations have submitted a list of nominees for the remaining four positions.[174] All appointments will be confirmed by the state senate. The appointed panel members will serve until December 1995.[175]

The Hawaiian Home Lands Trust individual claims review panel will be acting as a negotiating body.[176] It will attempt to negotiate with

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[170] *Id.* § 674-2. The definition of actual damages in this section excludes consequential damages. *Id.* The statute does not expressly exclude punitive damages, but it does not expressly provide for them either.

[171] HAW. REV. STAT. § 674-3 states in part that "[t]here shall be a Hawaiian home lands trust individual claims review panel to be composed of five members and appointed. . . ." by the governor. *Id.*

The Governor has appointed attorney Peter Trask as chairman and Melodie K. MacKenzie, director of the Native Hawaiian Legal Corporation, as acting executive director of the Hawaiian homelands trust individual claims review panel. To fill the remaining four panel positions, he has appointed Alexander Ahuna, a police officer from Maui, Marie McDonald, a retired teacher and homesteader from Hawaii, Warren Perry, an attorney from Kauai, and Monsignor Charles Kekumanu, Chairman of the Board of Trustees of the Liliuokalani Trust from Oahu. These appointments must be confirmed by the Senate. Telephone Interview with Heidi Meeker, Office of State Planning, Office of the Governor, State of Hawaii (April 13, 1992).

[172] HAW. REV. STAT. § 674-3 provides that "[t]he panel shall be placed within the department of commerce and consumer affairs for administrative purposes." *Id.* (Supp. 1991).

[173] HAW. REV. STAT. § 674-3 states that "the chairperson shall be appointed by the governor and shall be a former federal or state court judge, where possible, or an attorney licensed to practice law in the courts of the State." *Id.*

[174] HAW. REV. STAT. § 674-3 states, "The governor shall appoint the remaining four members, all whom shall be from nominations submitted by native Hawaiian organizations as defined in section 673-2." *Id.*

[175] Telephone Interview with Heidi Meeker, *supra* note 171. Ms. Meeker stated that a committee hearing would be held on March 17, 1992, to extend the deadlines contained in HAW. REV. STAT. ch. 674 for one more year. *Id.*

[176] HAW. REV. STAT. § 674-1 provides that the reviewing panel shall:

> [r]eceive, review and evaluate the merits of an individual beneficiary's claim, . . . [r]ender findings and issue an advisory opinion regarding the merits of

the beneficiaries who bring claims before them and the governmental agency involved.[177] The panel will issue findings and advisory opinions regarding corrective action or compensation.[178] It will then make reports to the 1993 and 1994 legislatures with recommended award amounts.[179] The legislature will make the ultimate decision regarding the action to be taken on each claim presented.[180] If the decision of the legislature is rejected, a claimant must give written notice of rejection before October 1, 1994.[181] An action may then be brought in a state circuit court, but not until after October 1, 1994.[182] This limitation on access to the state courts until 1994 further restricts the rights of claimants to have their complaints heard before a judicial body.

While the review panel does not stand as an adjudicative body, it does decide issues that involve the rights of the beneficiaries. Thus, this panel may encounter problems of due process. The Legislature specifically spelled out certain procedural requirements and limitations in Act 323. Although the Legislature gave the panel rulemaking powers,[183] *Hawaii Revised Statutes* section 674-9 specifically exempts the panel from *Hawaii Revised Statutes* sections 91 and 92.[184] This has several

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> each claim filed with the panel, including an estimate of the probable award of actual damages or recommended corrective action that may be implemented to resolve each claim. . . .

Id. The panel does not render a final, binding decision. The findings of the panel are preliminary and the result of a hearing where the claimant is able to present evidence and the panel is able to ask questions. *Id.* § 674-9.

[177] *Id.*

[178] *Id.* § 674-10. This section states: "The panel shall prepare findings and an advisory opinion concerning the probable merits of a claim, probable award of compensation or recommended corrective action by the State." *Id.*

[179] *Id.* § 674-14.

[180] *Id.*

[181] *Id.* § 674-17(b).

[182] *Id.* § 674-17(a).

[183] HAW. REV. STAT. § 674-6 states:

> The panel shall adopt rules in accordance with chapter 91 within six months after the effective date of this chapter prescribing the procedures to be followed in the filing of claims and in the proceedings for the review of claims under this chapter, and such other rules as the panel deems necessary to carry out the purposes of this chapter.

Id.

[184] These chapters address the rulemaking and adjudicatory powers of administrative agencies.

implications. First, discovery is not allowed.[185] Second, the parties are prohibited from receiving any records of the proceedings.[186]

This exclusion is further emphasized by *Hawaii Revised Statutes* section 647-11, which states:

> No statement made in the course of any hearing or review proceedings of the panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any legal proceeding. No opinion, conclusion, finding, or recommendation of the panel on the issue of liability or on the issue of compensation or corrective action shall be admitted into evidence in any legal proceeding, nor shall any party to the panel hearing, or the counsel or other representative of such party, refer to or comment thereon in any opening statement, any argument, or at any other time, to any court or jury.[187]

Hawaii Revised Statutes section 674-11 allows the panel to conduct its review and evaluation of claims without remaining responsible to anyone or any judicial body because it does not render a final and reviewable decision. As a result, claimants are not protected by any due process procedures that would ensure that their claims are presented in a fair setting.

The panel is part of a process that simply recommends action. The process does not resolve any controversies on its own because the legislature is ultimately responsible for compensating beneficiaries. The legislature asks the Native Hawaiian community to accept this process as a resolution of the controversies that have occurred since 1959. However, this process, which for some claimants may be their only chance to recover damages for breach of trust, does not adequately protect the claimants' rights to be heard in a fair and impartial forum.

V. IMPACT

Act 323 and the Hawaiian Home Lands Trust individual claims review panel were supposed to resolve the controversies surrounding the administration of both the Hawaiian Home Lands Trust and the Public Land Trust. While it provides a process for beneficiaries of these trusts to bring claims for individual compensation in the form of

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[185] HAW. REV. STAT. § 674-9 (Supp. 1991) states specifically that "[d]iscovery by the parties shall not be allowed." *Id.*

[186] *Id.*

[187] *Id.* § 674-11.

actual damages, it does not adequately address the problem of returning Native Hawaiians to the land.[188] Nor does it adequately address the problem of compensating O.H.A. for the inadequate management of its leases of ceded lands.

On November 20, 1991, the state announced that it plans to compensate the Hawaiian Home Lands Trust for illegal use or withdrawal of Hawaiian Home Lands, and O.H.A. for failure to pay O.H.A. its full twenty percent share of rents from the ceded lands.[189] The State plans to submit its findings to the 1992 Legislature.[190] So far the State has found that around 30,000 acres of Hawaiian homestead lands have been involved in illegal uses for parks and schools and by the military for its bases.[191] The State is also working with the Housing Finance and Development Corporation to figure out how much compensation O.H.A. may receive when leased sugar cane lands are used for affordable housing developments.[192] Land ownership issues will also be discussed.[193]

This action taken by the State is very encouraging. The State has calculated that O.H.A. is entitled to about $95.6 million.[194] This estimate covers the period 1981-1991 and involves funds derived from the public land trust.[195]

After the passage of the Native Hawaiian Trusts Judicial Relief Act in 1988,[196] the Native Hawaiian community adopted a wait and see attitude.[197] No claims have yet been filed in accordance with this Act.[198] The Native Hawaiian Legal Corporation feels that claims concerning breaches of trust that had occurred after 1988 would be very hard to prove and that suits filed would provide very little relief.[199] The belief

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[188] Becky Ashizawa, *Extra $25 Million to Test Hawaiian Homes' Mettle*, HONOLULU STAR BULL., Jan. 30, 1992, at A-15. The D.H.H.L. estimates that there are currently 22,712 applicants on file for homestead parcels. *Id.*

[189] Kevin Dayton, *'Discrimination' Snag in Home Lands Funds*, HONOLULU ADVERTISER, Nov. 20, 1991, at A3.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] Becky Ashizawa, *Hawaiian Lands To Cost State Millions*, HONOLULU STAR BULL., Jan. 13, 1992, at A3.

[196] *See supra* text accompanying notes 82-104.

[197] Interview with Alan T. Murakami, *supra* note 143.

[198] *Id.*

[199] *Id.*

is that the real relief sought is not to be found in the Native Hawaiian Trusts Judicial Relief Act since the breaches that occurred between 1959 and 1988 are the focus of many beneficiary claims for damages.[200] Because of this, many beneficiaries waited to see what kind of resolution the Governor would propose.[201] Whether or not the proposal actually complies with the intention of section 5 of the Act, the Native Hawaiian Legal Corporation will encourage its clients to file suits so that they will file their claims before the statute of limitations on their claims expires.[202]

Nor has the Native Hawaiian Trusts Judicial Relief Act generated much enthusiasm with the Hawaii Advisory Committee to the United States Commission on Civil Rights. The Advisory Committee recently completed a study concerning the failure of both the federal and state governments to protect the rights of Native Hawaiians.[203] The Committee dedicated only two small paragraphs in its eighty-four page report to the Act.[204] The focus of much of the report was on the role of the federal government in the on-going fight to protect Native Hawaiians.[205]

VI. CONCLUSION

The Native Hawaiian Trusts Judicial Relief Act flooded the state legislature with controversy in 1988 and now it sits quietly in the background as the focus shifts to matters involving the responsibilities of the federal government. While the Act was initially received enthu-

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[200] *Id.*

[201] *Id.*

[202] *See supra* notes 150-94 and accompanying text.

[203] A BROKEN TRUST, *supra* note 41.

[204] *Id.* at 34. The report provides a brief description of the Act and the Governor's proposal. It does not contain any commentary on its effectiveness or an endorsement of the Act itself.

[205] *Id.* Hearings are presently being conducted before Congress concerning Native Hawaiian sovereignty and the obligations of the federal government to the Native Hawaiian people. Becky Ashizawa, *Waihee May Face Battle to Get Hawaiian Homes Federal Funds*, HONOLULU STAR BULL., Jan. 30, 1992, at A4 [hereinafter Becky Ashizawa, *Waihee*]. Delegates from the State of Hawaii are urging the federal government to provide compensation for breaches of the land trusts that occurred when the federal government served as trustee. Some of the violations that will be pointed out are: the loss of 744 acres of Hawaiian homestead land, the use of 29,561 acres of homestead land by non-beneficiaries without compensation, and the permanent taking of land without compensation or the exchange of land. Becky Ashizawa, *Waihee*, *supra*, at A4.

siastically, in the three years since its passage, the inaction surrounding it has been very discouraging. The statement by the State of Hawaii that it was finally going to take a big step toward redressing the wrongs of the past and present and that it would address future breaches of the land trusts was welcomed. However, in taking these big steps to redress past wrongs, the State also took big steps to limit the rights of Native Hawaiians to sue the State of Hawaii for these wrongs. Claimants must go through a lengthy and time-consuming administrative process or legislative process before gaining access to the state court system. Beneficiaries with claims for breaches that occurred prior to 1988 must negotiate with an executive body and the legislature without the protection of *Hawaii Revised Statutes* chapters 91 and 92. In addition these claimants are precluded from access to the courts until October 1994. On the other hand, this sudden governmental focus on the mismanagement of the land trusts will benefit D.H.H.L. and O.H.A. It has forced D.H.H.L. to account for its decisions and to find support for its action or inaction.

Many feel that the focus should be on the federal government and its waiver of immunity. The State's waiver of immunity amounts to an empty promise because of its limited effect on providing relief and resolving the controversies.

However, until the federal government recognizes that it has a responsibility to compensate the Native Hawaiians for breaches of its trust duties, the Native Hawaiian Trusts Judicial Relief Act provides the only possible avenue for compensation. The Native Hawaiian community should begin to work with the Native Hawaiian Trusts Judicial Relief Act and Act 323 and explore the claims review process. While the series of preliminary and administrative proceedings may seem both costly and time-consuming to the beneficiaries with potential claims, the Native Hawaiian Trusts Judicial Relief Act must be used. The question of its actual effectiveness will not be answered until claims are filed and statutorily created cause of actions are heard in the circuit courts of the State of Hawaii.

Hundreds of claims go unresolved each day. A breach occurs every time a lease to a non-beneficiary is allowed to continue. A breach occurs every time a qualified beneficiary on the virtually endless waiting list is made to wait even longer to receive land for homesteading while a lease to a non-beneficiary is negotiated. These breaches must be stopped and the beneficiaries must be compensated. The Native Hawaiian Trusts Judicial Relief Act and the Governor's Proposal may not immediately solve the problems that have caused the Native

Hawaiians so much pain over the years, but they are steps in the right direction.

Mia Y. Teruya

The Law and Politics of Dancing: *Barnes v. Glen Theatre* and the Regulation of Striptease Dance

I. INTRODUCTION

The First Amendment to the United States Constitution prohibits the federal government from making laws that abridge the freedom of speech.[1] The Due Process Clause of the Fourteenth Amendment[2] extends this prohibition to the various state governments.[3] The Supreme Court of the United States has interpreted the First Amendment to protect not only pure written and spoken speech but also certain forms of expressive conduct.[4] The Court, however, recognizes that not all conduct through which the actor intends to express an idea may be labeled speech.[5] Additionally, the Court accepts the proposition that even those forms of conduct that the Court considers expressive may be regulated under certain circumstances.[6]

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[1] "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

[2] "Nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

[3] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[4] *See, e.g.*, Texas v. Johnson, 491 U.S. 690 (1989); United Sates v. Eichman, 496 U.S. 310 (1990) (burning an American flag is protected expression); Spence v. Washington, 416 U.S. 405 (1974) (per curium) (flying an American flag upside down with a peace symbol attached); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (wearing black arm bands to protest war in Vietnam).

[5] United States v. O'Brien, 391 U.S. 367 (1968). The Court rejected the notion that a "limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376.

[6] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); *see also infra* notes 95-97 and accompanying text.

Within this framework of constitutional provisions and judicial interpretation, the constitutional status of nude dancing[7] remained unsettled. Prior to the Court's decision in *Barnes v. Glen Theatre*,[8] it was unclear whether the Court considered nude dancing expressive conduct protected by the freedom of speech guarantee of the First Amendment.[9] Further, as previously stated,[10] even conduct that the Court considers expressive may be regulated. There was, therefore, and still is, uncertainty over how, and to what extent, nude dancing may be regulated.

Part II of this note examines the history and development of the case law dealing with the regulation and prohibition of nude dancing. This part also looks at the ways in which nude dancing is regulated by various communities. Part III analyzes the *Barnes* decision with emphasis on what issues, if any, the decision resolved. Part IV discusses the possible effects of the *Barnes* decision on communities that regulate or prohibit nude dancing. Part V presents the author's comments and conclusions.

II. History and Development of the Regulation of Nude Dancing

A. The Federal Courts

Prior to 1972, the Supreme Court had consistently refrained from interfering with state regulation and prohibition of nude dancing.[11] Consequently, states were free to regulate or ban nude dancing. In 1972, however, the Court rendered a decision that, for the first time, indicated its willingness to recognize nude dancing as expressive conduct deserving of some level of protection. In *California v. LaRue*,[12] the Court upheld an ordinance that regulated live, sexually explicit entertain-

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[7] For purposes of clarity, the many varied forms of nude and semi-nude, barroom, and go-go style dance discussed in this note are referred to as "nude dancing".

[8] Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456 (1991); *see infra* notes 79-122 and accompanying text.

[9] *See infra* notes 11-24 and accompanying text.

[10] *See supra* note 6.

[11] *See* Portland v. Derrington, 451 P.2d 111 (Or. 1968), *cert. denied*, 396 U.S. 901 (1969); Hoffman v. Carson, 250 So. 2d 891 (Fla. 1971), *appeal dismissed*, 404 U.S. 981 (1971); Adams Newark Theatre Co. v. City of Newark, 126 A.2d 340 (N.J. 1956), *aff'd*, 354 U.S. 931 (1957).

[12] 409 U.S. 109 (1972).

ment.[13] In so doing, the Court, without specifically mentioning nude dancing, recognized that some forms of entertainment that were affected by the law did enjoy constitutional protection.[14]

While the Court did not specifically mention nude dancing in *LaRue*, three years later, in *Doran v. Salem Inn, Inc.*,[15] the Court stated that nude barroom dancing might be entitled to protection "under some circumstances".[16] The Court did not revisit the issue until six years later.

The 1981 decision of *Schad v. Borough of Mount Ephraim*,[17] provided additional evidence that the Supreme Court considered nude dancing a form of protected expression. In *Schad*, the Court held unconstitutional a zoning ordinance that prohibited all live entertainment throughout the Borough.[18] The Court objected to the ordinance because it prohibited a "wide range of expression that has long been held to be within

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[13] The California Department of Alcoholic Beverage Control issued rules that regulated the type of entertainment that could be presented by establishments that serve liquor. The rules effectively banned totally nude dancing by prohibiting any display of the pubic hair, anus, vulva, or genitals. Cal. Dept. Alcoholic Beverage Control Rules 143.3 and 143.4.; *see LaRue*, 409 U.S. at 111-12.

[14] 409 U.S. at 118. "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board." *Id.*

[15] 422 U.S. 922 (1975).

[16] *Id.* at 932. The question of whether nude dancing is expressive activity protected by the First Amendment was not directly addressed by the Court. The case involved the issue of whether the respondents, owners of establishments that presented topless dancers and thus violated a North Hampstead, N.Y., ordinance, were entitled to a preliminary injunction against the application of the ordinance.

In addressing the question of whether the respondents made a sufficient showing of the likelihood of their ultimate success on the merits, the Court noted, "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue . . . that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances."
Id.

[17] 452 U.S. 61 (1981).

[18] *Id.* at 63-64. The ordinance did not mention which forms of entertainment were prohibited but rather listed all permissible uses and excluded all others. In this way, live entertainment was excluded.

Appellants operated adult bookstores that offered coin operated viewing machines to their customers. These machines allowed the patrons to view adult movies or a live dancer, usually nude, performing behind a glass panel. *Id.* at 62.

the protections of the First and Fourteenth Amendments.''[19] The Court reasoned that since other forms of live entertainment are protected[20] regardless of whether they contain nudity,[21] nude dancing is entitled to some level of protection. Citing *Doran* and *LaRue*, the Court stated that ''nude dancing is not without its First Amendment protections from official regulations.''[22]

This statement, however, is sufficiently vague to leave some question about the constitutional status of nude dancing. The Court seems to say only that, in certain situations, nude dancing may be protected. Nothing in these decisions precluded the possibility that, depending on the particular facts, nude dancing may be found lacking in expressive qualities and, thus, outside of the protection offered by the First Amendment. The decisions, therefore, left a great deal of uncertainty.

This uncertainty was highlighted in 1986 when the Court denied certiorari to a case that raised the issue of whether nude dancing should be afforded constitutional protection.[23] Justice White dissented from the denial of certiorari arguing that the Court had not directly dealt with the issue of whether nude dancing is protected expression.[24]

The lower federal courts, not surprisingly, disagreed over the import of the *LaRue*, *Schad*, and *Doran* decisions and over the broader issue of whether nude dancing is protected expression. The United States Court of Appeals for the Seventh Circuit, sitting en banc, held that non-obscene nude dancing is expressive and protected by the First Amendment.[25] While the court recognized that the Supreme Court had not yet delineated the precise scope of the protection afforded nude dancing,[26] it held, with reference to *Doran*, *Schad*, and *LaRue*, that the Supreme Court ''has repeatedly and consistently intimated that nude dancing performed as entertainment is protected activity under the First Amendment.''[27]

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[19] *Id.* at 65.

[20] *Id.* ''[L]ive entertainment, such as musicals and dramatic works, fall within the First Amendment guarantee.'' *Id.* (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)).

[21] *Id.* at 66.

[22] *Id.* at 66.

[23] Young v. Arkansas, 474 U.S. 1070 (1986).

[24] *Id.* at 1072 (White, J., dissenting from denial of cert.).

[25] Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990).

[26] *Id.* at 1082.

[27] *Id.*

Similarly, the Ninth Circuit Court of Appeals determined that non-obscene nude dancing, performed in a barroom setting, is expressive, protected activity.[28] Like the Seventh Circuit, the Ninth Circuit court relied on language in the *Schad* decision to support its position.[29] The Eighth Circuit Court of Appeals, however, reached a different conclusion.[30] In *Walker v. City of Kansas City*, the Eighth Circuit labeled as dicta the wording in the *Schad* decision that indicated that nude dancing was protected activity.[31] The circuit court pointed to other Supreme Court holdings that call into question the level of protection Supreme Court affords nude dancing.[32]

Additionally, the Eighth Circuit declared that nude striptease dancing is obscene under the three-prong test of *Miller v. California*.[33] This characterization of nude dancing places it outside of the protection of the First Amendment.[34] Therefore, even if the court had found the dancing expressive, the holding would leave nude dancing without First

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[28] *See* BSA, Inc. v. King County, 804 F.2d 1104, 1107 (9th Cir. 1986).

[29] *Id.*

[30] Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990). In *Walker*, a bar owner, who had applied for a change in the zoning classification of his establishment to allow him to present go-go dancers, sued the city claiming that the ordinance violated his constitutional rights to free speech and due process of the law. *Id.* at 82-83.

[31] *Id.* at 85. The court referred to the Supreme Court's apparent recognition of nude dancing as expression worthy of protection as "unadulterated dicta . . . and dicta quite wide of the holding." *Id.* (citing *Schad*, 452 U.S. 61, 66 (1981)).

[32] *Id.* at 86. In Paris Adult Theatre Inc. v. Slaton, 413 U.S. 49, the Court stated:

> Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected . . . merely because the conduct is moved to a bar or a 'live' theatre stage, any more than a live performance of a man and a woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

Id.; *see also* California v. LaRue, 409 U.S. 109, 117 (1972), where the Court granted states more power to regulate expressive acts than to regulate printed words.

[33] 413 U.S. 15 (1973). In *Miller*, the Court developed a three-pronged test to determine if material is obscene. The test requires the party that claims the material is obscene to show that the material: (1) would be found as a whole, by the average person applying contemporary community standards, to appeal to the prurient interest; (2) depicted or described in a patently offensive way sexual conduct as specifically defined by the relevant state law; and (3) as a whole lacked serious literary, artistic, political, or scientific value. *Id.* at 24.

[34] *See* Roth v. United States, 354 U.S. 476 (1957). In *Roth*, the Court held that the societal interest in order and morality outweighs any interest in protecting obscene material. *Id.* at 484-85.

Amendment protection and, thus, vulnerable to various forms of state regulation.[35]

In sum, from a historical perspective, it is clear that prior to the Court's decision in *Barnes*, there was a great deal of uncertainty surrounding the constitutional status of nude dancing. This uncertainty is apparent in the conflicting opinions issued by the various circuit courts.

It was within this field of uncertainty that communities that oppose nude dancing attempted to regulate it or to ban it entirely. These communities used a number of approaches that met with varying levels of judicial approval.

B. The States' Regulation of Nude Dancing

It is possible that, in communities that wish to regulate nude dancing, people are more concerned with what they perceive as the negative side effects of nude dancing than they are with the question of what level of constitutional protection nude dancing should be afforded. The politicians and administrators of these various communities, however, are most definitely concerned with the judicial decisions dealing with the constitutionality of regulating nude dancing because those decisions dictate the manner in which nude dancing may be regulated.

For example, prior to the Supreme Court's decision in *Barnes*, a community located in the Eighth Circuit certainly had more leeway in regulating nude dancing than a community located in the Ninth Circuit.[36] Even those communities in judicial circuits that recognize nude dancing as expressive conduct protected by the First Amendment may regulate nude dancing. Those communities use a variety of legal mechanisms that limit the type, location, or presentation of nude dancing without violating the First Amendment rights of the performers.

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[35] *See* Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990). The court stated that states are free to "ban obscene nude dancing." *Id.* at 1089. However, the court went on to state that "[i]f the State wishes to regulate non-obscene expressive activity or public nudity, it may do so, but only in consonance with the First Amendment." *Id.*

[36] Hawai'i, for instance, is bound by the Ninth Circuit's decisions that recognize nude dancing as a form of protected expression. *See supra* note 28.

1. The Twenty-First Amendment

The Supreme Court of the United States recognizes that the Twenty-First Amendment[37] grants states broad regulatory powers and allows the states to go beyond normal police power in regulating the sale and use of liquor.[38] In *California v. LaRue*,[39] the Court held that the regulatory powers granted to the states by the Twenty-First Amendment include the power to regulate nude dancing in establishments that serve alcoholic beverages.[40]

The *LaRue* case dealt with the constitutionality of a series of regulations enacted by the California Department of Alcoholic Beverage Control. The regulations, which severely restricted nude dancing in establishments that serve alcohol,[41] were enacted in direct response to community complaints regarding illegal activities that occurred in and around California's nude dancing establishments.[42]

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[37] U.S. CONST. amend. XXI states:

"Section 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed.

"Section 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited."

[38] *See e.g.*, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964) (holding that states may go beyond generally recognized limits of the police power in regulating sale and use of alcohol); Board of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936) (holding that under the Twenty-First Amendment states have broad regulatory powers).

[39] 409 U.S. 109 (1972).

[40] *Id.* at 115-18.

[41] *Id.* at 112. The regulations prohibited among other things: (b) The actual or simulated "touching, caressing, or fondling of the breast, buttocks, anus, or genitals;" (c) The actual or simulated "displaying of pubic hair, anus, vulva or genitals . . . ." *Id.* at 112 (citing California Department of Alcoholic Beverage Control Rules 143.3, 143.4 (1970)).

[42] *Id.* at 111. In *LaRue*, Justice Rhenquist described the activities that occurred in and around the California establishments:

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself . . . . Prostitution occurred in and around such licensed premises . . . . Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

Id. at 111.

The Court refused to strike down the regulations, finding them a reasonable response to the illegal activity associated with the dance bars.[43] This conclusion was reached in spite of the Court's recognition that some of the performances affected by the ordinances enjoyed First Amendment protection.[44] The Court reasoned that this infringement on protected activity was acceptable because the ordinance did not forbid the performances across the board but merely prohibited performances in establishments that serve alcohol.[45]

In the years since the Supreme Court's decision in *LaRue*, the power given to states to regulate nude dancing in establishments that serve liquor has expanded. The Ninth Circuit Court of Appeals allowed the regulations in question in *LaRue* to be applied to a club even though there was no evidence of the illegal activities complained of in *LaRue*.[46] The court held that the absence of illegal activities in or around the bar is irrelevant and that the regulations are constitutional as applied to any business holding a liquor license.[47]

This interpretation of *LaRue* was adopted by the Supreme Court in *New York State Liquor Authority v. Bellanca*.[48] In *Bellanca*, the Court also held that the states, under the Twenty-First Amendment, had absolute power to regulate mere topless dancing as well as the bottomless dancing discussed in *LaRue*.[49]

It is, therefore, well settled that under the Twenty-First Amendment the states have the power to regulate or to ban nude dancing in establishments that serve alcohol.[50] Unfortunately for states wishing to ban nude dancing completely, an establishment can avoid regulation

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[43] *Id.* at 116.

[44] *Id.* at 118; *see supra* note 14.

[45] 409 U.S. at 118.

[46] Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168 (9th Cir. 1977), *cert denied*, 434 U.S. 1046 (1978). Richter, the owner of a San Diego bar, attempted to distinguish *LaRue* based on his assertion that there were no incidents of dancer/patron sexual contact at his bar. *Id.* at 1171.

[47] *Id.* at 1172. "If it is concluded, as it apparently was in *LaRue*, that the combination of nude dancing and alcoholic inebriation increase to an unacceptable level the likelihood of illegal and/or disorderly conduct, the state can properly prohibit the two." *Id.* at 1173.

[48] 452 U.S. 714, 718 (1981) (per curiam).

[49] *Id.* "Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-First Amendment makes that a policy judgment for the legislature, not the courts." *Id.*

[50] This power to regulate nude dancing may be delegated by the states to local governments. *See* Newport v. Iacobucci, 479 U.S. 93, 96 (1986).

under the Twenty-First Amendment by not serving alcohol. Further, some state courts have determined that, under their state constitutions, nude dancing remains protected and may not be banned even in establishments that serve liquor.[51] In both of these instances, however, the states may still regulate nude dancing in other ways.

2. Time, place, and manner restrictions

The Supreme Court recognizes that reasonable time, place, and manner restrictions may be constitutionally placed on protected speech.[52] The Court, in *Heffron v. International Society for Krishna Consciousness*,[53] held that such restrictions must satisfy four requirements. The restrictions must: (1) be content neutral; (2) not covertly discriminate against certain forms of speech; (3) serve a significant government interest; and (4) not foreclose alternate forums for the regulated speech.[54]

Thus, like the application of the Twenty-First Amendment, time, place, and manner restrictions could not be applied to ban nude dancing entirely. They are, as their name suggests, merely restrictions on when, where, and how the dancing may be performed.

The two most commonly used restrictions are distance requirements and zoning ordinances. Distance requirements generally mandate that dancers remain a specified distance from the audience.[55] The requirement is usually intended to prevent sexual contact[56] or to prevent the audience and the dancers from negotiating for sexual favors or drugs.[57] These types of restrictions have been upheld as legitimate time, place, and manner restrictions by the Ninth Circuit Court of Appeals.[58]

While distance requirements regulate the manner in which nude dancing may be performed, zoning ordinances regulate the location of the establishments that offer nude dancing. There is very little case law dealing specifically with the application of zoning ordinances to

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[51] *See* Cabaret Enterprises, Inc. v. Alcoholic Beverages Control Comm'n, 468 N.E.2d 612 (Mass. 1984).

[52] *See* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

[53] 452 U.S. 640 (1981).

[54] *Id.* at 648-54.

[55] *See, e.g.*, Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986) (requiring dancers to remain at least 10 feet from patrons).

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1062; *see also* BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986).

establishments that offer nude dancing. There are, however, cases dealing with the constitutionality of regulating, through zoning, other types of adult entertainment establishments. These holdings are applicable to an analysis of the constitutionality of regulating businesses that offer nude dancing.[59]

In *Young v. American Mini Theatres*,[60] the Supreme Court held constitutional a Detroit zoning ordinance that regulated the location of all adult entertainment establishments within the city.[61] The Court, while recognizing that the ordinance was not content neutral, found it, nevertheless, to be viewpoint neutral.[62] The Court reasoned that although the ordinance regulated protected expression based on the content of that expression, it did not seek to prevent the conveyance of a particular erotic message.[63] The Court further justified the infringement on protected expression by noting that although erotic expression is protected, it receives a lower level of protection than does highly valued expression such as political speech.[64]

This defense of zoning as a means of regulating adult entertainment establishments was bolstered by the Supreme Court's 1986 decision in *City of Renton v. Playtime Theatres, Inc.*[65] In *Renton*, unlike the decision in *Young*, the Court analyzed the ordinance as a time, place, manner restriction.[66] The Court again recognized that the ordinance in question was not content neutral but found it constitutional because it did not

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[59] *See* Young v. American Mini Theatres, 427 U.S. 50, 75 (1976) (Powell, J., concurring).

[60] 427 U.S. 50 (1976).

[61] *Id.* at 52 n.2. The ordinance prohibited adult entertainment establishments from being located within 1000 feet of any other such facility or within 500 feet of a residential area. *Id.*

[62] *Id.* at 70.

[63] *Id.*

[64] *Id.* Justice Stewart wrote:

> Whether political oratory or philosophical discussion moves us to applaud what is said, every school child can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizens right to see "Specified Sexual Activities" exhibited at theatres of our choice.

Id.

[65] 475 U.S. 41 (1986). In *Renton*, the Court upheld a zoning ordinance that prohibited adult movie theatres within 1000 feet of any residential area, family dwelling, park, or church. The ordinance further prohibited such establishments from locating within one mile of a school. *Id.* at 44.

[66] *Id.* at 46

seek the suppression of erotic expression but rather sought the elimination of negative "secondary effects" engendered by such expression.[67] That is, the ordinance was designed to deal with the crime and public disturbances that the community associated with adult entertainment establishments.[68] Thus, under a *Heffron* analysis,[69] the ordinance served a significant government interest.

Additionally, the Court was satisfied that the ordinance left open sufficient alternative forums for the regulated expression.[70] Although the ordinance relegated adult entertainment establishments to areas that the owners of those establishments considered unsuitable,[71] the Court stated that the difficulty the owners might have in locating an acceptable location does not constitute a violation of the First Amendment.[72]

In sum, it is clear that, irrespective of any First Amendment protection that nude dancing may enjoy, states may use zoning ordinances to regulate the location of establishments that offer nude dancing and distance requirements to regulate interaction between dancers and patrons. These ordinances, however, like the other means of regulation previously discussed, are not a means of eliminating nude dancing completely.

3. Indecency statutes

Indecency statutes, or statutes that prohibit nudity in public places, take many forms.[73] Communities opposed to nude dancing frequently pass laws that regulate or to ban it. Sometimes, their efforts are upheld by the courts.[74]

When a court does object to the application of an indecency statute to regulate nude dancing, its objection is often based on the overbreadth

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[67] *Id.* at 47.

[68] *Id.* at 48.

[69] *See supra* notes 52-54 and accompanying text.

[70] 475 U.S. at 54.

[71] *Id.* at 53.

[72] *Id.* at 54. "That respondents must fend for themselves in the real estate market, on equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Id.*

[73] These statutes can be broken down into two broad categories: those that require that a second party take offence at or be affronted by the display, and those that illegalize the nudity or activity regardless of its effect on persons who witness it.

[74] *See generally*, Erwin S. Barbre, Annotation, *Topless or Bottomless Dancing or Similar Conduct As Offense*, 49 A.L.R.3d 1084, 1099 (1973).

doctrine. The overbreadth doctrine prohibits a government from enacting laws that are so broad in what they illegalize that they ban protected as well as unprotected activity.[75]

Under the doctrine, a court may determine that an indecency statute cannot be applied to ban nude dancing if it would also ban ballet or other works that are clearly protected by the First Amendment.[76] Additionally, a court may go one step further and simply rule that the indecency statute cannot be applied to nude dancing because the dancing itself is expressive and protected by the First Amendment.

The alleged expressive nature of nude dancing is, of course, the issue that brought the *Barnes*[77] case before the Supreme Court. Had the Court determined that nude dancing is not expressive and, therefore, not entitled to First Amendment protection, the impact would have been tremendous. Such a ruling would have broadened considerably the avenues of regulation open to communities opposed to nude dancing. The Court, however, chose to recognize the expressive nature of nude dancing.[78]

III. The *Barnes* Decision

The Supreme Court's decision in *Barnes* establishes the Court's recognition of nude dancing as a form of expression that is entitled to limited protection under the First Amendment.[79] Beyond this recognition, the case is significant in that it clears the way for states to apply certain forms of indecency statutes to regulate nude dancing without regard to the expressive nature of the dancing.

A. A Statement of the Case

The Respondents in *Barnes* were two Indiana adult entertainment establishments[80] and two performers who worked at the establishments.

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[75] Laurence H. Tribe, American Constitutional Law 1022 (2d ed. 1988).

[76] Attwood v. Purcell, 402 F.Supp. 231 (D. Ariz. 1975).

[77] *Barnes*, 111 S.Ct. 2456 (1991).

[78] *Id.* at 2460. "[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Id.*

[79] *Id.* at 2460.

[80] *Id.* at 2458-59. Respondent Kitty Kat Lounge, Inc. is a bar in South Bend Indiana. Kitty Kat presents go-go dancing to its patrons.

Respondent Glen Theatre, Inc. is also located in South Bend. It supplies adult entertainment in the form of written and printed materials, movies, and live nude and semi-nude dancing. No alcohol is served on the premises. *Id.* at 2459.

Respondents brought an action in the United States District Court for the Northern District of Indiana claiming that the Indiana public indecency statute[81] deprived them of their First Amendment right of free speech by preventing them from engaging in and from presenting totally nude dancing.[82]

The district court initially enjoined the enforcement of the statute against the respondents, finding it facially overbroad.[83] The decision was reversed by the Court of Appeals for the Seventh Circuit[84] and remanded with instructions that the district court consider the respondents' claim that the statute violated their First Amendment rights.[85]

On remand, the district court viewed a film of the proposed dancing performed by respondents, and held that the dancing was not expressive and, therefore, not protected by the First Amendment.[86] Respondents again appealed. A panel of the Seventh Circuit reversed the district court, finding the dancing expressive, protected conduct.[87] After rehearing en banc, the court adhered to the panel decision.[88]

The majority held that non-obscene nude dancing that performed as entertainment is expression and is entitled to First Amendment pro-

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[81] IND. CODE § 35-45-4-1 (1980) provides:

"Public Indecency

Sec. 1 (a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

(b) 'Nudity' means the showing of human male or female genitals, pubic area, or buttock with less than a fully opaque covering, the showing of the female breasts with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

Id. (citing *Barnes*, 111 S.Ct. at 2463-64).

[82] *Barnes*, 111 S.Ct. at 2459. The State contended that the Indiana statute requires the dancers to wear, at a minimum, pasties and g-strings when they perform. *Id.*

[83] *Id.* at 2459.

[84] *Id.*

[85] *Id.*

[86] Glen Theatre, Inc. v. Civil City of South Bend, 695 F.Supp. 414 (N.D. Ind. 1988). "The type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States." *Id.* at 419.

[87] Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989).

[88] Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990).

tection.[89] Given this determination, the court found that Indiana's application of the statute to nude dancing was unconstitutional[90] because it was an attempt to withdraw protected expression from the "realm of public discourse."[91] The State appealed and the Supreme Court granted certiorari.[92]

B. The Decision

The *Barnes* case presented two major issues to the Court. The first was whether nude dancing is expressive conduct protected by the First Amendment. The second issue, whether Indiana may apply its indecency statute to regulate nude dancing, was dependent upon the first. If the Court determined that no protected expression was involved in the dancing then, clearly, Indiana, and other jurisdictions, would be free to regulate nude dancing in the same manner that any other type of conduct would be regulated. If, however, the Court found the dancing expressive and deserving of First Amendment protection, the second issue would have to be addressed.

Chief Justice Rhenquist delivered the opinion of the Court in which Justices O'Connor and Kennedy joined. Rhenquist, with reference to the Court's opinions in *LaRue*, *Doran*, and *Schad*,[93] dispatched the first issue in one paragraph. The Chief Justice conceded that nude dancing, of the kind sought to be presented by the respondents, was expressive conduct within the "outer parameters" of the First Amendment.[94]

In addressing the second issue of whether the indecency statute may be applied to the dancing irrespective of its expressive nature, Rhenquist turned to the Court's 1968 decision in *United States v. O'Brien*.[95] In *O'Brien* the Court held that when speech and nonspeech elements are found in the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[96]

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[89] *Id.* at 1085; *see supra* notes 25-27 and accompanying text.

[90] 904 F.2d at 1089.

[91] *Id.* at 1088.

[92] 498 U.S. ___ (1990).

[93] *See supra* notes 12-23 and accompanying text.

[94] 111 S.Ct. at 2460.

[95] 391 U.S. 367 (1968). O'Brien was convicted of violating a statute that prohibited the intentional destruction or mutilation of a draft card. He argued that his act was symbolic speech protected by the First Amendment. *Id.*

[96] *Id.* at 376.

The Court held that the government regulation is sufficiently justified

> [if] it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[97]

Under this four-part test articulated in *O'Brien*, the plurality in the *Barnes* decision found that Indiana's indecency statute was justified despite its "incidental limitations on some expressive activity."[98]

The Court began by noting that the statute is within the constitutional power of the state.[99] It then addressed the question of whether the statute furthers a substantial governmental interest as required by *O'Brien*.

Although Indiana does not record legislative history,[100] the Court determined that the purpose of the statute, protecting societal order and morality, is clear from its text and history.[101] This interest, the Court reasoned, is legitimate and finds support in several of the Court's recent decisions.[102]

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[97] *Id.* at 376-77.

[98] *Barnes*, 111 S.Ct. at 2461.

[99] *Id.*

[100] *Id.*

[101] *Id.* As early as 1831, Indiana had statutorily prohibited "open and notorious lewdness, or . . . any grossly scandalous and public indecency." *Id.* (citing Rev. Laws of Ind., ch. 26, § 60 (1831); Ind. Rev. Stat., ch. 53, § 81 (1834)).

During a period in which no such statute was in effect, the supreme court of Indiana ruled that a conviction could be sustained for exhibiting one's privates in the presence of others. *Id.* (citing Ardery v. State, 56 Ind. 328, 329-30 (1887)).

In 1881, Indiana enacted an indecency statute that remained in effect until 1976. It prohibited indecent exposure in public places or "in any place where there are other persons to be offended or annoyed thereby." 1881 Ind. Acts, ch. 37, § 90. The current statute was enacted in 1976. *See supra* note 81.

[102] *Barnes*, 111 S.Ct. at 2461; *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), where the Court said, "In deciding *Roth* . . . this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the societal interest in order and morality." *Id.* at 61 (citing *Roth*, 354 U.S. 476, 485 (1957)).

See also, Bowers v. Hardwick, 478 U.S. 186 (1986), where the Court upheld a prohibition of private homosexual sodomy. The Court stated that the law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.* at 196.

The Court then determined that, although the statute restricted nudity on moral grounds, this interest in order and morality is unrelated to the suppression of free expression.[103] The Court determined that the statute does not seek to regulate an erotic message[104] but rather is intended to prohibit all forms of public nudity.[105] Additionally, the plurality argued that the requirement that the dancers wear pasties and g-strings does not deprive the dancing of its erotic message but, rather, makes the message less graphic.[106]

Finally, Justice Rhenquist asserted that the statute's incidental restrictions on First Amendment freedom are no greater than is essential to the furtherance of the governmental interest.[107] The statute, he claimed, is narrowly tailored and its requirements that the dancers wear pasties and g-strings are modest.[108]

Thus, satisfied that the four requirements of the *O'Brien* test were met, the plurality held that the Indiana statute could be applied to ban totally nude dancing.[109] Accordingly, the Court reversed the judgment of the Court of Appeals.

Justice Scalia, agreeing that the Court of Appeals should be reversed,[110] concurred in the judgment. Scalia argued that the challenged regulation should be upheld because it is a general law regulating conduct and it is not designed to suppress expression.[111] It is not, therefore, subject to First Amendment scrutiny at all.[112]

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[103] *Barnes*, 111 S.Ct at 2462-63.

[104] *Id.* at 2463. The plurality argued that it is the nudity itself to which the state objects. Therefore, the statute is content neutral because it does not concern itself with what message, if any, the actor is seeking to send. *Id.* Justice White, in his dissent, asserted that the statute is not content neutral and should be subject to a higher level of scrutiny. White stated: "The purpose of the proscription . . . is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. Content based restrictions 'will be upheld only if narrowly drawn to accomplish a compelling governmental interest.'" *Id.* at 2474 (quoting United States v. Grace, 461 U.S. 171, 177 (1983)) (White, J., Dissenting)).

[105] *Id.* at 2463.

[106] *Id.*

[107] *Id.*

[108] It appears that the Chief Justice was having a little fun with his choice of words when he argued that "Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose." *Id.*

[109] *Id.*

[110] *Id.* at 2458 (Scalia, J., concurring).

[111] *Id.* at 2463.

[112] *Id.*

While Justice Scalia recognized that the First Amendment does protect expressive conduct, he argued that the protection comes into play only when the government prohibits conduct because of its communicative qualities.[113] This, he asserted, is not the case with the Indiana statute.

Justice Souter also concurred in the judgment. Unlike Justice Scalia, he agreed that the regulation of the nude dancing at issue was subject to First Amendment scrutiny.[114] He also agreed that the *O'Brien* analysis, employed by the plurality, was appropriate.

Justice Souter wrote separately to express his view that the state had a substantial interest not merely in protecting societal order and morality but also in combating the pernicious secondary effects of adult entertainment establishments.[115] While not openly hostile to the plurality's assertion that Indiana's interest in societal order and morality is sufficient to justify the statute, Justice Souter seemed concerned with content neutrality, an issue that had popped up throughout the litigation of this case.

The dissent, as well as the petitioners, argued that the content neutrality of the statute was compromised when the Supreme Court of Indiana narrowed the scope of the law by determining that it could not be applied to ban nudity that was part of an expressive performance.[116] The Indiana court's decision came up several times during

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[113] *Id.* at 2466.

[114] *Id.* at 2468 (Souter, J., concurring).

[115] *Id.* at 2469. Justice Souter stated:

> While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality . . . from [the statute's] text and history" . . . I think we need not so limit ourselves . . . and may consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity."

Id. (citing brief for petitioners at 37.)

[116] State v. Baysinger, 397 N.E. 2d 580 (Ind. 1979). In *Baysinger*, the Indiana Supreme Court, in determining that the statute was not facially overbroad, limited the statute's application: "There is no right to appear nude in public. Rather it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Id.* at 587.

In his dissenting opinion, Justice White pointed out that the State has not enforced the ordinance against actors in plays or dancers in ballets. *Barnes*, 111 S.Ct. at 2473. Thus, if nude barroom dance is expressive, as the plurality says it is, and Indiana is allowed to apply the statute to barroom dance but does not enforce the statute against

oral argument and led both Justice O'Connor and Justice Scalia to openly question the content neutrality of the statute.[117]

Justice Souter's decision appears to be an attempt to find the middle ground and to avoid the possibility of the statute being applied to plays and other artistic performances that, though they incorporate nudity, do not lead to negative secondary effects.[118] By relying on the governmental interest of preventing increased levels of crime associated with barroom nude dancing, Justice Souter preserved the exception carved out of the statute by the Indiana Supreme Court.[119]

In preserving this exception, Justice Souter made it clear that, contrary to the dissent's argument, it is possible that the negative secondary effects are caused not by the message of nude dancing but rather by the existence of the establishments themselves.[120] Thus, Justice

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other forms of nudity found in more "socially redeeming" forms of entertainment, the conclusion could be reached that the state objects to the immoral message of the former but not to the more "wholesome" message of the later. *See supra* note 104.

[117] AM. LAW., April 1991, at 94. This question led the Indiana Deputy Attorney General to argue, during oral argument of the *Barnes* case, that the Indiana statute is a blanket prohibition against nudity. It could, therefore, be applied by the state to prohibit nudity in plays and in ballets.

[118] *Barnes*, 111 S.Ct. at 2470 n.2 (Souter, J., concurring). Under Justice Souter's approach, the statute could not easily be applied to dramatic performances.

> It is enough, then, to say that the secondary effects rationale on which I rely here would be open to question if the state were to seek to enforce the statute by barring expressive nudity in classes of production that could not readily be analogized to the adult films at issue in *Renton* . . . It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" . . . would further the states interest in avoiding harmful secondary effects . . . .

Id.

[119] The fact that no arrests have been made for nudity as a part of a play or ballet supports the contention that the Indiana Supreme Court's decision in *Baysinger* was understood by law enforcement officials as creating an exception for nudity found in plays and ballets.

[120] *Barnes*, 111 S.Ct. at 2470. Justice Souter stated:

> To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing.

Id.

Souter argued, the state's interest is unrelated to the suppression of free expression.

Justice White, in his dissent, contended that the governmental interest behind the application of the Indiana statute is not "unrelated to the suppression of free expression" as required by *O'Brien*.[121] Justice White accepted the position of Justice Souter and of the petitioners that the government's interest is the elimination of negative side effects, but argued that this interest is content-based in that it seeks to prohibit a form of conduct because of the message inherent in that expression.[122]

IV. Impact and Effects of the *Barnes* Decision

The Court's decision in *Barnes* will not have a tremendous impact on the regulation of nude dancing. The decision is merely another tool that states may utilize to regulate nude dancing. It is, in fact, a tool with limited powers.

The primary impact of the decision is to allow states with indecency statutes similar to Indiana's[123] to apply those statutes to regulate nude dancing without regard to the expressive nature of the dancing. This, of course, will not eliminate erotic dancing but merely regulate the amount or type of clothing that the dancers must wear.

The impact of *Barnes* may also be limited by the state courts. The United States Supreme Court recognizes that states may interpret their own constitutions as granting broader protections and freedoms than those given by the United States Constitution.[124] Thus, a state with an indecency statute that is identical to Indiana's might be prevented from enforcing it against establishments that offer nude dancing if that state's

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[121] *Id.* at 2474 (White, J., dissenting).

[122] *Id.* Justice White said:

> It is only because the nude dancing performances may generate emotions and feeling of eroticism and sensuality among the spectators that the state seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas . . . may lead to increased prostitution and the degradation of women.

Id.

[123] While most states have public indecency statutes, only 23 jurisdictions illegalize public nudity without requiring those exposed to it to be unconsenting or offended by the nudity. Indiana, of course, is such a jurisdiction. *See* Ruth Marcus, Wash. Post, June 22, 1991, at A1.

[124] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

courts determine that, under the state constitution, nude dancing is a form of protected expression.[125]

Further, many states have indecency statutes that stipulate that the exposure, in order to be illegal, must create affront, offense, or alarm on the part of an observer.[126] It is difficult to imagine the circumstances under which this type of statute could be enforced against a dancer who performs for a willing audience behind the closed doors of a bar.

Any state that attempted to pass a new indecency statute, that does not make affront or alarm an element of the offense, for the purpose of regulating nude dancing would run into other difficulties. The holding of *Barnes*, based as it is on an *O'Brien* analysis,[127] sanctions only general regulations that are content-neutral. The Court dedicated a good portion of its opinion to a demonstration that Indiana passed its statute for reasons other than the regulation of nude dancing.[128] An indecency statute born of a legislative intent to regulate an activity that the Court now recognizes as a form of protected expression[129] could not be supported by the *Barnes* decision.

It is clear, then, that this decision is no panacea for those communities that view nude dancing as an evil requiring regulation. It is equally clear that the decision will have an even less significant impact in communities such as Hawai'i that lack the political will to regulate nude dancing.

Hawai'i stands out as a state that, for all intents and purposes, does not regulate nude dancing.[130] In fact, past legislative attempts at

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[125] Cabaret Enterprises, Inc. v. Alcoholic Beverages Control Commission, 468 N.E. 2d 612 (Mass. 1984). The Massachusetts court held that article 16 of the Massachusetts Constitution (equivalent to the First Amendment of the United States Constitution) "does not permit the prohibition of non-obscene nude dancing on licensed premises in the absence of a demonstrated countervailing State interest." *Id.* at 614.

[126] *See, e.g.* the indecent exposure statute of Washington State: "(1) A person is guilty of indecent exposure if he intentionally makes any open and obscene exposure of his person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm . . . ." WASH. REV. CODE ANN. § 9A.88.010 (West) (amended by Laws 1987, ch 277, § 1).

[127] *See supra* notes 95-97 and accompanying text.

[128] *See supra* notes 103-06 and accompanying text.

[129] *See supra* note 79.

[130] The Honolulu Liquor Commission has promulgated rules that, among other things, prohibit patrons and dancers from fondling each other. Honolulu Liquor Comm'n Ref. R. § 7-8(g) (1980).

The rules, according to various police officers with whom the author spoke, are

utilizing the Twenty-First Amendment to regulate or eliminate nude dancing in establishments that sell liquor have failed. A 1985 proposed bill,[131] which would have allowed county liquor commissions to deny liquor licenses to establishments that offer nude entertainment, was rejected by the Senate.[132]

A further limitation on the impact of the *Barnes* decision in Hawai'i is the nature of Hawai'i's indecency statute. Unlike Indiana's statute, the Hawai'i statute makes affront or alarm an element of the offense.[133] The legislative intent of this statute makes it highly unlikely that it could ever be applied to regulate nude dancing.[134]

This discussion is not meant to imply that the *Barnes* decision is insignificant but rather is designed to illustrate the limitations of its impact. It is clear that the decision furnishes communities that object to nude dancing with another weapon with which they may regulate nude dancing. This weapon, if used in conjunction with other means of regulation already in the hands of state governments, could certainly

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enforced by inspectors whose faces are known by the operators of the establishments. As a result, when the inspectors are not present, a good deal of contact between dancers and patrons does occur at some of the establishments.

[131] S. 891, 13th Leg., 1st Sess. (1985).

[132] 1985 HAW. SEN. J. 383. The vote was 13-11 against the bill. Sen. Joe Kuroda spoke against the bill on the floor of the Senate:

> [I] don't frequent bars; I don't drink; but I have friends who do and they enjoy art. They also enjoy singing called 'karaoke'. Art and 'karaoke' go together, and for the sake of these people who enjoy 'karaoke' and art, a special kind of art, I feel that this bill should be defeated.

Id.

Senator Kuroda's remarks are significant because they demonstrate that, in Hawai'i, nude dancing may enjoy a level of cultural significance and acceptance not found in other states.

[133] HAW. REV. STAT. § 707-738 (1985).

> Indecent Exposure.
>
> (1) A person commits the offense of indecent exposure if, with intent to arouse or gratify sexual desire of himself or of any person, he exposes his genitals to a person to whom he is not married under circumstances in which his conduct is likely to cause affront of alarm.

Id.; *see also* HAW. REV. STAT. § 712-1217 (1985), "Open Lewdness. (1) A person commits the offense of open lewdness if in a public place he does any lewd act which is likely to be observed by others who would be affronted or alarmed." *Id.*

[134] HAW. REV. STAT. § 707-738 (1985). The commentary to § 707-738 suggests that the reasons for illegalizing indecent exposure are two-fold. First, the offence causes affront and alarm and, second, such conduct is "indicative of a personality in need of some corrective treatment . . . ." *Id.* commentary.

weaken the economic viability of nude dancing establishments by undermining the appeal of such establishments.

For example, a community such as South Bend, Indiana, with a strong political will to regulate nude dancing, could insist that dancers wear pasties and bikini bottoms,[135] and remain fifteen feet from the patrons. Further, these communities could, through zoning, relegate nude dancing establishments to less desirable parts of the community and, through Twenty-First Amendment powers, prohibit them from serving alcohol. The combined effect of these regulations would certainly diminish the appeal of the establishments. An equally erotic and more enjoyable experience could be had at the nearest beach without the expense of a cover charge.

V. Comments and Conclusions

In 1968, *United States v. O'Brien*[136] presented the Court with a conundrum. Clearly, some forms of conduct are expressive in and of themselves. Other forms of conduct, though not inherently expressive, may be used to express ideas or emotions. Thus, any law that outlaws a particular form of conduct may, at some point, be applied to someone who engages in the conduct in order to express an idea or a message.

Faced with this problem, the Court developed the four-part *O'Brien* test to grant some measure of protection to expressive conduct. The Court determined that O'Brien was convicted for the "noncommunicative impact of his conduct, and for nothing else . . . ."[137] Once satisfied that the government's interest was not related to the suppression of expression, the Court reasoned that the conduct could be prohibited so long as that interest was "important or substantial" and the incidental restriction on First Amendment freedoms is no greater than is essential to further that interest.[138]

The problem with the *O'Brien* test is that its last two prongs have very little effect on the outcome of the analysis. The requirement that

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[135] In *Barnes*, the Court upheld a statute that prohibits the exposure of buttocks. It is clear that a g-string does not place dancers in compliance with the statute because it would not cover their buttocks. Applying Justice Rhenquist's reasoning, it could certainly be argued that requiring dancers to wear a full covering on their buttocks would not deprive the dance of its erotic message but merely make the message "slightly less graphic." *Barnes*, 111 S.Ct. at 2463.

[136] 391 U.S. 367 (1968).

[137] *Id.* at 377.

[138] *Id.*

the restriction be no greater than is essential to the furtherance of the governmental interest merely requires the court to ask whether the governmental interest could be achieved as effectively without the restriction.[139] This test, therefore, has little effect except in cases of "gratuitous inhibitions of expression."[140]

The requirement that the governmental interest be sufficiently important is, similarly, functionally irrelevant. Although the inclusion of this prong suggests that it was meant to force the court to consider the substantiality of the governmental interest, the purported governmental interest has never been found insufficient. In every case where the Supreme Court applied the *O'Brien* test and determined that the governmental interest was not related to the suppression of expression, the statute in question was upheld.[141]

Accordingly, any statute that a community has on the books, and that was passed for reasons other than the suppression of expression, could be applied to ban expressive conduct. The Court, instead of recognizing this weakness of the test and making efforts to protect expressive conduct by scrutinizing the governmental interest, has shown great deference to the will of local legislative bodies.

The Court's decision in *Barnes* does nothing to reverse this trend. In fact, by finding Indiana's interest in protecting "societal order and morality" sufficiently important to justify the suppression of expressive dancing, the Court completed the judicial evisceration of the *O'Brien* test. The Court in a very real sense, made it clear that a community may prohibit conduct that is a part of an expressive activity merely because it thinks that activity is amoral or, put differently, because it does not approve of the activity.

Clearly, a community consisting of "rational" citizens would not outlaw conduct unless it objected to that conduct. Thus, for all practical purposes, any law that illegalizes conduct is supported by a sufficiently important governmental interest. It is apparent that, aside from the preliminary requirement that the regulation be within the power of the government, the only portion of the *O'Brien* test that poses a serious challenge to the legitimacy of a statute is that which requires the statute

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[139] United States v. Albertini, 472 U.S. 675, 688-89 (1985).

[140] John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 (1975).

[141] *See, e.g.*, Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); United States v. Albertini, 472 U.S. 675 (1985); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

to be content neutral.[142] But, as Justice Scalia pointed out in his concurrence, the notion that the government cannot prohibit conduct because it objects to the message presented by the conduct is well supported by the case law.[143] Given this case law, the *O'Brien* test, as it has been interpreted, serves no useful purpose. It is merely a devise used by the Court to reach a desired result.

The Court, it would appear, is hesitant to state clearly its position on the regulation of expressive conduct. The case law, however, speaks clearly. If a statute is content-neutral, that is if the statute's legislative history indicates that it was not passed in order to suppress a particular message, then it may be applied to regulate or ban expressive conduct. This is, in essence, the position taken by Justice Scalia in his concurring opinion.[144] Whether or not one agrees with Justice Scalia's position, it is certainly praiseworthy for its honest, straightforward approach to the issue.

The United States Supreme Court is back to where it was in 1968, before the *O'Brien* decision. Does the Court believe that some government interests, and the laws that are engendered by those interests, are not sufficiently important to outweigh the need of a democratic society to allow and to foster the expression of ideas and emotions? If the Court accepts this proposition then it should adopt a true balancing test to weigh the state's interest in regulating a particular form of conduct against the societal interests in protecting the expression inherent in that conduct. If the Court rejects this proposition then it should adopt Justice Scalia's position. In either case, the *O'Brien* test, flawed as it is, should be allowed to die. The *Barnes* decision should be its last uneasy gasp.

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[142] If one accepts that the *O'Brien* test is so limited, then perhaps Justice Scalia is correct when he says that general laws not specifically targeted at expressive conduct do not implicate the First Amendment. 111 S.Ct. at 2465 (Scalia, J., concurring).

[143] *Id.* at 2466. Justice Scalia cites, among others, Texas v. Johnson, 491 U.S. 397 (1989); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); and Stromberg v. California, 283 U.S. 359 (1931).

[144] *See supra* notes 110-14 and accompanying text.