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Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?

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I. Introduction

The State Water Code[1] requires that the Commission on Water Resource Management promote the "maximum beneficial use" of the water resources of the State,[2] while at the same time be the guardian and steward of those waters for the benefit of the public.[3] These dual roles create an inherent conflict within the Water Commission. It must conserve the resource and at the same time must administer a permit system for its allocation.[4] It must promote public values of conservation, aquifer protection and instream flows,[5] while adjudicating permit entitlements that directly impact upon those values.[6]

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[1] Act 45, 14th. Leg., Reg. Sess., 1987 Haw. Sess. Laws 74 (codified in Haw. Rev. Stat. §§ 174C-1 to -101 (1993)) [hereinafter Code].

[2] Code §§ 2(c), 31(d)(1).

[3] *See* Code § 2(a).

[4] Code §§ 2(b), 31(d)(2), 48.

[5] Code §§ 2(b), 31(g), 71.

[6] *See* Code § 49.

Underlying this conflict in roles of the Water Commission is the tension between protection of private expectations and furtherance of public values. The private sector needs and hopes for a stable and predictable system of land use and water rights that will provide adequate security of investment.[7] To the greatest extent possible, it seeks to know which water uses the Water Commission will protect and which it will not. It wants free transferability of water to higher valued uses as underlying land uses change.[8] Public values, on the other hand, primarily concern resource conservation, such as protecting aquifers, defining and protecting minimum instream flows and "natural stream environments". Public values also entail regulating instream beneficial uses consistent with the public trust concept and implementing Native Hawaiian water rights and gathering rights. Significantly, the public interest also encompasses obtaining maximum beneficial uses of water while making "adequate provision" for the other competing needs.[9] Since the use of water in a water management area requires an administrative permit, the application process becomes the flash point of conflict between these public and private forces.[10]

It seems clear that the Legislature intended that the Water Commission strike a balance between and among these interests.[11] It is less clear how the Legislature intended the Water Commission to achieve

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[7] Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1542-44 (1989); Phyllis P. Saarinen & Gary D. Lynne, *Getting the Most Valuable Water Supply Pie: Economic Efficiency in Florida's Reasonable Beneficial Use Standard*, 8 J. LAND USE & ENVTL. L. 491 (1993); L. M. Hartman & D. A. Seastone, *Efficiency Criteria for Market Transfers of Water*, 1 WATER RESOURCES RES. 165, 167 (1965).

[8] *See generally* GEORGE A. GOULD, *Recent Developments in the Transfer of Water Rights*, *in* WATER LAW: TRENDS, POLICIES, AND PRACTICE 93 (Kathleen M. Carr & James D. Crammond, eds. 1995); BARTON H. THOMPSON, JR., *Takings and Water Rights*, *in* WATER LAW: TRENDS, POLICIES, AND PRACTICE 43 (Kathleen M. Carr & James D. Crammond, eds. 1995). Thompson asserts that many jurisdictions now promote the free transferability of water rights: "The West is seeing a shift in paradigms within water law—from a 'public resource' paradigm, which views water as a carefully managed and regulated public source, to a 'market' paradigm, which promotes reallocation of rights through private transfers." THOMPSON at 43.

[9] CODE § 2(c).

[10] Once a geographic area has been designated a water management area, no person may make any "withdrawal, diversion, impoundment or consumptive use of water" without a permit from the Water Commission. CODE § 48(a). Uses in existence at the time of designation may be continued so long as an application for a permit filed within one year of designation. *See generally* CODE §§ 48(a), 50, 51.

[11] *See* CODE § 31(d).

that balance, and to what extent water scarcity in a given case may affect the balance.[12] If in a particular context the Water Commission views its mission fundamentally as conservator of the resource for the benefit of the public interest, its commitment to maximize private water use will become secondary. If on the other hand the Water Commission sees itself as primarily in business to allocate water for maximum beneficial uses, determined more or less by land uses and water needs of individual users, it will in some degree compromise its role as conservator. In either case, the Water Commission appears to have the necessary authority under the Water Code to tip the balance in either direction.[13] And the Water Commission may widen or constrain its exercise of administrative power in granting or denying permits to match its conception of its role.

II. PERSPECTIVES ON REASONABLE BENEFICIAL USE

Since any applicant for a water use permit must prove that his or her use is "reasonable beneficial,"[14] the Water Commission may

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[12] The balance between public values (expressed as the "rights of the general public") and consumptive needs was discussed in the REPORT OF THE ADVISORY STUDY COMMISSION ON WATER RESOURCES TO THIRTEENTH LEGISLATURE, STATE OF HAWAII (January 14, 1985) [hereinafter ASC REPORT]. That Commission was charged with formulating a proposed water code. *Id.* at 2. The Advisory Study Commission commented that the idea of reasonable beneficial use contains within it the concept of balancing competing public and private needs:

> [M]aximum reasonable beneficial use of the State's waters is to be obtained. "Reasonable beneficial use" as defined in the recommended codes [sic] includes efficient, economic use of water. Wasteful use is not condoned, even if there is sufficient water for all. Reasonable beneficial use also requires the user to consider the rights of the general public. The concept of reasonable beneficial use also requires that the need to protect fish and wildlife, to maintain proper ecological balance, and to preserve and enhance the State's waters be taken into account. The consumptive use of water needs to be weighed against these interests.

Id. at 12. When there are "competing applications for limited water these special public interests shall be preferred to other beneficial uses." ASC REPORT, *supra*, at 3. *See also* CODE § 54 (". . .if mutual sharing is not possible, then the Commission shall approve that application which best serves the public interest"). There is no allocation methodology provided in the Code when the public interests compete with each other.

[13] The Water Commission has "exclusive jurisdiction and final authority in all matters relating to implementation and administration of the State Water Code" except where specifically limited, and the limitations are few. CODE § 7(a). Given the breadth of the terms "reasonable" and "public interest" in the definition of "reasonable beneficial use," the Water Commission has wide latitude to interpret these terms broadly or narrowly.

[14] CODE § 49(2).

expand or limit its scope of inquiry, and the applicant's burden of proof, through its interpretation of this key test. Reasonable beneficial use is defined in Hawai'i's Water Code as: "the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the State and County land use plans and the public interest."[15] This definition has three overlapping components: amount of use, manner of use, and purpose of use.[16] The *amount* of water requested must be necessary, efficient, and economic—hence not more that one should actually need;[17] the *manner* of use must be reasonable—not causing unreasonable harm to others or harm the resource;[18] and the *purpose* of the use must be reasonable—that is, not used for trivial, extravagant, wasteful, or otherwise non-beneficial ends, particularly in view of other users' needs for the resource.[19] The manner and purpose, as well, must be consistent with regional planning and "the public interest"[20]—those public values which the Water Commission must promote and which will compete with every individual use for water that the Water Commission is also charged with allocating.

In discharging its duty to examine overall reasonableness of a use and consistency with the public interest, the Water Commission may

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[15] CODE § 3. Hawai'i's definition of "reasonable-beneficial use" is almost identical to the definition of "reasonable-beneficial use" in the Model Water Code. *See* FRANK E. MALONEY ET AL., A MODEL WATER CODE § 1.03(4) (1972). The only difference is that the model definition excludes the phrase "consistent with State and County land use plans." *Id.*

[16] Seven years after publishing the Model Water Code, Maloney analyzed the meaning of his definition of "reasonable beneficial" in an articled published in the University of Florida Law Review. Frank E. Maloney et al., *Florida's "Reasonable Beneficial" Water Use Standard: Have East and West Met?*, 31 U. FLA. L. REV. 253 (1979). Maloney dissected his definition of reasonable beneficial into the following three requirements: (1) that the quantity of water used to be efficient, (2) that the purpose of the use be reasonable in relation to other uses, and (3) that the method for diverting the water be reasonable and consistent with the public interest. *See id.* at 269-70. Maloney clarified that the definition did not require that the use be the "most economical" use; instead, the definition only requires that the method of use be "economically efficient." *Id.* at 269, Maloney apparently did not read the definition to say that the *purpose* of the use (as well as the manner of use) must be consistent with the public interest. A close reading of the text of the definition, however, would seem to compel that conclusion.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] CODE § 3.

discern an invitation to question its own role, and which of its missions it will emphasize: as activist conservator of resources for the benefit of the public interest, or more limited allocator for maximum beneficial uses determined largely by free market choices. If the standard of reasonableness is interpreted traditionally,[21] the main inquiry will be on the reasonableness of the *means*, or manner of use, rather than the end.[22] If a farmer diverts far more stream water than his crops need, for instance, the amount of water diverted may be justifiably challenged as unnecessary for the use to which his land has been put.[23] It is wasteful.[24] But the underlying beneficial use of water for farming purposes will not be challenged as being unreasonable.[25] As the resource

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[21] Traditionally, the "reasonableness" of use was a riparian concept. The basic rule of riparian law is that each riparian owner's right to use the water is qualified by the same right of other riparian owners. Lummis v. Lilly, 429 N.E.2d 1146, 1148-49 (Mass. 1982). Determining the reasonableness of a use required balancing a number of different factors. *See infra* note 73. Prior appropriation law later adopted the standard of "beneficial use" rather than the riparian standard of "reasonable use," but the reasonableness of use is an element of beneficial use. *See also* Maloney, *supra* note 16, at 267. However, reasonableness under the "beneficial use" standard goes to the question of waste rather than the correlative nature of riparian water rights. *See infra* notes 73 & 92.

[22] Under the riparian doctrine of reasonable use, the primary inquiry was whether one riparian owner's use unreasonably *interfered* with the rights of another riparian owner. *See* Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982). The purpose of the use is one factor to be considered in determining whether a use is reasonable, but it is a factor considered in the context of the *effect* of the use on other riparian owners. Reasonableness is a question of fact. Lake Williams Beach Assoc. v. Gilman Bros. Co., 496 A.2d 182, 185 (Conn. 1985); Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board, 855 P.2d 568, 576 n. 40 (Ok. 1990). Very rarely would a court declare that a use is unreasonable per se. *See infra* note 73. Likewise, prior appropriation jurisdictions have recognized a wide range of beneficial purposes ranging from dust control to boron leeching. *See infra* notes 103-105 and accompanying text. Like "reasonable use," "beneficial use" is a question of fact. Department of Natural Resources v. Southwestern Colorado Water Conservation District, 671 P.2d 1294, 1322 (Colo. 1983); Basin Electric Power Cooperative v. State Board of Control, 578 P.2d 557, 568 (Wyo. 1978). The beneficial use determination considers the purpose of the use, but narrows the question to whether the *means* are beneficial in relation to the particular beneficial purpose. *See infra* notes 106-108 and accompanying text.

[23] *See, e.g.,* State Dept. of Ecology v. Grimes, 852 P.2d 1044, 1049-1052 (Wash. 1993).

[24] *Id.*

[25] *See, e.g.,* Harloff v. City of Sarasota, 575 So.2d 1324, 1326 (Fla. App. 1991) ("no one questions the economic importance and significance of . . . farming operations in Manatee County. . . .").

becomes taxed by new, competing demands, the scrutiny on the means of use will be greater.[26] The farmer will have to show that his irrigation techniques are efficient, and that his source, storage and delivery facilities are reasonably free from leakage.[27] But still, the *farm* use of his water will be unquestioned.[28]

If on the other hand the Water Commission were to construe reasonable beneficial use more broadly, it might also decide to examine the reasonableness of the *ends*, or purposes, to which an applicant's water is put, as well as the means. If demands upon the resource became extreme, or if other public values competing for the source were to weigh in strongly, the Water Commission might be impelled to interpret its mandate more expansively as public conservator and question whether farming will continue to be an appropriate use of this water.[29] The individual's application may appear far less important to a Water Commission wrestling with weighty conflicts among competing public values.[30] The Water Commission could declare, as did the Supreme Court of California almost thirty years ago in *Joslin v. Marin Municipal Water District*,[31] that "state-wide considerations of transcendent importance" require the reasonableness of the use of water (i.e., the purpose to which it is put) be determined in each case as a

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[26] *Grimes*, 852 P.2d at 1050-52.

[27] *Harloff*, 575 So.2d at 1326.

[28] *Id.*

[29] The Water Code does not grant the Water Commission the authority to arbitrarily modify a single user's permit. If water becomes scarce, it has the power in a declared water shortage to cut back *classes* of permits to protect the resource from harm. CODE § 62(b), 62(c). Only a permittee may request modification of his or her permit. CODE § 57(a). A permit may not be revoked except for material misrepresentation, willful violation of permit conditions, violation of the Water Code, or significant periods of non-use (at least four continuous years). CODE § 58. The opportunity for the Commission to question the purpose of the use would typically arise in four contexts: (1) a permit application for a new use, CODE § 49; (2) an application to perpetuate an existing use, CODE § 50; (3) a change in the use (i.e., a permit modification), CODE § 57; and (4) a transfer of a water permit involving a change in initial permit conditions, CODE § 59. Since these situations will arise whenever an area is designated a water management area, or whenever even insubstantial changes occur in place, purpose or quantity of use, *see, e.g.*, CODE § 57(a), the Water Commission has ample opportunity to regulate every facet of use. This is true even though permits are ostensibly perpetual, subject to review at least once every twenty years. CODE § 56.

[30] *See infra* notes 265-284 and accompanying text.

[31] 429 P.2d 889 (Cal. 1967).

question of fact and public policy.[32] In other words, the Water Commission could put the farmer out of business.[33]

Such an exercise of regulatory power by Hawai'i's Water Commission would have profound implications in Hawai'i. First, a re-examination of purposes of water use could in some cases effectively usurp the role of land planners in the land use planning process. Even though the notions of reasonable purpose and consistency with the public interest appear in the Water Code's definition of reasonable beneficial use, the Code mandates that the Water Commission respect State and

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[32] *Id.* at 894. The particular facts in *Joslin* made it an easy case to resolve on the facts. Plaintiffs were downstream riparian owners. *Id.* at 890. Plaintiffs were in the business of taking rock, sand, and gravel from the stream for commercial purposes. *Id.* at 891. Plaintiffs initially sought to enjoin construction of an upstream dam that would result in the diminished flow of the stream and replenishment of rocks and gravel on the Plaintiffs' property. *Id.* The plaintiffs' "use" of the water consisted of "using" the water to bring rock, sand, and gravel to their property. *Id.* at 895. Finding this use to be unreasonable, the court analyzed the case as follows:

> [U]nlike the unanimous policy pronouncements relative to the use and conservation of natural waters, we are aware of none relative to the supply and availability of sand, gravel and rock in commercial quantities. Plaintiffs do not urge that the general welfare or public interest requires that particular or exceptional measures be employed to insure that such natural resources be made generally available and should therefore be carefully conserved. Is it 'reasonable' then, that the riches of our streams, which we are charged with conserving in the great public interest, are to be dissipated in the amassing of mere sand and gravel which for aught that appears subserves *no* public policy? We cannot deem such a use to be in accord with the constitutional mandate that our limited water resources be put only to those beneficial uses 'to the fullest extent of which they are capable,' that 'waste or unreasonable use' be prevented, and that conservation be exercised in the interest of the people for the public welfare.

Id. at 895 (emphasis in original). Thus, the particular facts strongly supported the conclusion that plaintiffs' use of the water was unreasonable; the "use" consisted only of "amassing sand and gravel." *Id. See also infra* notes 73-87 and accompanying text (discussion of the riparian reasonable use standard). However, the effect of the holding went much *further* than requiring the plaintiffs to reduce their water consumption to *accommodate* the dam; since the dam obstructed delivery of additional rock and gravel, the ruling effectively put the plaintiffs out of business.

[33] This might happen, for example, by reducing the amount of water available for irrigation to a level below that required for a profitable farming operation. If the Water Commission were to force the farmer to draw water from alternative, higher-cost sources—such as from stream or ditch water to pumped water—the power costs of pumping would have to be added to the farmer's balance sheet and either absorbed or recovered in a higher product cost. This added cost could hypothetically render the farmer's operation uncompetitive.

County land use and zoning prerogatives.[34] Second, the displacement of planned or existing uses with uses deemed more reasonable by the Water Commission would result in arbitrary, inconsistent rulings. Such action would seem to require some basis in law, some standards by which the agency's preference would be justified, to avoid being arbitrary.[35] Third, the exercise of such power by the Water Commission would disrupt valid investment-backed expectations which hinge on existing uses. Jobs, enterprises, and livelihoods turn on uses of water that have been entirely legal. Reasonable certainty in the continuation

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[34] CODE §§ 2(3), 3, 31(b)(2)-(3), 49(a)(5)-(6), 93.

[35] In 1992, the Hawaii Supreme Court addressed an analogous scenario involving the Department of Health's procedures for issuing geothermal emission permits in Aluli v. Lewin, 73 Haw. 56, 828 P.2d 802 (1992). A statute authorized the Department of Health to require air pollution permits for operation of geothermal wells. *Id.* at 58, 828 P.2d at 803. The statute required that "the director shall refuse to issue the permit unless it appears that the operations would be in compliance with the rules of the department and the state ambient air quality standards." *Id.* (citing HAW. REV. STAT. § 342B-32 (Supp. 1991)). Permit applicants submitted applications before the Department of Health enacted regulatory guidelines. *Id.* The Department of Health issued a permit, but subjected the permit to 26 special conditions. *Id.* at 59, 828 P.2d at 804. The court declared that such conditions were rules, and that such rulemaking did not comply with the Hawaii Administrative Procedures Act. *Id.* To allow an agency to attach ad hoc conditions would mean that "it can set different rules and standards for each permit application and that it has unbridled discretion in issuing permits." *Id.* The court emphasized that "fairness to the public and potential applicants for air pollution permits dictates that the rules adopted by the [Department of Health] be known beforehand. This will enable one to plan and make decisions *with certainty*." *Id.* (emphasis added). Citing the United States Supreme Court, the court declared: "Where. . . there are no standards governing the exercise of discretion granted. . . the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Id.* at 61-62, 828 P.2d at 805 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).

Cf. Monroe v. Middlebury Conservation Comm'n, 447 A.2d 1, 5 (Conn. 1982). In *Monroe*, the court held that a statute that required proposed water developments to be consistent with the "water authority's regional water supply plan" presupposed the existence of such a plan. *Id.* The agency had not adopted any appropriate regulations to define a regional plan. *Id.* The court declared that "to permit an administrative agency to develop an ad hoc plan (in the absence of rulemaking) as a yardstick against which to measure any given proposal, is to substitute whimsy for sound judgment." *Id.* The court ruled that constitutional due process protections required the agency to adopt a regional water supply plan prior to acting on applications for water supply plans. *Id.*

For a thorough judicial discussion of this issue, *see* Tennessee Cable Television Assoc. v. Tennessee Public Service Comm'n, 844 S.W.2d 151 (Tenn. App. 1992).

of such enterprises is essential for long-term economic stability.[36] Nevertheless, as competition for scarce water resources increases in the years ahead, the Water Commission may be tempted to assert greater authority than the Legislature intended to grant. As will be discussed below, there is evidence in at least one case that the Water Commission may view itself as the vehicle for reallocating water to achieve broad utilitarian goals of optimum land and water use on the leeward and windward sides of O'ahu.[37]

If water use purposes and preferences can be freely and suddenly determined and constantly revised without apparent limitation or constraint, the Water Commission will without doubt have a free hand in adjusting ultimate water use and land use all over the State.[38] The only standard guiding the Water Commission is reasonable beneficial use.[39] Reasonable beneficial use is a standard whose components are deeply rooted in judicially created and applied common law.[40] The significant difference is that with the Water Commission, the interpretation of rules developed in the context of limited judicial oversight among competing users will be applied by an administrative body in charge of allocating water.[41] Application of the same rule by a different branch of government, with different, specific missions, will have a

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[36] *See infra* text accompanying notes 249-252.

[37] *See infra* text accompanying notes 139-208.

[38] If the Water Commission were to interpret the Code to enable this result, then the public interest in obtaining maximum beneficial use of water may be short-circuited. *See infra* notes 249-264 and accompanying text. There is no question that land use needs to be coordinated with water use, to avoid harmful affects of land uses on streams and aquifers. The difficulty faced by the Water Commission here is in the attempt to reallocate any existing reasonable beneficial uses to other consumptive uses in the absence of a clear scheme of statutory preferences or guidelines.

[39] *See* CODE § 49(a).

[40] *See* Maloney, *supra* note 16, at 253.

[41] *See* WATERS AND WATER RIGHTS § 9.03(a) (R. Beck, ed. 1991) [hereinafter WATERS AND WATER RIGHTS].

> In a riparian system where permits are required, the rights of competing users are determined by the permits, not by the riparian nature of, or a judicial balancing of, the uses. What this system has in common with pure riparian rights is that permit applications are judged on whether the proposed use is reasonable (or under the Model Water Code, reasonable beneficial). While the criterion is reasonable use, it is applied very differently from under the common law.

Id. The principal differences are: (1) the reasonableness is determined prior to litigation and before the use can begin, (2) nonriparian uses are not unreasonable per se, (3) the permit may be conditioned to protect public values. *Id.*

significant impact on water rights.[42] Most importantly, this agency of the State which makes the allocation decision has at the same time the power and the duty to set aside water for public values.[43] The argument that the Water Commission's evaluation of reasonable beneficial use is limited merely to prevention of waste and recognition of preferences established by law, the traditional judicial application of the standard, may seem hollow if water resources in a given area become critically scarce.[44] Whereas the historical judicial concern with protection of the resource has been largely the prevention of waste,[45] the emergence of ecological, aesthetic, and recreation values, as part of the evolving notion of the public trust,[46] and the perception of the State's duty toward the Native Hawaiian community,[47] has made the State an attentive proponent of public values.[48] These values now compete with private uses in a far more tangible way than ever before.

However difficult future choices may become, any code regulating the resource should be based on those fundamental economic and legal principles which govern other hard choices in our society.[49] From an

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[42] *See id.*

[43] An example of an agency with dual adjudicative and regulatory roles is the California State Water Resources Control Board. In California, an application for an appropriation of surplus available water must be made to the Board. *See* United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 177 Cal. Rptr. 161 (1986). The Board must accordingly examine prior riparian and appropriative rights, an adjudicative function. 182 Cal. App. 3d at 102; 227 Cal. Rptr. at 169. But the Board's other primary duty is to "protect the public interest, a regulatory function." *Id.* In reviewing the Board's own interpretation of its dual role, the Court found that "[i]n its *water quality* role of setting the level of water quality protection, the Board's task is not to protect water rights, but to protect 'beneficial uses.'" 182 Cal. App. 3d at 116, 227 Cal. Rptr. at 1780.

[44] It would be an incorrect interpretation of the statute to read it so narrowly as to exclude its regulatory resource protection mission. *See, e.g.,* CODE § 31(g); *infra* notes 209-231 and accompanying text. *See also* United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 177 Cal. Rptr. 161 (1986)(correcting the California State Water Resources Control Board for viewing its role too narrowly).

[45] *See infra* notes 75 & 96.

[46] The signal case in the west dealing with the expansion of the public trust concept is National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983. The State Water Code adopted trust concepts without either embracing or rejecting the *National Audubon* notion of the public trust. *See* Douglas MacDougal, *Testing the Current: The Water Code and the Regulation of Hawaii's Resources*, 10 U. HAW. L. REV. 205 (1988).

[47] *See infra* text accompanying notes 236-248.

[48] *See infra* text accompanying notes 109-138.

[49] Saarinen & Lynne, *supra* note 7, at 491.

economic perspective, then, beneficial uses of water, even when water is scarce, should be set principally by free market forces, consistent with regional land planning.[50] From a legal perspective, preferences or limitations on one's use of water should not be decided by the Water Commission on a case by case basis, but should be grounded upon standards and priorities established by law.[51]

Use of the term "free market forces," requires explanation. Hawai'i's "regulated riparianism" is not a market-driven system of allocation. Common law appurtenant uses, riparian uses, Department of Hawaiian Home Lands uses, are wholly non-transferable.[52] Water permits are not auctioned, and uses regulated by permit in water management areas are not freely transferable to follow higher valued land uses as uses change.[53] Water itself covered by permits is not separately marketable. Many citizens, particularly in the Native Hawaiian community, regard water as sacred or in any event so intimately bound up in the concept of the public trust that the idea of selling water as a commodity is anathema.[54] The most recent Hawaii Supreme

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[50] *Id.* For a contrary view, *see* Freyfogle, *supra* note 7.

[51] Most riparian jurisdictions that have transferred common law water rights to administrative permit systems have given state agencies more guidance in determining how to allocate the available water when the demand for water exceeds the supply. This is most commonly accomplished through a statutory prioritization of preferred uses. With some exceptions, priority schemes give the highest priority to direct human consumption (domestic and municipal uses), followed by agricultural uses, and then by other uses such as recreation and aesthetic uses. *See generally* WATERS AND WATER RIGHTS, *supra* note 41, § 9.03(a)3.

[52] *See* McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd upon reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974).

[53] *See* CODE § 59. In order to transfer a permit, "the conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use" must remain the same. *Id.*

[54] The Hawaii Supreme Court has emphasized that the Western system of water rights is fundamentally different than the traditional Hawaiian conception:

> Inalienable title to water rights in relation to land use is a conception that had no place in old Hawaiian thinking. The idea of private ownership of land was likewise unknown until Kamehameha's autocracy, established as a result of the intrusion of foreign concepts, set up the figment of monarchy, a politico-social pattern alien to the Polynesian scene theretofore existing. Water, whether for irrigation, for drinking, or other domestic purposes, was something that "belonged" to Kane-i-ka-wai-ola (Procreator-in-the-water-of-life), and came through the meteorological agency of Lono-makua the Rain-provider.
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Court opinions adjudicating water disputes, *McBryde Sugar Co., Ltd. v. Robinson*[55] and *Reppun v. Board of Water Supply*,[56] have reinforced this view.[57] Indeed, the trend over the last twenty-five years in Hawai'i water law has been to impose far greater restrictions on the free transferability of water than was the case at common law in Hawai'i.[58]

Common law restricts transferability of water in areas that have not been designated water management areas.[59] In designated areas, a permitting system which allows limited transferability of water subject to Water Commission approval displaces the common law restrictions.[60] But the trade-off under the permitting system is that all uses in designated areas are regulated, and subject to the uncertain criterion of reasonable beneficial use, including the public interest.[61] Thus, the ability to transfer water is subject to the same uncertainties that all applicants for water permits must face.[62] Transfers that the Water Code allows are not true free market transfers.[63] They more closely resemble an expedited permit application proceeding.[64]

> The person of the *ali'i nui* (great chief) was sacred (*kapu*) as though he were a god (*akua*). His power and authority (*mana*) was complete. But this was not equivalent to our European concept of 'divine right.' The *ali'i nui*, in old Hawaiian thinking and practice, did not exercise personal dominion, but channeled dominion. In other words, he was a trustee. The instances in which an *ali'i nui* was rejected and even killed because of abuse of his role are sufficient proof that it was not personal authority but trusteeship that established right (*pono*). Water, then, like sunlight, as a source of life to land an man, was the possession of no man. . . .

Reppun v. Board of Water Supply, 65 Haw. 531, 548, 656 P.2d 57, 68 n. 14 (1982) (citing HANDY & HANDY, NATIVE PLANTERS IN OLD HAWAII 63-64 (1972)). *See also* MELODY K. MACKENZIE, *Historical Background, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 3-5 (Melody K. MacKenzie, ed. 1991).

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

[56] 65 Haw. 531, 656 P.2d 57 (1982).

[57] *See generally* MacDougal, *supra* note 46, at 233-40.

[58] *Id.*

[59] *See Reppun*, 65 Haw. 531, 656 P.2d 57 (1982).

[60] *See* CODE §§ 41(a), 59.

[61] CODE § 41(a).

[62] *See* CODE § 57(b).

[63] Permits cannot be transferred if the place, quantity, or purpose of the use change. *See* CODE § 59.

[64] Because permits transfers do not authorize a change in quantity, location, or purpose of use, the permit terms must be modified prior to any transfer if the new user seeks to change the location, quantity, or purpose of the use. Permit modifications

Yet to the extent the free market more or less determines *land* uses, albeit subject to zoning, one may question whether the Water Commission should "second guess" or undermine private and public land use decision-making by the regulation of water use. For example, withholding a permit for irrigation because irrigation use is not reasonable beneficial would effectively undermine zoning regulations that designate an area for agricultural use. Many land uses are water dependent. The Water Code requires that the statute be "liberally interpreted and applied" to conform with the "intentions and plans of the counties in terms of land use planning."[65] This mandate is echoed in the definition of reasonable beneficial use.[66] Yet these standards are as general as county plans tend to be, and offer little real guidance either to the Water Commission or to the private water user applying for or holding a permit. One's water use could still be displaced by another "preferred" water use, for example, without either use being inconsistent with zoning.

The problem begins with the Water Code's lack of more specific guidelines for exercise of Water Commission discretion.[67] As noted above, even though the Hawaii Water Code requires that permits for water use be issued for "reasonable beneficial" uses, the term is facially broad enough in its reference to reasonability of purpose and consistency with the public interest to allow the Water Commission the opportunity to examine *de novo* whether any new or existing use of water is economically, socially, and politically worthy.[68] Because water

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are governed by section 57 of the State Water Code: "permit modification applications shall be treated as initial permit applications," with a number of limited exceptions. CODE § 57(b).

[65] CODE § 2(e).

[66] CODE § 3.

[67] Florida also adopted the "reasonable beneficial use" standard and, like Hawai'i, did not establish a hierarchy of preferred uses. *See* FLA. STAT. § 373.019(4) (1991). Commentators in Florida have recommended that either the legislature or the agencies (through rulemaking) delineate more specific guidelines to determine in advance which users will be favored in the event of a water shortage. *See generally* Saarinen & Lynne, *supra* note 7.

[68] *See generally* Saarinen & Lynne, *supra* note 7. The commentators contend that this is an impossible task to bestow on an administrative agency. "The reason rests in the character of human valuing processes: values evolve through time in a process of human interaction, possibly through markets, or through a more generalized political process." *Id.* Since the social and political value of uses evolve over time, the social value of a use cannot be known before the fact—at the time the agency acts on a

is such an important resource, *any* permit application for a new use may be seen as a basis for questioning both the purpose of the use and who ought to get it. Any request to perpetuate an existing use and any request to transfer water to a different purpose may similarly be viewed as an opportunity fundamentally to re-examine the purpose of the use and whether the water should really be directed elsewhere.[69] Moreover, because the Water Code's declaration of policy appears to create conflicting priorities as to certain types of water use, the Water Commission must decide any preferences among competing beneficial uses in a legal and procedural vacuum.[70] The potential for arbitrary, insecure, and inconsistent determinations of reasonable beneficial use in the context of the present Water Code creates an intolerable dilemma for water permit applicants.[71]

III. The Historical Context: Riparian and Prior Appropriation Doctrines

Historically, courts have not been tempted to apply either the riparian doctrine of reasonable use or the prior appropriation doctrine of

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permit application. *Id.* Saarinen and Lynne argue that if the reasonable beneficial standard is to be interpreted so broadly, economic efficiency demands that the new water users compensate displaced users. *Id.* While this solution is feasible for displacements within the private sector, it is unlikely that the state would be eager to compensate private users to protect public values.

[69] *See id.*

[70] The Code does not establish priorities between different classes of uses. The legislature could remedy this condition by amending the code to establish a ranking of preferred uses. *See generally* Frank J. Trelease, *Preferences to the Use of Water*, 27 Rocky Mtn. L. Rev. 133 (1955). Alternatively, the Water Commission could establish preferences through rule-making procedures. *Id.* Preferences are common in regulated riparian statutes. *See* note 63, *supra*.

[71] *See* Saarinen & Lynne, *supra* note 7. *See also* Waters and Water Rights, *supra* note 41, § 9.03.

> Regulated riparianism carries with it certain problems, the solutions for which have not been worked out. The problems relate both to the protection of private values, and the furtherance of public values. There are two major problems in relation to private values: providing adequate security of investment in the face of a high degree of administrative discretion and enabling the transferability of water to higher valued uses. For public values, the problems center on creating effective comprehensive planning mechanisms, defining and protecting minimum streamflows, managing direct public uses, and responding to serious water shortages.

Id.

beneficial use in ways that have swept beyond the need to conserve the resource, or to define, enforce, and accommodate the rights of those entitled to use the resource.[72] More than anything else these twin concerns constituted the overriding public interest—concerns grounded in the limited sphere of prudent water management among individual competing uses.

The concept of reasonable use in riparian jurisdictions always contemplated the need for certain adjustments among users to insure that one's reasonable use would not unreasonably harm others' reasonable uses.[73] Most of the early eastern riparian cases thus dealt with questions

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[72] *See generally* Frank J. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1 (1957). ". . . the legal concepts of reasonable riparian use and beneficial purpose of appropriation act as only a slight check on water users." *Id.* at 19.

[73] WILLIAM GOLDFARB, WATER LAW 23 (2d ed. 1988). The fundamental principle of riparian water law is that all land owners abutting a natural watercourse have a right to the reasonable use of the water. *See* Reppun v. Board of Water Supply, 65 Haw. 531, 553, 656 P.2d 57, 72 (1982). Riparian rights appertain only to land adjoining a natural watercourse. McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 197, 504 P.2d 1330, 1334 (1973), *aff'd upon reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974). The riparian right of a riparian owner is subject to the riparian right of every other riparian owner. People's Counsel v. Maryland Marine, 560 A.2d 32, 36-37 (Md. 1989). The purpose of the flexible riparian doctrine is to prevent monopolization of the water supply. A. DAN TARLOCK, LAW OF WATER RIGHTS AND WATER RESOURCES § 3.12(4) (6th ed. 1994) [hereinafter TARLOCK].

Riparian law requires that a use of water be reasonable. *Id.* The use must be reasonable in two respects: it must meet a minimum threshold of reasonability when considered independently of other uses, and it must be reasonable in light of its effect on other riparian owners. Courts must first decide "if the use can be considered reasonable under *any* circumstances" so as to be afforded some degree of legal protection. *Id.* (emphasis added). The riparian user must use the water for a beneficial purpose. *In re* Adjudication of the Water Rights of the Upper Guadalupe River, 642 S.W.2d 438, 445 (Tex. 1982). Thus, almost all uses of water are "*potentially* reasonable." TARLOCK, *supra*, § 3.12(4) (emphasis added). Only rarely will a court declare a use to be unreasonable per se. *Id.* Courts have found flood control, storage, irrigation, oil and gas extraction, power generation, recreation, view, and wild rice harvesting to meet the first requirement. *Id.* However, competing needs of other riparian owners or the method of use might make these uses or the quantity of water used unreasonable in the context of other demands on the water supply. *Id.*

The Restatement (Second) of Torts identifies nine abstract factors to consider in determining the reasonableness of a use in the context of other competing uses: (1) the purpose of the use, (2) the suitability of the watercourse to the particular use, (3) the economic value of competing uses, (4) the social value of competing uses, (5) the

of reasonability of use and harms occasioned by alleged unreasonable use.[74] This essentially tort concept created a flexible vehicle for maximizing uses of streams.[75] The Restatement (Second) of Torts espoused an idealistic view of the virtues of the system:

> The courts have fashioned the law of riparian rights so that it is capable of fulfilling the function of promoting the optimum use of water resources if it is properly understood and applied. By allocating the water to individuals who put it to use, private initiative is employed to increase the wealth of those individuals and the total wealth of society. By restricting its uses to those that are reasonable and beneficial, harmful and undesirable effects are minimized. By requiring users to share the resource and accommodate other users, successive and multiple uses are made possible. By giving security to water rights and protection to reasonable water uses, investments in water-resource development and enterprises dependent on water use are encouraged. By permitting the grant and transfer of water rights, less valuable uses of water can be changed to higher and more beneficial uses through purchase by persons and entities for whom the water has greater value or productivity. By restricting water uses that interfere with public uses and have undesirable effects on the public at large, public rights are enforced and the public interest in environmental amenities may be promoted.[76]

More critical commentators have described the riparian system as uncertain, unpredictable, and prone to endless dispute.[77] The rule of

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extent of harm caused to other riparian owners, (6) the practicality of avoiding harm, (7) the practicality of adjusting the quantity used by each riparian owner, (8) the protection of existing values of investment and water dependent enterprises, and (9) the burden of requiring the users causing the harm to bear the loss. RESTATEMENT (SECOND) OF TORTS § 850A (1977).

[74] *See, e.g.*, Anthony v. Lapham, 22 Mass. 1975 (1827); Tyler v. Wilkinson, 4 Mason 397 (1827).

[75] Saarinen & Lynne, *supra* note 7, at 491.

[76] RESTATEMENT (SECOND) OF TORTS, ch. 41 introductory note on the nature of riparian rights and legal theories for determination of the rights (1977).

[77] WATERS AND WATER RIGHTS, *supra* note 41, § 9.01; TARLOCK, *supra* note 73, § 3.12(4); GOLDFARB, *supra* note 73, at 25. The rule of reasonable use is "a rule that is not a rule . . . it is essentially a tort test designed to impose after the fact liability on a user." TARLOCK, *supra* note 73, § 3.12(4). The wide range of abstract factors that contribute to the "reasonability" of a given use make it impossible to determine whether a use is reasonable prior to litigation. *Id.* Litigation is the only means to resolve disputes under the riparian system. WATERS AND WATER RIGHTS, *supra* note 41, § 9.01. The reasonable use standard often results in "ad hoc arbitrary determinations" of what is reasonable and unreasonable. *Id.*

reasonable use is highly context-dependent.[78] Any certainty and economic stability achieved by the system would be at the expense of its primary feature, which is the ability to adjust to fluid and shifting contexts of water use over time. As it was put by the original Advisory Study Commission which advised the Hawaii Legislature in the drafting of the original Water Code, "riparian holders are always subject to later adjudications which may diminish their rights."[79] This uncer-

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[78] WATERS AND WATER RIGHTS, *supra* note 41, § 9.01. "What is reasonable will change with every significant change of circumstance." *Id.*; Trelease, *supra* note 72, at 15.

[79] ASC REPORT, *supra* note 12, at 19. "A principal problem with the riparian system is the lack of security of riparian rights. These rights are judicially determined and thus riparian holders are always subject to later adjudications which may diminish their rights." *Id.* The absence of definite and quantifyable diversion rights in a pure riparian system preclude comprehensive water management because the reasonableness of use is always an ad hoc temporal determination. GOLDFARB, *supra* note 73, at 25.

The priority of existing uses does, however, factor into the analysis of whether a use is reasonable. One of the restatement factors that determines the reasonability of use is the protection of existing values of investment and water-dependent enterprises. *See* note 73, *supra*. Perhaps the most straightforward explanation of the relevance of existing uses on the reasonability of a use comes from the federal equitable apportionment case of Colorado v. New Mexico, 459 U.S. 176 (1982). Commentators have recognized the analogous relationship between the analysis of riparian rights disputes and the analysis in equitable apportionment disputes. *See generally* WATERS AND WATER RIGHTS, *supra* note 41, § 9.06(b)(1). Equitable apportionment is a doctrine of federal common law governing disputes between States concerning their rights to use the water of an interstate stream. Kansas v. Colorado, 206 U.S. 46, 98 (1907). Like the doctrine of riparian rights, it is a flexible doctrine that considers many factors in apportionments "without quibbling over formulas." New Jersey v. New York, 283 U.S. 336, 343 (1931). These factors include physical and climatic conditions, the consumptive use of water in several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, and the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945). Equitable apportionment only protects those rights to waters that are "reasonable required and applied." Wyoming v. Colorado, 259 U.S. 419, 484 (1922). Explaining the relevance of existing uses in determining "just and equitable" allocations, Justice Marshall wrote for seven justices in Colorado v. New Mexico:

> We recognize that the equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote. Under some circumstances, however, the countervailing equities supporting a diversion for future use in one State may justify the detriment of existing users in another State. This may be

tainty, together with a growing awareness of the need for greater control over resource protection, are the chief reasons why Hawai'i and many eastern states adopted systems of administrative regulation based upon water use permits.[80] The drafters of regulated riparian statutes saw water essentially as a public resource which should not vest permanently in private parties.[81] They thus replaced the system with periodically renewable water permits.[82] Renewable permit systems did not provide an ideal system of investment security, but attempted to balance the need for certainty against the need for flexibility.[83] The public interest in reasonable, non-wasteful uses of water could then be incorporated as conditions to permit issuance applicable to all users.[84] Or public values could be asserted through the inclusion of statutory

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> the case, for example, where the State seeking a diversion demonstrates by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that may result.

459 U.S. at 187.

However, notwithstanding the relevance of considering the impact on existing uses and giving *greater* protection to existing uses in the final allocation, this protection is not absolute. Riparianism recognizes that every riparian user has a right to use *some* quantity of water from a riparian stream:

> The right of no one is absolute but is qualified by the existence of the same right in all others similarly situated. The use of water flowing in a stream is common to all riparian owners and each must exercise this common right so as not essentially to interfere with an equally beneficial enjoyment of the common right by his fellow riparian owners.

Lummis, 429 N.E.2d at 1148-49. *See also* People's Counsel v. Maryland Marine, 560 A.2d 32, 36-37 (Md. 1989). Thus, while the original user is guaranteed to a right to a continued use of *some quantity* of the water, the eventual allocation in light of all the relevant factors is impossible to predict. Flexibility necessarily results in instability.

[80] GOLDFARB, *supra* note 73, at 25. *See also* WATERS AND WATER RIGHTS, *supra* note 41, § 9.01.

[81] WATER AND WATER RIGHTS, *supra* note 41, § 9.03(a)(4).

[82] *Id.*; GOLDFARB, *supra* note 73, at 26-31.

[83] WATERS AND WATER RIGHTS, *supra* note 41, § 9.03(a)(4). The critical question in striking the balance is the duration of the permit. The challenge was to "provide a sufficient period to enable investors to accomplish their goals, or at least to amortize their investment, while preventing monopolization by the earliest users." WATERS AND WATER RIGHTS, *supra* note 41, § 9.03(a)(4). Monopolization by the earliest users results in "a rigid, inflexible system imposing in large measure today's needs and knowledge far into the future—in itself a form of waste." Jeffrey O'Connell, *Iowa's New Water Statute — The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549, 578 (1962).

[84] WATERS AND WATER RIGHTS, *supra* note 41, § 9.03(a)(5)(A).

preferences for certain classes of uses.[85] In either case, the legislature's determination of public values in the statute would be known in advance and (hopefully) sufficiently clear so as to preserve the stability in water allocations that gave rise to the permit system in the first place.[86]

While the riparian reasonableness doctrine contained inherent flexibility to merge somewhat gracefully into a permit system that would provide for a periodic review of reasonableness, the Advisory Study Commission rejected a permit system for Hawai'i based upon prior appropriation; it was deemed "not suited for Hawaii."[87] Among other considerations, the Advisory Study Commission was concerned that new public values could not easily be asserted against appropriators:

> [T]he prior appropriation systems were developed before the explosion of land use and environmental legislation that has occurred in the last two decades. The existence of heavy land use controls in Hawaii renders the prior appropriation systems of other states ill-fitting or obsolete for Hawaii.[88]

Far more than the riparian doctrine, the prior appropriation doctrine was historically concerned with maximizing use of the resource and defining and enforcing clear entitlements to water.[89] But whereas equality of right is basic to riparianism, priority of right is the touchstone of prior appropriation.[90] Mutual accommodation at the expense of certainty in riparianism is complemented by certainty at the expense

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[85] *Id.*

[86] GOLDFARB, *supra* note 73, at 28-29.

[87] ASC REPORT, *supra* note 12, at 18.

[88] *Id.*

[89] *See generally*, O'Connell, *supra* note 83, at 567.

[90] KATHLEEN M. CARR & JAMES D. CRAMMOND, *in* WATER LAW: TRENDS, POLICIES, AND PRACTICE xix, xx (Kathleen M. Carr & James D. Crammond eds., 1995). "Cornerstone principles are 'first in time, first in right' and 'use it or lose it.'" *Id.* Junior appropriators bear the risk of water shortage:

> Once a water right is perfected, most western states have no hierarchy of beneficial uses allowing one use to trump another; thus, a water right for mining is as protected and inviolate as one for domestic use. Priority date alone determines who will get the water in times of shortage . . . . When there is a shortage of water, the more senior rights holders with the earlier priority dates receive their full allotment before the junior appropriators—leaving the junior appropriators to bear the weight of any drought.

Id.

of accommodation in prior appropriation.[91] In Western prior appropriation water law, water can be appropriated only for a beneficial purpose.[92] Typically these are broad categories of use. Domestic, mu-

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[91] Prior appropriation has been criticized on the grounds that its "principal defect. . .is the result of its primary virtue. The absolute security of a water right held by the senior appropriators makes it very difficult to establish new uses." P. N. Davis, *Eastern Water Division Permit Statutes: Precedents for Missouri?*, 47 Mo. L. Rev. 426, 434 (1982).

[92] Tarlock, *supra* note 73, § 5.16(1). In general, four concepts enter into what constitutes a beneficial use: (1) there must be actual use, (2) the use must be generally recognized and socially accepted, (3) the water cannot be used in an inefficient manner, (4) the use must be reasonable. Waters and Water Rights, *supra* note 41, § 12.03(c)(2). What is reasonable in the context of beneficial use involves balancing the benefit to the user with the economic and social burden in view of the present and future demands on the water supply. *Id.* The historic functions of the beneficial use doctrine have been: (1) to establish that the basis of a water right is the continued use of the water, (2) to ensure that water is used for productive purposes, and (3) to empower the courts to curb the wasteful use of water. Tarlock, *supra* note 73, § 5.16(1). Because waste has traditionally been determined by community custom, the beneficial use doctrine has not been a significant limitation on the use of water. *Id.* § 5.16(3)(a). However, nonuse of water is waste per se. *Id.*

The Washington Supreme Court enunciated a clear state of the beneficial use standard in the recent case of State Dept. of Ecology v. Grimes, 852 P.2d 1044 (Wash. 1993). The court explained:

> 'Beneficial use' is a term of art in water law, and encompasses two principal elements of a water right. First, it refers to the purposes, or type of activities for which water may be used. . . .Second, beneficial use determines the measure of a water right. The owner of a water right is entitled to the amount of water necessary for that purpose to which it has been put, provided that that purpose constitutes a beneficial use. To determine the amount of water necessary for a beneficial use, courts have developed the principle of 'reasonable use.' Reasonable use of water is determined by analysis of the factors of water duty and waste.

Id. at 1049. The use of water in *Grimes* was for irrigation purposes. *Id.* The court determined that water duty, in the context of irrigation, is that measure of water

> which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown. It is not a hard and fast unit of measurement, but is variable according to conditions.

Id. at 1050. *In re* Steffans Creek, 756 P.2d 1002, 1005-06 (Colo. 1983).

A water appropriator is entitled to make reasonable use of the water according to the general custom of the locality, so long as the custom does not involve unnecessary waste. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 997 (Cal. 1935). Hence, there is an efficiency relationship that separates a "beneficial

nicipal, agricultural and industrial uses are universally regarded as beneficial.[93] The categories vary from state to state, but generally, by statute or common law, have evolved as economies have developed and sensibilities have changed as to appropriate needs and uses of water.[94] Recreation, for example, is now generally regarded as a beneficial use.[95]

The principal function of the beneficial use doctrine is to prevent waste.[96] If a use is wasteful, it is not beneficial; it goes to no recognized, good purpose, and cannot be appropriated.[97] The use of large quantities

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use" from a "waste" of water: "There is a wide margin between the absolute waste of water and its economical use. But the difference between the two questions is one of degree only." *Grimes*, 852 P.2d at 1051 (citing *In re* Water Rights of Deschutes River and Tributaries, 286 P.2d 563, 577 (Or. 1930)). Custom can fix the manner of use of water for irrigation only when it is founded on *necessity*; custom cannot justify waste of water. *Id.* at 1051-52 (emphasis added). The method of use must be relatively efficient; "unreasonable transmission loss and use of cost ineffective methods" constitute waste. *Id.* However, "absolute efficiency" is not required. *Id.*

[93] CARR & CRAMMOND, *supra* note 90, at xx; GOLDFARB, *supra* note 73, at 35.

[94] *See generally* TARLOCK, *supra* note 73, § 5.16(1).

[95] *See, e.g.*, Hi-Line Sportsmen Club v. Milk River Irrigation Districts, 876 P.2d 13, 15 (Mont. 1990); *In re* Applications of the Central Platte Natural Resources District, 512 N.W.2d 392, 397 (Neb. App. 1993); State v. Morros, 766 P.2d 263, 267 (Nev. 1990); Trujillo v. CS Cattle Co., 790 P.2d 502, 504 (N.M. 1990).

[96] TARLOCK, *supra* note 73, § 5.16(3)(a). The western United States rejected the riparian doctrine in favor of prior appropriation law because water was in such short supply in the West. *See generally* O'Connell, *supra* note 83, at 567. The beneficial use standard's emphasis on preventing waste assured that the limited supply of water would be put to maximum use. Hence, nonuse was "the biggest waste of all." TARLOCK, *supra* note 73, § 12.03(c)(2).

> In a barren land, ripe for pioneering, the problem was not to share but to grasp, and in formulating a rule, to provide an incentive to grasp. Thus, miners who by appropriation had taken water from its natural beds and by costly artificial work had conducted it for miles over mountains and ravines to supply the needs of gold diggers were held entitled to priority to the water. Similarly, when farmers followed miners and diverted water for irrigation purposes, again perhaps on land remote from the streams, they were not required to share the water with later arrivals who consequently took the land and the water which was left over.

Id. at 568. The prior appropriation system has substantially fulfilled the goals of economic development and promotion of maximum economically beneficial uses of water. GOLDFARB, *supra* note 73, at 41.

[97] The Oregon Supreme Court adopted a semantically different approach that yields substantially the same result in the case of *In re* Water Rights of Deschutes River and Tributaries, 286 P.2d 563 (Or. 1930). The Oregon approach separates "beneficial"

of water to drown gophers, for example, was not a beneficial use of water in California.[98] Nor was the use of water to clean debris from an Oregon reservoir, to keep it out of electric turbines.[99] The water was used during the irrigation season and could have irrigated 1600 acres of land.[100] While the benefit of keeping debris from the turbines was acknowledged,[101] the court noted that there were other times of the year, and other means, to clean the reservoir and protect the turbines.[102] On the other hand, boron leaching,[103] land reclamation[104] and dust control[105] have each been deemed beneficial uses. In general, if the perceived public or private return on the investment of water is substantial, the use will probably be deemed beneficial. If large amounts of water are consumed for what appear to be minor or insubstantial benefits, or for uses where less consumptive, more efficient means are available, the use will be wasteful.[106] The question of waste thus involves a cost-benefit "reasonableness" analysis; if one expends much water for little benefit, the use will be both non-beneficial and unreasonable

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and "use" into separate concepts. The *purpose* of a use must be *beneficial*, but a "wasteful" "use" is by definition an impossibility. The word 'use" implies that there is no waste:

> An extravagant and wasteful application of water, even though a useful project, or the employment of water in an unbeneficial enterprise, is not included in the term "use," as contemplated by the law of waters. In the latter cases it was held, in effect, that one is entitled to use water only in such quantities and at such times as may be reasonably necessary for some useful purpose, either existing or fairly contemplated in the future, and cannot waste water even for a useful purpose. Use of water by any one in a legal sense is always qualified by the condition that it must be restricted to such quantity and time of employment only as may be reasonably necessary for the accomplishment of some useful purpose.

Id. at 578 (citations omitted).

[98] Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. 1935).

[99] *Deschutes River*, 286 P.2d at 577.

[100] *Id.*

[101] *Id.* at 578.

[102] *Id.*

[103] Benz v. Water Resources Comm'n, 764 P.2d 594 (Or. App. 1988).

[104] Dept. of Natural Resources v. Southwestern Colorado Water Conservation Dist., 671 P.2d 1294 (Colo. 1983).

[105] *Id.*

[106] United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983).

as an appropriate means to the intended end.[107] This may be so even if the end or purpose is entirely legitimate to the user.[108]

IV. The Modern Era: The Emergence of Public Values

Reasonableness of the manner in which water is used is thus an integral component of both riparian and prior appropriation jurisdictions. Its role is historically broader more pronounced in riparian jurisdictions because it supervises the equality of rights fundamental to that doctrine. It also provided a convenient door through which emerging public values could be asserted: since all uses are subject to the requirement of reasonability, any uses inconsistent with the public interest could be deemed unreasonable. In prior appropriation jurisdictions, the public interest has been asserted in the language of prior appropriation: the maintenance of instream flows for the protection of stream ecosystems, and occasionally, recreation and aesthetic values, have been established in many states as beneficial uses, among other traditional beneficial uses.[109] A Colorado statute, for example, has declared that the state may "appropriate" instream flows for public purposes.[110] But since appropriators are subordinate to those whose appropriations were earlier in time, this vehicle for asserting public values was not alone sufficient to challenge existing appropriations that did not adequately accommodate emerging conceptions of the public interest. Gradually, the doctrine of prior appropriation made the transition in most western states from "a pioneering system of acquiring water rights to a system of state control of water resources" by establishing permitting systems.[111] In these systems, administrators may deny permits if the use is in conflict with the public interest.[112] And from the beginning, systems of preference have altered the pure priority concept.[113] Where pending applications among beneficial users are competing, some states give administrators discretion to prefer the

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[107] *Id.*; *See also* Tarlock, *supra* note 73, § 5.16(3)(a).

[108] *See, e.g., supra* notes 98 & 99.

[109] *See, e.g.*, State Dept. of Parks v. Idaho Dept. of Water Admin., 530 P.2d 924, 927 (Idaho 1974).

[110] Colo. Rev. Stat. § 37-92-103(3) (1974).

[111] Trelease, *supra* note 70, at 140.

[112] *See, e.g.*, Cal. Water Code § 1255 (1971). *See generally* 1 Wells A. Hutchins, Water Rights Laws in the Nineteen Western States 409-15 (1971).

[113] Trelease, *supra* note 72, at 17-19; Hutchins, *supra* note 112, at 423-25.

"more beneficial" use, or to prefer applications based upon other delineated public interest criteria.[114]

California's system of water rights is an amalgam of prior appropriation and riparian doctrines.[115] After firmly expanding the concept of riparian reasonable use in the *Joslin* case,[116] California opened the door fully to admit public values into a position of priority against existing appropriative uses in the famous case of *National Audubon Society v. Superior Court of Alpine County*[117] ("*Mono Lake*"). There the California Supreme Court held that the public trust doctrine protected the public interest in ecological, recreational and scenic values.[118] Moreover, that doctrine qualified

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[114] *See, e.g.*, CAL. WATER CODE § 1257 (1971). *See generally* Trelease, *supra* note 70.

[115] For a brief history of California water law, see National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 724-729 (Cal. 1983).

[116] Joslin v. Marin Municipal Water Dist., 429 P.2d 889 (Cal. 1967).

[117] National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983).

[118] *Id.* at 719. The court declared that the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. *Id.* at 712.

The *National Audubon* court established an analytical framework to address three aspects of the public trust: the purpose of the trust, the scope of protection, and the duties of the state as trustee. *National Audubon*, 658 P.2d at 719. The court held that purpose of the trust has evolved in tandem with the changing public perception of the values and uses of waterways. *Id.* Diversions to the City of Los Angeles threatened to transform Mono Lake from a treasured "unique scenic, recreational, and scientific resource" into a "desert wasteland." *Id.* at 716. Protection of such values are now among the purposes of the public trust. *Id.* at 719. The court recognized that the original scope of the public trust was quite limited. The trust doctrine originally only protected shore lands within reach of the tides. *Id.* The public trust doctrine has since expanded to encompass all navigable lakes and streams. *Id.* (citations omitted). Finally, the court established that the public trust is more than an affirmation of state power to use public property for public purposes; it is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right only in rare cases when the abandonment of that right is consistent with the purposes of the trust. *Id.* at 724.

The Hawaii Supreme Court was slow to recognize the public trust doctrine in Hawai'i in any context other than tidal waters. *See, e.g., In re* Sanborn, 57 Haw. 585, 562 P.2d 771 (1977). The supreme court first held that the State holds title to surface waters, but the court did not address the public trust doctrine squarely or extend the trust concept as far as the California Supreme Court did. *See* McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd upon reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974). Only later did the Hawaii Supreme Court (in dicta) acknowledge trust doctrine as a mechanism to protect public values. *See* Robinson v. Ariyoshi, 65 Haw. 641, 673-77, 658 P.2d 287,

even existing appropriative diversions, including the water supply of the City of Los Angeles.[119] The court held that parties "can assert no vested right to use those . . . rights in a manner harmful to the trust."[120] The court extrapolated upon the concept of public trust:

> It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tide lands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with the purposes of the trust.[121]

The Court did not displace the rights of the City of Los Angeles.[122] It held only that the substantial concerns of the City, including its need for water and the cost of alternative sources do not *preclude* a "reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment."[123]

In reflecting upon the *Mono Lake* case and others that followed it, California commentators have declared that California water law is now in the "era of reallocation."[124] Actually the sea change in California's water law was held to have begun with the *Joslin* case.[125] According to Brian Gray, that case was said to have "marked the first time in more than sixty years that the reasonable use doctrine was employed to divest one party's water rights in favor of what the court perceived to be a socially more valuable, and hence more 'reasonable' use."[126] Another commentator, Eric Freyfogle, noted that the power to restrict undesirable water uses in *Joslin* was exercised by *redefining* the basic attributes of water rights.[127] This was done by stating that a

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310-12 (1982). The language in the State Water Code and the State Constitution, however, is similar to the langauge the California Supreme Court used in *National Audubon*. *See* CODE § 2(a); HAW. CONST. art. XI, § 7. *See also* MacDougal, *supra* note 46, at 237-38 n. 177. Still, however, the contours of the public trust doctrine in Hawai'i remain to be decided.

[119] *National Audubon*, 658 P.2d at 728.

[120] *Id.* at 721.

[121] *Id.* at 724.

[122] *Id.* at 732.

[123] *Id.* at 729. However, any subsequent reallocation based on public trust principles would be limited by the reasonable use standard: "all uses of water, including public trust uses, must conform to the standard of reasonable use." *Id.* at 725.

[124] Brian E. Gray, *The Modern Era in California Water Law*, 45 HASTINGS L.J. 249, 253 (1994).

[125] *Id.*

[126] *Id.* at 258.

[127] Freyfogle, *supra* note 7, at 1535.

usufructuary right—such as the right to a use of water—exists only to the extent it is reasonable.[128] As soon as the contours of reasonability shift and no longer protect a certain aspect of use or type of use, the "right" disappears to that extent.[129] In the words of Professor Gray:

> According to *Joslin* and other cases, water rights differ from other property rights. Water rights are fragile—the right exists only insofar as the water user exercises the right in accordance with the doctrine of reasonable use, which in turn requires a comparative assessment of the value of competing demands for the water. Moreover, water rights are dynamic in that the definition of reasonable use may change over time. As the California Supreme Court observed in its first major reasonable use case following *Joslin*, "reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes."[130]

Commenting on the *Mono Lake* case, Professor Freyfogle also emphasized the "precarious" nature of the water right in California:

> There was no suggestion in *Mono Lake* that the state water board was obligated to terminate the most junior uses on a stream when it became necessary to reclaim water in the stream for public trust purposes. The board could go after any use that it chose, even the most senior, if the targeted use seemed the most socially unnecessary. For decades, the water rights of Los Angeles seemed secure in California's strict hierarchy of water law rights. After *Mono Lake*, those rights were suddenly precarious. The state water board and reviewing California courts had a new tool to employ in restricting undesirable water uses. Once again, it was a tool that involved not the regulation of an existing property right, but rather a definitional decision that the property right was simply differently configured.[131]

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[128] *Id.* "As a result, when a court concludes that a particular use is unreasonable or is inconsistent with public trust values, the court has not simply restricted an otherwise broad-based property right—it has fundamentally changed the nature of the underlying right." *Id.* at 1539-40.

[129] *Id.* at 1535. "Since the reasonableness of a water use could change as social needs shifted and other demands for the water arose, a court could terminate a water use that was reasonable when begun." *Id.*

[130] Gray, *supra* note 124, at 262. Gray explains the significance of this distinction: "Because the property rights of a user exist only in the reasonable uses of that water, government-mandated reallocations of the user's water based on a finding of unreasonable use do not implicate the Takings Clause . . . of the United States Constitution or the Due Process Clause . . . of the Fourteenth Amendment." *Id.*

[131] Freyfogle, *supra* note 7, at 1537.

While it is clear that the emphasis on the reasonability of use found in the California Constitution,[132] the enormity of the diversions of the Central Valley Project, the State Water Project, and other large impoundments,[133] and the history of California water law all create a context that is altogether unique and distinct from that of Hawai'i, the perception of trends in California are nevertheless instructive to Hawai'i. The analysts' comments highlight the implications of evolving public values colliding with private and other public interests—themes common to Hawai'i and many other states. The analysis involves not concepts of local law of limited application, but reasonability of use and the scope of the public interest generally in water resources.

The vision of the future of California law outlined above by Professors Freyfogle and Gray—that water rights in California are no longer "autonomous,"[134] but are wholly temporary, context-determined and communitarian—if applicable to that extent in Hawai'i, would greatly

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[132] The California Constitution proclaims:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water and shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled.

CAL. CONST. art. X, § 10.

[133] *See* Gray, *supra* note 124, at 254-56.

[134] Freyfogle, *supra* note 7, at 1541. "This scheme of water rights is like an intricate puzzle, with each piece fitting snugly with its neighbors. It is wrong, then, to view the water right as an absolute dominion that is subject to regulatory restrictions that can easily be added or withdrawn. In the case of water, these restrictions are largely part of the right's definition." *Id.* at 1540. Thus, usufructuary water rights are now subject to a "temporal dynamism." *Id.* at 1552.

undermine the stability of water uses, and create at least the same level of uncertainty for which the riparian doctrine has been criticized.[135]

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[135] There are distinct parallels between the California commentators' view of California water law and pre-Water Code Hawai'i decisions that sought to reintroduce a greater communitarianism into what was perceived to be an overly rigid structure of water law in Hawai'i. *See, e.g., Reppun v. Board of Water Supply*, 65 Haw. 531, 546-47, 656 P.2d 57, 68 (1982). In reaffirming the validity of *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, *aff'd upon reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974), the Hawaii Supreme Court criticized the direction water law had taken over the last century, away from ancient and "purer" forms of riparianism:

> The western doctrine of "property" has traditionally implied certain rights. Among these are the right to the use of the property, the right to exclude others and the right to transfer the property with the consent of the "owner". In conformance with creation of private interests in land, each of these rights were embodied in the delineation of post-Mahele judicial water rights. Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with the Hawaiian custom.
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> Under the ancient system both the self-interest and responsibility of the konohikis would have created a duty to share and to maximize benefits for the residents of the ahupua'a. In other words, under the ancient system the "right" of the konohiki to control water was inseparable from his "duty" to assist each of the deserving tenants. The private division of land and the subsequent division of water allowed for the separation of this "right" from the concomitant "duty".

Reppun, 65 Haw. at 547, 656 P.2d at 68.

Among other holdings, the court disapproved the transfer of water away from riparian lands. *Reppun*, 65 Haw. at 549-51, 656 P.2d at 69-70. The court did not draw this conclusion on the basis of the unreasonability of transfers. Rather, it found its rationale in a separate *statutory* basis for riparian rights in Hawai'i, which the court interpreted to forbid such transfers. *Id.* at 549, 656 P.2d at 69. For further discussion of the *Reppun* case, *see* MacDougal, *supra* note 46, at 238-46.

The Hawaii Supreme Court's recent holding in Public Access Shoreline Hawaii v. Hawaii County Planning Commission, No. 15460, 1995 WL 515898 (Hawai'i Aug. 31, 1995), quotes the language in *Reppun* cited in this footnote. *Id.* at *11 (citing *Reppun*, 65 Haw. at 547, 656 P.2d at 68). *PASH* reinforces the view that traditional western concepts of property may be limited because of the unique history of Hawai'i: "Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i." *Id.* at *14.

The court's historical analysis of Hawai'i's transition to western concepts of property noted that the Board of Land Commissioners, created in 1845, was responsible for

As Professor Freyfogle concedes, "[e]conomists bemoan the interdependency and connectedness of water uses and call for entitlements that are cleanly defined, strictly hierarchical, and easily transferable."[136] As "contextual complexity" of water rights has apparently made free transferability impossible, the resulting "crisis" in California's water later became the underlying justification for this expansive vision.[137] Rather than focus on eliminating the crisis of non-transferability to allow market forces to attempt more efficient allocations, the pendulum in California has swung toward the administrative alternative: water users "will see more plainly that they must voluntarily improve their water use practices or run the new risk of definitional elimination of their water rights."[138]

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quieting land titles. *Id.* at 12. The Land Commission was constrained to make its decisions "in accordance with the principles established by the civil code of this kingdom in regard to. . . occupancy, . . . [and] native usages in regard to landed tenures." *Id.* at *20 n. 33 (ellipses in original). Because the Land Commission recognized during the early stages of the land tenure transition that Hawaiian Land laws are based upon ancient tradition, practice, and usage, the "issuance of a land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property." *Id.* at 14.

It is difficult to predict the impact of the *PASH* decision on Hawai'i water law. One key question is whether the Water Commission must take traditional and customary native Hawaiian rights more actively into account in the issuance of water use permits. Arguably, however, the principles of the *PASH* decision are already incorporated into Part IX of the Water Code, which effectively forbids the Water Commission from abridging those rights.

[136] Freyfogle, *supra* note 7, at 1542-44. Critics of insecure permits have observed:

> The brevity of the duration of . . . permits and the lack of articulated standards for renewal raises the specter of a thriving enterprise being wiped out by an arbitrary or even corrupt decision by some bureaucrat for which not one penny in compensation will be forthcoming. Fear of being arbitrarily wiped out without compensation might well deter entrepreneurs with worthwhile new ideas for using water, or make it too difficult or expensive for an entrepreneur to obtain long-term financing.

WATERS AND WATER RIGHTS, *supra* note 41, § 9.03(a)4. The security of a water permit depends not only on its duration, but also the degree to which it is subject to revision by the permitting authority. Although water permits under the Code are "valid until designation of the water management area is rescinded," CODE § 55, they are subject to multiple conditions that may result in downward adjustments to the allocated amount. *See infra* note 284 and accompanying text. Criticism of short-term permits therefore applies to long-term permits subject to readjustment.

[137] Freyfogle, *supra* note 7, at 1543. "Water law today is in a state of crisis, largely because the contextual complexity of water rights renders them difficult to transfer." *Id.*

[138] *Id.* at 1544.

So as the private sector in California clings to a fast-disappearing notion of stability and certainty in water rights, the public sector craves flexibility so that government can adapt to changing conditions. Where is the balance to be struck? Is it possible that the Hawai'i Water Commission will view its own role as expansively, so as to create its own "era of reallocation" in Hawai'i? This seems unlikely from past Commission practice, but a pending water allocation controversy has provided an interesting study in how the Water Commission could evolve to take a far more activist, public conservator role.

V. A Case Study: The Waiahole Ditch Controversy

In the 1995 Waiahole Ditch case,[139] the request by O'ahu farmers[140] for a permit to perpetuate use of water for irrigation from a man-made ditch has clashed directly with public interest considerations. The Waiahole Ditch[141] begins with a tunnel drilled early in the century

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[139] *In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing, No. CCH-0A95-1 (Commission on Water Resource Management, State of Hawai'i 1995) [hereinafter Waiahole Ditch Case]. The case combined nine water use permit application dockets (designated WUP-0A93-1(a)- 1(i)) filed by Waiahole Irrigation Company, the owner of the ditch, and by landowners with agricultural uses, the Department of Land and Natural Resources of the State of Hawai'i, and various other owners, developers and interests, including the U.S. Navy. Interim Instream Flow Standard Amendments (IIFS-0A-94-1) requested pursuant to Part VI of the Code, were joined in the combined water use permit application docket. Petitions for reservations for water, under Code § 49(d) (designated RES-0A93-1 through 4 and RES-OA95-1) were initially combined with CCH-0A95-1 then later separated. *See* Waiahole Ditch Case, *supra*, Order No. 7 (August 15, 1995).

[140] Farmers were the principal applicants for the use of Waiahole Ditch water, but not the sole users. Several other users, including a correctional facility and a golf course were included. *See* Waiahole Ditch Case, *supra* note 139.

[141] For a brief history of the Waiahole Ditch and estimates of flows through it, *see* Staff Submittal to the Commission on Water Resource Management (September 28, 1994) (on file with the Water Commission) [hereinafter September Submittal]. The Waiahole Ditch was described there as follows:

> In 1912, the Territory of Hawaii and the Waiahole Water Co. entered into an Agreement (Lease No. 810) to provide for a ditch and tunnel system to transport high-level dike and surface waters from Windward Oahu to Central Oahu in order to cultivate sugar cane. The original 21.9 mile ditch system was constructed between February 1913 and finished in May 1916. Later, another 3.4 miles was added to establish the present length of 25.3 miles.
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through the Ko'olau mountain dike system.[142] Water diverted to leeward farming operations on the southern side of the island of O'ahu for much of this century for sugar cane cultivation has resulted in the equivalent amount of water no longer available for the Waiahole Stream, which is located on the northern, or windward, side of O'ahu. Its flows, originating from the same mountain dike system, have been continuously reduced by the diversion.[143] In recent years, however, large-scale leeward sugar cane production declined, and was replaced in large part by diversified agriculture.[144] The success of the new, diversified farming enterprises will depend on the continued availability of low-cost irrigation water, such as that supplied by the Waiahole Ditch.[145]

As a result of the change of crops, agriculture on the leeward side was perceived to be in a state of transition.[146] Windward citizens viewed this change as a historic opportunity to alter the pattern of water use originating from the Ko'olau dike system, and to "return" the water to the windward side of the island.[147] The question before the Water Commission was whether Windward O'ahu Waiahole Stream flows

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> The Waiahole Ditch system collects ground and surface water from the Koolau mountains beginning in Kahana Valley in Windward Oahu and passes through the Waiahole Ditch system (collecting water from lands belonging to SMF, Castle and Cooke, Amfac, and the State of Hawaii). The Windward system has 27 connected tunnels and 37 stream intakes, and four main development tunnels. The water passes through the 2.76 mile long Waiahole Transmission tunnel (elevation 752 feet on the windward side) and crosses lands belonging to the State of Hawaii, the Bishop Estate, Castle and Cooke, the Robinson Estate, and finally delivers water on Campbell Estate property 25.3 miles away in Honouliuli. The ditch is authorized through a series of easement agreements with Waiahole Water Company, Ltd. and now Waiahole Irrigation Co. over and through private and public lands.

Id. at 1.

[142] *Id.*

[143] *Id.* at 2. Average flow in the Waiahole Stream before diversion ranged from 17.4 to 18.1 mgd. According to USGS data 1955-1968 relied upon by the Water Commission, stream flows after diversion ranged from 2.7 to 11 mgd. *Id.*

[144] *Id.* at 4-5.

[145] *Id.* at 3-4. The Water Commission annexed letters of testimony from the farmers, and others, to the SEPTEMBER SUBMITTAL, *supra* note 141, regarding the necessity of the Waiahole Ditch water to support diversified agriculture.

[146] *Id.* at 3-5.

[147] *Id.* The Water Commission staff also determined that with the phase out of sugar on the leeward side of O'ahu, water formerly used for that crop, not yet applied to other agricultural uses, was being wasted. *Id.* at 8.

should now be restored, at the expense of the irrigation diversion, for ecological, scenic and recreational purposes, and for the sake of allowing Native Hawaiian traditional and customary practices on the windward side which depend upon greater stream flows.[148] A complete reallocation of the Waiahole Ditch water to the windward side would force the new diversified farming operations to search for other economic sources of water (such as pumped well water) to replace the inexpensive, gravity-driven flows of the ditch. Because of the high altitude of the leeward farm lands in question, however, it was argued that pumping large quantities of water up from down-slope wells would not be cost-effective, and could not support diversified agriculture.[149] On the other hand, windward citizens contended, in essence, that the environmental and cultural cost of allowing leeward farmers to use the full share of the

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[148] *Id.* at 6. The Water Commission entertained the notion that stream restoration was a matter of only slight modification of procedure in the typical operating pattern of the Waiahole Ditch:

> The Commission could redirect back into the Windward Oahu streams a portion of that water which was originally diverted in 1916 and which, but for the diversion, would still flow in its natural state. Such stream restoration does not require an environmental assessment under HRS § 343-5. The only actual physical change will be an opening or lowering of the man made diversion gates or structures to allow some portion of the pre-diversion flow to pass down the stream bed as it once did. Such releases are expressly provided for under GL S-4329 [the State lease] and conducted periodically under normal management and maintenance practices. If the additional releases were structured to increase the number of days that the historical average flow was in the stream, then the CWRM [the Water Commission] would simply be restoring the typical pre-diversion conditions. By definition, it would be substantially less than the yearly range of flows or most month's high flows. Likewise, such a release would be far less than an annual flood and would affect the environment far less than peak flows at the present time.
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> Moreover, there is no change in the "use" of state or county lands nor the use of state or county funds. While most of the ditch system is on land in the conservation district, there is no new "use" of these lands. The activities on the land remain unchanged. No new alteration to the native environment is proposed. Restoration of the pre-diversion stream flows in amounts no exceeding their natural volume is no more than the removal of an obstacle that once interrupted the environment's natural balance.

Id.

[149] Since the water in the Waiahole Ditch flows by gravity from the mountains, *Id.* at 1, there is no power cost associated with the transport, as there would be with a well source, which must be pumped.

Waiahole Ditch waters was too high; the status quo must be changed.[150]

The legal controversy began when leeward landowners filed permit applications to continue the existing use of the Waiahole Ditch water.[151] The application process then provided the opportunity for windward citizens, various Hawaiian and community organizations, and the Water Commission itself, to assert the public value of restoration of instream flows.[152] If the move to restore instream flows of Waiahole Stream were to be viewed as a request to the Water Commission to appropriate or reserve use of certain quantities of stream water from the Waiahole Ditch for the public interest (however that term may be defined), the public-private nature of that case, and many like it that will follow, stands in sharp relief.[153]

Two major themes of interest emerged from the initial sparring among the two dozen or so parties involved in the Waiahole Ditch contested case. The first was the extent to which transferability of water and uses within the leeward area to different crops and, in some cases, to different lands, was to be narrowly or broadly construed.[154] The second was whether the Water Commission would accept at face value the purpose of the leeward owners' existing water use for agricultural purposes, or would make its own independent inquiry as to the social worth of that use, in light of windward demands for stream restoration.[155]

A. Should Water Uses be Transferable?

As mentioned, much of the land served by the Waiahole Ditch had for eight decades been used for sugar cane production.[156] As Oahu Sugar Company, the principal grower of cane on Central O'ahu, began to phase out of business in the early 1990s, that cane land was leased

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[150] *Cf.* SEPTEMBER SUBMITTAL, *supra* note 141, at 3-5.

[151] *See supra* note 139.

[152] WAIAHOLE DITCH CASE, *supra* note 139. *See, e.g.*, WAIAHOLE DITCH CASE, *supra* note 139, Petition to Amend Interim Instream Flow Standard (IIFS-OA-94-1), filed December, 1993 by Kahaluu Neighborhood Board, Waiahole-Waikane Community Association, and the Haki Puu Ohana.

[153] *See infra* text accompanying notes 224-252.

[154] *See infra* text accompanying notes 156-181.

[155] *See infra* text accompanying notes 182-208.

[156] *See supra* note 174.

to various farmers for diversified agriculture.[157] The representatives from the windward side, who were urging restoration of the Waiahole Stream, took the position that this change of crops constituted a "new" use, and was not an "existing use" renewal, entitled to preferential treatment.[158] The implications of that argument were unsettling: if a change in crops were to be deemed a change in use, diversified agriculture probably could not exist.[159] This is because diversified agriculture depends upon both seasonal and spontaneous crop changes to take advantage of fluctuations in weather and markets.[160] The cost

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[157] SEPTEMBER SUBMITTAL, *supra* note 141, at 4. *See also* WAIAHOLE DITCH CASE, *supra* note 139, Order No. 8 (August 15, 1995) (setting forth the fields, acreages, uses and quantities of water for all of the diversified agriculture uses, as well as other uses, provisionally approved by the Water Commission—such uses were permitted to continue during the pendency of the Waiahole Ditch proceedings under section 48(a)) [hereinafter EXISTING USE ORDER].

[158] This preferential treatment is afforded to existing users by express provision of the Water Code. CODE § 48(a). Section 48(a) allows existing uses to continue until the Water Commission has acted upon the user's application for water use. *Id.* Moreover, section 50(b) requires an existing use to be "reasonable and beneficial," after which determination the Water Commission "shall issue a permit for the continuation" of the use. CODE § 50(b). This section contrasts with the more extensive permit requirements in section 49(a) to obtain a permit for a new use. CODE § 49(a). Many of the conditions necessary for obtaining a new use, however, are incorporated into the definition of reasonable beneficial use. *Compare* CODE § 3 ("reasonable beneficial use") *with* CODE § 49(a). The Water Commission determines existing uses as of the designation of Water Management areas; it does not itself regard section 50(b) as significantly preferential to section 49(a). *See In re* Board of Water Supply Water Use Permit Applications for Koolaupoko Ground Water Management Area, No. DEC-OA94-64 3 (Commission on Water Resource Management, State of Hawai'i April 5, 1995).

[159] Diversified agriculture may entail a variety of crops on one's land, and require flexibility to change crops on different fields from time to time. If each such change were regarded as a change in use, either of purpose or of place, one would have to apply for a new water use permit under section 57(a) every time one changed a crop or field. CODE § 57(a). The permit process requires published notice and a hearing. CODE § 52. The impediments to flexible crop and field rotation are obvious; and if one ignores the Code requirement one's water use permit may be permanently revoked. CODE § 58. The correspondence to the Water Commission from the diversified agriculture farmers, annexed to the SEPTEMBER SUBMITTAL, *supra* note 141, attest to the perceived risk of investing in farm leases, equipment, employees and other assets when there remain uncertainties in achieving a reliable supply of water for their crops, and where the legal issues are unsettled.

[160] SEPTEMBER SUBMITTAL, *supra* note 141. *See also* EXISTING USE ORDER, *supra* note 157 ("The Commission recognizes that factors such as crop rotation, crop cycle, crop

and bureaucratic impediments in obtaining repeated modifications to water permits each time a crop were to be changed would render the enterprise wholly unviable.[161] Much time, money and water would be wasted in waiting on the Water Commission, and market opportunities would pass by. Fortunately for the future of diversified agriculture, the Water Commission did not accept the argument that a change in crop was a change in use under the Water Code.[162] But the very fact that the issue was seriously raised, and took time and legal effort to defend, illustrates how precarious one's expectations must be respecting even existing water uses.

The windward parties thus questioned whether water could be transferred to different crops without impairing the status of the water use as an existing use, for which a permit had yet to be issued.[163] If the challenge had involved a water permit already issued, the question of transferring water to other crops could have been more troublesome to the Water Commission.[164] The Water Code requires a permit holder

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maturity, . . . and weather create peaks and valleys in water demand." Some farmers intended to plant seed corn as the sole crop; others planned tomatoes, potatoes, Asian vegetables, corn, taro, herbs and other crops.).

[161] The Water Commission theoretically must act on a water use permit application requiring a hearing within 180 days. CODE § 53(c). This time is regarded as extendable by the Water Commission. *See e.g.*, WAIAHOLE DITCH CASE, *supra* note 139 Order Extending 180-Day Rule to Act on Water Use Permits and Interim Instream Flow Standard Petitions (July 13, 1995). Hence, if a change in crops constituted a change in use, a farmer would be legally unable to rotate crops and fields until the Water Commission acted on the application. *See supra* note 159. Modifications of permits are treated as initial permit applications. CODE § 57(b).

[162] EXISTING USE ORDER, *supra* note 157. "In determining which existing uses may continue, the Commission recognizes that a change in crop type is still a form of farming and does not constitute a 'change in use' under the Water Code so long as the 'use' remains in agriculture." *Id.* Even so the problem may arise again in other cases: the Water Commission does not issue published opinions, and in any event could decline to give precedential effect to earlier decisions if it felt the facts so warranted.

[163] Most of leeward parties sought permits for the continuation of existing uses under section 50 rather than apply for new use permits under section 49. WAIAHOLE DITCH CASE, *supra* note 139. The initial question before the Water Commission was whether, pending final determination of the Leeward parties' permit applications, the "existing uses" of water in place as of July 15, 1992 could continue under section 48(a). *Id.* (July 15, 1992 was the date the Water Commission designated Windward O'ahu as a water management area).

[164] Modifications to existing water use permits are treated as initial permit applications. CODE § 57(b). This is true even if the change in use is immaterial. CODE §

who contemplates a change in use, "whether or not such change is of a material nature," to obtain a permit modification from the Water Commission.[165] Given the comprehensive scope of the above text, and the demands this type of requirement will place upon the Water Commission, it may have the unwelcome consequence of inhibiting the movement of water to more valued and efficient uses (for example, to new crops that need the water).[166] Even though water use may be subject to regulation, states should encourage water transfers to promote efficiency and to reduce waste.[167] Hawai'i should be no exception. The purpose of the Hawaii Water Code is to conserve the resource and obtain maximum beneficial uses of the waters of the State.[168] Adequate provision is also to be made for a variety of beneficial instream uses, including Native Hawaiian traditions and practices.[169] Once instream flows have been established to accommodate such public values,[170] and permits issued, there is scant reason strictly to control purposes for which the permit holder's water is thereafter used. Such control is inevitably costly in time, money and effort both to the Water Com-

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57(a). This limitation on flexibility in the statute applicable to modifications of already-issued permits contrasts with the undefined reference to existing use in section 48(a). The Water Commission arguably may interpret "existing use" in that section with more latitude, to encompass historical variations in place, purpose or quantity of use, even if the variations are not immaterial. Likewise, the Water Commission may interpret the reasonable beneficial use criteria for issuance of final permits for existing uses under section 50 with as much latitude as is given by the definition of reasonable beneficial use. *See supra* text accompanying notes 21-33.

[165] CODE § 57.

[166] *See, e.g., supra* notes 159 & 161 (regarding the time it may take to process an application to modify a permit).

[167] Waste of water can arise in the time it takes to process a permit, if the water could be more beneficially applied elsewhere in the meantime. And where water becomes scarce, the importance of free transferability increases, as there is little additional water for development. For a perspective on the issue of transfer of water and water rights in the West, *see generally* GOULD, *supra* note 8, at 93.

[168] CODE §§ 2, 3.

[169] CODE § 3.

[170] Gould notes that where applied to water rights, the public trust doctrine "undoubtedly places limits on water rights transfers. Legislation designed to protect instream values, such as the Colorado statutes permitting appropriation of water for instream purposes, could provide a basis for objection . . . if a proposed transfer would have an adverse effect on instream flows." GOULD, *supra* note 8, at 95 (citations omitted). This could occur, for example, if a use encompassed a return flow to a stream which return flow would be terminated upon transfer.

mission and to the permit holder.[171] It achieves no further benefit to the resource or to any public value to do so.[172] To the extent a specific other purpose could negatively impact the resource, the permit could be appropriately conditioned to prevent use for that specific purpose.[173] At the very least, freer transfers could "ease the state's regulatory burden by creating market incentives to use water efficiently (i.e., reasonably) without the threat of reallocation by government fiat."[174]

Windward representatives also asked the Water Commission narrowly to interpret the water user's freedom to transfer water to different

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[171] Gould relates that the application of a generalized public interest criteria in water transfers creates uncertainty, increases "transaction costs" of transfers, and raises the issue of "institutional competency":

> When the transfer process is primarily concerned with effects on other [users] . . . , vesting the responsibility with an agency or official with technical expertise, such as a state engineer, is an appropriate choice. When the agenda expands to include broad policy concerns, this choice becomes suspect, particularly where the statute gives the agency or official little or no guidance beyond a general reference to the public interest.

Id. at 95 (citations omitted).

[172] Transferability of water in Hawai'i historically appears to have been regarded as at least not inconsistent with the public interest. *Cf.* McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd upon reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974) (Marumoto, J., dissenting). Justice Marumoto understood the common law to sanction transferability:

> It is obvious that the right of the owner of the water to divert it from the watershed of origin to other watersheds was not raised as an issue in the case for the reason that the existence of such right was deemed to be a closed question under the prior court decisions going back to *Peck v. Bailey*, 8 Haw. 658 (1867), followed by *Horner v. Kumuliilii*, 10 Haw. 174 (1895), *Wong Leong v. Irwin*, 10 Haw. 265 (1896), and the Wailuku River cases litigated in *Lonoaea v. Wailuku Sugar Co.*, 14 Haw. 50 (1902), 15 Haw. 675 (1904), and 16 Haw. 113 (1904). *Peck v. Bailey* sanctioned a diversion of water from one portion of an ahupua'a to another portion of the same ahupua'a; *Horner v. Kumuliilii* a diversion from one kuleana to other kuleanas; and *Wong Leong v. Irwin* a diversion from one ahupuaa to other ahupua'as.

Id. at 203, 504 P.2d at 1347.

Regarding the common law of change in place of use of water, *see* W.A. HUTCHINS, THE HAWAIIAN SYSTEM OF WATER RIGHTS 136-39 (1946). In general, changes were freely permitted, so long as there was no injury to others caused thereby. *Id.* at 137-38 (citing Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 14 Haw. 50 (1902)). Under the Water Code, harm to the resource would be included in the no-injury rule. *See generally* CODE § 71.

[173] *See infra* note 284.

[174] Gray, *supra* note 124, at 278.

locations.[175] Any present use of water outside of the original "footprint" of the existing use, the windward parties argued, required a "new use" permit.[176] The Water Commission accepted the narrow "footprint" argument.[177] Given the need in agriculture to move crops from field to field, to leave some fields fallow and intensify production on others, the "footprint" concept could unnecessarily hamper the movement of water to land uses that legitimately need it.[178] As with changes in purpose of use, changes in location of use typically have little or no impact on the resource itself.[179] There is thus no need for such restrictions. If the Water Commission were to have a resource-related concern about a particular use or location, it could express such concern as a condition in the permit.[180] In the Waiahole Ditch case, the Water Commission could have allowed transfers of water to any location within the physical reach of the source. Such an interpretation would have been consistent not only with the concept of "existing use" but also with a policy of encouraging maximum beneficial uses of water.[181] By unnecessarily limiting such transfers, the most efficient use of water for legitimate and necessary purposes will surely be discouraged.

B. Should the Applicant's Land Use be Questioned?

The Water Commission took a broad view of the "reasonable beneficial" use standard in the case of the leeward farmers: it appeared

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[175] *See, e.g.*, WAIAHOLE DITCH CASE, *supra* note 139, Waiahole-Waikane Community Association, Hakipuu Ohana, and Kahaluu Neighborhood Board's Opening Memorandum on "Existing Uses" 23-24 (June 5, 1995).

[176] *Id.* at 21-24.

[177] EXISTING USE ORDER, *supra* note 157.

[178] The Water Commission did narrowly allow for some crop rotation, but only for lands that were "temporarily fallow" on July 15, 1992, the date of designation of the Windward Water Management Area. *Id.*

[179] An example of a transfer of water to a place where it might harm the resource would be if brackish water were to be pumped uphill to irrigate a golf course located over a purer aquifer with lower chloride levels. *See, e.g., In re* Application of John Moon for a Water Use Permit, No. 2104-02 (Commission on Water Resource Management, State of Hawai'i January 7, 1994). With respect to surface waters, if the diversion from the stream is permitted in the first instance—such that the affects of the diversion on the stream have been found to be acceptable—it would seem to make little further difference to the resource that the water used in one place or another. While the older Hawai'i cases generally did not take resource protection into account in the question of transfer, *see supra* note 172, section 71 now provides such a mechanism. *See* CODE § 71.

[180] *See* CODE §§ 49, 58(2).

[181] *See infra* note 191.

prepared to determine whether diversified agriculture was a viable and appropriate use for the leeward land, an inquiry which is essentially a *land use* decision intimately connected to water allocation.[182] It gave the impression of wanting to ascertain the most beneficial purposes to which the Waiahole Ditch water could be put.[183] This determination was to occur in the context of the claims of the windward side, whose representatives desired to restore the flows of Waiahole Stream, and to reserve water for future purposes benefitting the windward side.[184] The Water Commission thus did not limit its inquiry to the impact of the quantity of the existing use upon the resource itself.[185] In its view of instream flows, the Water Commission made no distinction between police power regulation for the protection of the resource itself (e.g., by determining minimum or "baseline" flows to sustain stream-dependent ecosystems) and the need for additional flows for aesthetic, scenic, or recreational purposes for the public, for Native Hawaiian uses, or other new purposes. In other words, the Water Commission was considering a *reallocation* of water to purposes more consonant with its view of the public interest.[186] It joined all of these issues—public and private—into a single, combined contested case.[187]

Early in the case, the Water Commission issued a list of fifty-two multi-part questions to which it sought answers it apparently deemed relevant to its determinations.[188] In deciding whether or not the existing

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[182] *See infra* note 188 and accompanying text.

[183] *Id.* This approach would appear to extend beyond the Water Commission's mandate to determine the reasonability of the water use or the public interest. *See supra* notes 16-20 and accompanying text.

[184] *See supra* note 139.

[185] The windward parties did not file water use applications for their purposes, hence, there were no water use applications competing with the leeward applications. *Id.* The windward parties were seeking an augmentation of instream flows. *See id.* As will be noted, public values considered by the Water Commission in such cases include more than resource protection. *See infra* text accompanying notes 209-223.

[186] *See infra* note 188. *But see infra* notes 199 & 207 and accompanying text.

[187] *See supra* note 139.

[188] *See* WAIAHOLE DITCH CASE, *supra* note 139, Attachment 6 to Agenda for Prehearing Conference 1 (May 22, 1995) [hereinafter ISSUES OF INTEREST]. The Issues of Interest in Attachment 6 were divided into the following categories: Land Use Planning; Social/Political/Legal; Agriculture; Economic; Instream/Nearshore; Pearl Harbor Aquifer; and Ditch System: Technical. Many of the questions sought direction as to whether the Water Commission should investigate a particular aspect of the overall case. The "Agriculture" questions were as follows:

What is the estimated productivity of leeward and windward lands?

(primarily agricultural) use of water on the leeward side of the island is reasonable and beneficial, the Commission sought to know about the economics of the existing farm enterprises, types and varieties of crops, whether or not there was an adequate local and export market for the produce, expenses and income (gross and net) from sales, estimates of employment, and comparative "values" of community-based agriculture and agribusiness.[189] Among other things, it appeared that the Water Commission sought to ascertain whether existing leeward agriculture was a socially and economically worthy enterprise.[190] These considerations are appropriate for regional land use planning, but exceed the scope of the Water Commission's mandate to protect the

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> What is the likely market (local and export) for diversified ag and how much land and water would it take?
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> What are the actual and projected estimates of employment and value (gross or net product?) of agriculture in both leeward and windward?
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> What impact will Waialua lands coming available for agriculture have on the demand and use for leeward ag lands? How do the priorities for the two areas compare?
>
> What values does community-based agriculture provide that agribusiness does not? Quantify the benefits of those values.
>
> What length of leases indicate commitment to agriculture?
>
> Are landowners banking water for short-term agriculture and long-term development?
>
> How should water for ag lands be planned for? Which ag lands should receive priority for water?
>
> Should water be reserved for lands with good soils for future cultivation? Should other criteria be used to reserve water for future cultivation?
>
> What were the actual acreages on the windward side that were in taro since the 1900's (and over time) and what evidence exists to indicate that reductions in acreage were related to ditch construction?

Id.

Under the heading "Economic" the Water Commission asked seven additional questions, including this inquiry: "What economic values should be considered and how heavily should they be weighed (ag for local consumption, for subsistence, for export, community-based economic development, bait stock in Kaneohe Bay, fisheries, ag for open space)?" *Id.* With respect to the "Instream/Nearshore" category, the Water Commission asked: "What should be the Commission's policy regarding stream restoration? Should one or more streams be restored? What kinds of streams? Is 'restoration' incremental or total?" *Id.*

[189] *See id.*

[190] *Id.* Note, for example, the "Agriculture" questions regarding the "likely market" for diversified agriculture and its employment possibilities; questions regarding priorities and criteria among different types of agriculture uses, and the question requesting quantification of the "benefits" of the "values" of different types of agriculture.

public interest by conserving the resource and maximizing beneficial water uses.[191]

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[191] Section 2 states that "the State Water Code shall be liberally interpreted to obtain maximum beneficial use of the waters of the state. . . ." CODE § 2(c). The doctrine of "maximum beneficial use" is perhaps the easiest "use" doctrine to comprehend. Maximum beneficial use is the policy that all water in the state should serve a beneficial purpose. The purpose need not be a consumptive use; instream uses can be beneficial. The concept does *not* require that any given use be the "most efficient" or "best" beneficial use water. *See generally* Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co., 207 Cal. App. 3d 378, 254 Cal. Rptr. 757, 765 (1989). The concept does not explicitly establish a hierarchy of beneficial uses. It does not give the Water Commission the authority to establish a hierarchy of beneficial uses. All the policy does is attempt to maximize the number of beneficial uses of water in the state so that water is not wasted.

At least six other states have declared maximum beneficial use policies: Arizona, ARIZ. REV. STAT. § 49-282(D)(2) (1988); Texas, TEX. NAT. RES. CODE ANN. § 25.001(b)(3) (1991); Oregon, OR. REV. STAT. § 536.220(b) (1989); Colorado, COLO. REV. STAT. § 37-92-102(1)(a) (1990), Idaho, Parker v. Wallentine, 650 P.2d 648 (Idaho 1982); and California. CAL. CONST. art. X, § 2. The maximum beneficial use provision in the California Constitution declares that the "general welfare requires that the water resources of the states be put to beneficial use to the fullest extent of which they are capable." *Id.* One California court stated that the maximum beneficial use provision in the California Constitution does not mandate the most efficient use of water resources. *Big Bear*, 207 Cal. App. 3d 378, 254 Cal. Rptr. 757, 765 (1989). Instead, the California Supreme Court has recognized that the purpose of the provision is to

> prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained, and undiminished to the sea, and is an effort on the part of the state, in the interest of the people of the state, to conserve our waters' without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners . . . . The amendment . . . promotes the public interest by fostering more reasonable and beneficial uses of state waters."

In re Waters of Long Valley, 599 P.2d 656, 664-65 (Cal. 1979).

Idaho and Colorado courts have interpreted their maximum beneficial use provisions similarly. The leading case in Idaho is Parker v. Wallentine, 650 P.2d 648 (Idaho 1982). Idaho uses the words "maximum use" to describe the policy, but this is not a significant difference; Idaho is a prior appropriation jurisdiction that requires that uses be beneficial to be protected by law. The *Parker* court acknowledged the long-standing policy of maximum use, equating the concept with "the policy of maximum *development* of the water resources of this state." *Id.* at 656 (emphasis added).

In Colorado, the Colorado Supreme Court explained the policy of maximum beneficial use in Trans-County Water v. Central Colorado Water, 727 P.2d 60 (Colo. 1986):

There is a fundamental policy underlying Colorado's water law favoring the

It is legitimate to question whether revisiting land uses is an appropriate role for the Water Commission, considering that other public agencies are responsible for regulating land uses.[192] The Water Commission has no expertise in land use.[193] Its members are not elected.[194]

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most beneficial use of the state's limited water supply. To that end, the General Assembly has required that the water courts review the development of conditional appropriations every four years to prevent the accumulation of undeveloped and unproductive conditional water rights to the detriment of those seeking to apply the state's water beneficially. To allow Trans-County to maintain its conditional appropriation indefinitely and without progress [towards making beneficial use of the water] would frustrate that fundamental policy.

Id. at 65. In Denver v. Consolidated Ditches Co., 807 P.2d 23 (Colo. 1991), the Colorado Supreme Court explicitly incorporated the concept of "waste" to interpret the policy, concluding that any activity "fostering wastage" would frustrate the policy of maximum beneficial use. *Id.* at 34.

In each of these jurisdiction, maximum beneficial use was interpreted to be a policy favoring actual beneficial use of the water. The policy does not go so far as to require a ranking of different beneficial uses; so long as water is put to *some* "beneficial" use, the mandate of the policy is fulfilled. The policy appears never to have been interpreted to require water users to develop new sources of water; it only goes so far as to favor beneficial use of existing sources of water. The policy declaration of maximum beneficial use in the Water Code appears to be consistent with these interpretations.

[192] Land use regulation in Hawai'i is extensive:

> The state of Hawaii and its four counties are arguably the foremost example of a heavily regulated, multi-permit state and local government system in the area of land management. Layered on top of the counties comprehensive plans and zoning ordinances are the many and various regulations administered by the State's Land Use Commission and, in the case of state-designated conservation land, the Board of Land and Natural Resources. The State also exercises control over special redevelopment districts through the Hawaii Community Development Authority. Considering the different agencies involved and the breadth of regulations ranging from environmental controls to coastal zone management, it is no surprise that the City and County of Honolulu's Permit Register lists 95 different types of county and state land use permits and approvals that might apply to a landowner seeking to develop land.

Michael B. Dowling & A. Joseph Fadrowsky, III, Note, *Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems*, 17 U. HAW. L. REV. 193, 246-47 (1995).

[193] The Commission on Water Resource Management consists of six members. CODE § 7(a). The Governor of the State of Hawai'i appoints four members. CODE § 7(b). Each of the four appointed members of the Water Commission must have "substantial experience in the area of water resource management." *Id.* The chairpersons of the Board of Land and Natural Resources and Director of Health are ex officio voting members. *Id.* The Code does not provide that members must have land use experience. *See id.*

[194] *Id.*

They are neither chosen for nor accountable to the public for land use decisions.[195] And to duplicate county functions in determining appropriate land uses is inconsistent with the principle of deference to county land use mandated throughout the Water Code.[196] Land use decision-making in the state of Hawai'i is already a multi-tiered process: County planning and zoning is overlaid by a state land use designation process, managed by the State Land Use Commission.[197] Within the broad categories of state and county land use and zoning, the private sector determines specific land uses. While land use decisions must be *informed* by knowledge of water resource availability, the Legislature clearly did not intend that the fundamental issues of land use be revisited at the level of the Water Commission.[198]

It is possible, of course, that the Water Commission was only seeking information about the case, in the fullest possible context, so it would not overlook important considerations.[199] Even granting this, however, the case was a water use case, not a land use case.[200] The standard for issuing an existing use water permit is "reasonable beneficial use" of water.[201] Arguably leeward owners and others in the future seeking continuation of existing uses should prove only the elements of reason-

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[195] The Water Commission is prohibited from restricting "the power of any county to plan or zone. . ." CODE § 4 (b). The scope of the accountability of the Water Commission would appear to hinge upon its given powers and duties, set forth in section 5. *See* CODE § 5. No provision of section 5 makes the Water Commission accountable for the *land* use consequences of its allocations.

[196] *See* CODE §§ 2(3), 3, 31(b)(2)-(3), 49(a)(5)-(6), 93.

[197] *See generally* HAW. REV. STAT. §§ 205-2 to -5 (1993).

[198] If a county will through zoning allow for a given land use that is harmful to a water resource, or exceeds its capacity to supply, then the Water Commission will inevitably be faced with limiting or enjoining the harmful activity to the extent it has the power to do so under section 15 and limiting supplies. *See* CODE § 15. *Cf. infra* text accompanying note 228. There is presently inadequate planning coordination between state and county to avoid this problem. *See also infra* note 206.

[199] Any adjustments to instream flow standards require a balancing of concerns. *See* CODE §§ 71(1)(C), 71(1)(E), 71(2)(D). The Issues of Interest did not purport to be a request for the presentation of evidence on this issue. *See* ISSUES OF INTEREST, *supra* note 188.

[200] *See supra* note 148 and accompanying text. Of course, the consequences of Water Commission action may affect land use. The question here is whether the Water Commission's decisions should be directed to controlling or influencing land use, rather than being largely "blind" to land use consequences, focusing instead on the water resource itself, the prevention of waste, and the promotion of other public values set forth in the Water Code.

[201] *See* CODE § 50(b).

able beneficial use: that the amount of water requested is necessary, efficient and economic; that the manner of use is reasonable, i.e., that it does not cause unreasonable harm to others or harm the resource; and that the purpose (e.g., agriculture) is legally recognized and protected. With respect to the leeward owners' position, it was noted that agricultural use is presumptively beneficial in all prior appropriation jurisdictions.[202] Given that the leeward land in question on O'ahu was zoned agricultural, that the method of irrigation from the Waiahole Ditch was drip irrigation—a widely accepted means of efficient water use, that the amount of water used (substantially less than required for sugar cane) was a conventionally accepted and necessary amount of water for diversified agriculture, and that there were no other competing applications for consumptive use of the ditch water, the Water Commission's inquiry as to these criteria should have been correspondingly straightforward.[203]

But the reasonable beneficial use definition contains two additional factors relating to the manner and purpose of the use: The use must be consistent with State and County land use plans and the "public interest."[204] As mentioned, there was no dispute that agricultural use of the leeward lands served by the Waiahole Ditch conformed to State and County land use plans.[205] One might be tempted to conclude, as well, that supplying vegetable produce to the Hawai'i consumer would be consistent with the public interest—at least if the public interest is at least partially reflected in the Hawaii State Plan, and the County Water Use and Development Plan.[206] Yet it appears that the Water

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[202] *See supra* note 93 and accompanying text.

[203] Compare the foregoing analysis in the text with the Issues of Interest which suggested that the Water Commission was taking an island-wide perspective on the case, possibly to determine a more appropriate reallocation of the ditch water. *See supra* note 188.

[204] CODE § 3.

[205] WAIAHOLE DITCH CASE, *supra* note 139.

[206] To the extent elements of the public interest may be found in the Hawaii Water Plan, referred to in section 31 of the Water Code, it will be too general to be of use to the Water Commission in specific cases. The County Water Use and Development Plans, being essentially low-resolution assessments of mostly municipal water needs and developable sources, are likewise of little practical value in the resolution of problems specific to an aquifer or watershed. The Review Commission on the State Water Code noted various planning problems in the Water Code. *See generally* INTERIM REPORT OF THE REVIEW COMMISSION ON THE STATE WATER CODE 2 (December 15, 1993) [hereinafter INTERIM REPORT]. While more components were recommended for

Commission may not have interpreted the public interest in this way.[207] It may have viewed the term as vesting comprehensive power in the Water Commission to determine its own view of the public interest in light of both water use and land use considerations on a case-by-case basis.[208]

The critical inquiry is whether the public interest component in Hawai'i's reasonable beneficial use criterion in fact gives the Water Commission broad authority to deny permits or reallocate water for what it considers more socially worthy purposes and uses of land. There is guidance in the collective articulations of the public interest that will help answer this question.

VI. WHAT IS THE "PUBLIC INTEREST"?

An express or implied reference to the public interest appears in a number of contexts in Hawai'i's water law. The Hawaii Constitution, the common law, and the Water Code, when read together, define public interests in water resources principally in several broad categories or themes: resource conservation;[209] control of beneficial instream uses;[210] allowance of Native Hawaiian uses;[211] and, finally, assurance of maximum beneficial uses.[212] As we survey the spectrum of these public interests, we observe conservation of water resources on one hand and

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inclusion in the Hawaii Water Plan, and more coordination among agencies was suggested, the Review Commission's Final Report to the Legislature did not recommend fundamental alterations to the planning process established in the Code. *See generally* FINAL REPORT OF THE REVIEW COMMISSION ON THE STATE WATER CODE 22-23, 41-49 (December 28, 1994) [hereinafter FINAL REPORT].

[207] As of this writing, the Water Commission has not issued any rulings or orders specifically addressing its interpretation of the public interest. Yet its inclination to look at every aspect of land use planning, social, political, legal, economic, environmental and hydrologic issues in its Issues of Interest, *supra* note 188, suggests a broad reading of the public interest on the part of the Water Commission.

[208] The components of the Hawaii Water Plan are broad and generalized. *See supra* note 206; CODE § 31. As a result of this, the individual permit application may become the occasion for de facto water resource "planning." The Water Commission must determine allocations with inadequate aquifer or watershed-related information. *See* INTERIM REPORT, *supra* note 206, at 6-7. For a suggested alternative to the generality of the Hawaii Water Plan, *see infra* note 264.

[209] CODE § 31(d)(2).

[210] CODE § 71(1)(c).

[211] CODE § 2(c).

[212] CODE §§ 2(c), 31(d)(1).

maximizing beneficial use of water on the other.[213] As we will see, these items strongly overlap each other.[214] A primary beneficial instream use, for example, is the maintenance of conditions that conserve stream resources.[215] Other beneficial instream uses under the Water Code also go beyond this conservation purpose and encompass assuring sufficient water to allow the practice of traditional and customary Hawaiian rights, among other purposes.[216] The first three public values mentioned above (resource conservation, control of beneficial instream uses, and allowance of Native Hawaiian uses) are "protective" values; with respect to streams, they are subsumed completely in the determination of instream flow standards.[217] For groundwater, they are subsumed in the available or developable yield of the aquifer.[218] Off-setting such protective public interests is the clear mandate in the Water Code to maximize the beneficial use of water.[219] As such, the interplay of the various elements of the public interest in surface water resources can be viewed more generally, and more simply, as the competition between controlling instream flows and obtaining maximum beneficial use of water.[220] Quantified flows (or yields), within which are distilled the protective public values, are matched against various demands to use the remainder of the resource.[221] In setting instream flow standards, however, the Water Commission must balance the impacts of doing so against the present or potential out-of-stream uses.[222] From this and

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[213] CODE § 2(c).

[214] *See, e.g., infra* note 265.

[215] *See* CODE § 3.

[216] *Id.*

[217] *See generally infra* notes 286-290 and accompanying text.

[218] *See generally infra* text accompanying note 290.

[219] CODE § 2(c).

[220] *See infra* text accompanying notes 285-295. For groundwater, the various elements of the public interest can be viewed as the competition between setting a credible developable yield for a given aquifer, supported by reasonable hydrologic data, and obtaining maximum beneficial use of the aquifer.

[221] This implies obtaining adequate data to do the job. *But see infra* note 304 (regarding the Water Commission's need for data).

[222] CODE § 71(1)(E). The balancing in question would be an evaluation of the harm to the public interest entailed by the diversion or withdrawal against the harm in disallowing or curtailing the use requiring the water, and to the public interest in not allowing maximum beneficial use. It is reasonable, however, that proposed uses that would have the effect of polluting a stream or aquifer, or that would damage the resource through excessive pumping or diversion, should not be permitted, no matter how useful the application of that water might be to a given enterprise. *See* Douglas

other requirements of the Water Code we thus discern an overriding, more general public interest in achieving a balance among all of these competing needs.[223] These overlapping elements of the public interest are discussed briefly below.

A. Conserving the Resource

The public interest in the conservation of the resource includes components of both water quality and quantity.[224] The historic prevention of wasteful uses of water remains a dominant public value.[225] Protection of the resource also includes assuring that ground and surface resources are free from contamination.[226] Groundwater sources should not be pumped so aggressively as to encourage the intrusion of higher levels of sea water into the aquifer.[227] The surface disposal of pollutants, fertilizers, effluent, or saline irrigation water can detrimentally affect

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MacDougal, The Feasibility of a "Conservation Reserve" in the Context of a Proposed Hierarchy of Stream Uses (November, 1993) (presentation to the Hawaiian Stream Ecology, Management & Preservation Symposium, Hilo, Hawai'i) (on file with the author). Such an approach would call for quantifying the "baseline" levels below which water may not be allocated. This would mean that, as a matter of law, no further balancing occurs at that extreme level of harm. *See infra* text accompanying notes 286-297 (regarding the importance of quantifying instream flows and developable yields to protect the public interest in conserving the resource, among other public interests). The public trust doctrine would arguably require that the State preserve some minimum level of water in a stream to maintain its "purity and flow . . . for future generations"; this duty of the State has been characterized as a "superior public interest" overriding any earlier presumed "right of private parties to drain rivers dry for whatever purposes they saw fit." Robinson v. Ariyoshi, 65 Haw. 641, 673-77, 658 P.2d 287, 310-12 (1982).

[223] CODE § 31(d).

[224] *See, e.g.*, CODE §§ 2(d), 31, 44, 45; HAW. CONST. art. XI, §§ 1, 7. The Hawaii Constitution provides:

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

HAW. CONST. art. XI, § 7.

[225] *See, e.g.*, CODE §§ 13, 44(6).

[226] *See* CODE § 2(d).

[227] *See* CODE §§ 5(10), 44.

the quality of both streams and groundwater.[228] For streams, the protection of the resource will include the guardianship of "watersheds and natural stream environments," the latter through the "statewide instream use protection program" of part VI of the Water Code.[229] The Water Code requires that established instream flow standards provide for the "protection and procreation of fish and wildlife" and "the maintenance of proper ecological balance and scenic beauty."[230] This latter includes maintenance of "ecosystems such as estuaries, wetlands, and stream vegetation."[231] These elements comprise the conservation component of the instream flow protection program.

B. Control of Beneficial Instream Uses

Beneficial instream uses also include components that reach beyond conservation. The definition of "instream use" in the Water Code includes recreational, aesthetic, and scenic values, and also navigation.[232] They encompass the use of the stream as a conduit of water

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[228] At least as important as other contaminants, salt water can have a severe polluting effect on surface and ground water resources. *See, e.g.*, United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 177 Cal. Rptr. 161 (1986) (intrusion of salt water into the Sacramento-San Joaquin Delta was the major factor affecting water quality). As fresh water was diverted from the delta for use, salinity intrusion into the delta intensified. *Id.* In Hawai'i, ground water aquifers can become contaminated by salt water intrusion caused by excessive overpumping; it is a key contamination issue. The sustainable yield of an aquifer is determined based upon the long term protection of the aquifer from saline intrusion. *See generally* COMMISSION ON WATER RESOURCE MANAGEMENT, WATER RESOURCES PROTECTION PLAN 97-122 (1992). Mananagement of watersheds helps prevent infiltration of pollutants into aquifers and streams. *Id.* at 193-200.

[229] *See* CODE § 71. *See also supra* note 222 (regarding the question of balancing competing public interests in the establishment of such a program, and the question of the role of the public trust concept).

[230] CODE § 2(c).

[231] CODE § 3.

[232] CODE § 3. The Code defines "instream use" as:

> beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:
>
> (1) Maintenance of fish and wildlife habitats;
>
> (2) Outdoor recreational activities;
>
> (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
>
> (4) Aesthetic values such as waterfalls and scenic waterways;

to enable later diversionary uses, for example, by the "conveyance of irrigation and domestic water supplies to downstream points of diversion,"[233] or for the "protection of traditional and customary Hawaiian rights."[234] As with the public interest in conservation, these varied public interests are protected by the establishment of standards for instream flows, stream by stream.[235]

C. Protecting Native Hawaiian Rights

The third public interest, the protection and promotion of Native Hawaiian rights, customs, and practices is a multi-tiered public interest.[236] Although only a portion of the overall population of the State is directly affected by this interest, the State has made it a public matter, a public value. This public interest may be discerned not only in a specific mandate in the Hawaii Constitution, but also in the expansion of the common law and by recent additions to the Water Code.[237] The latter requires the State to "incorporate and protect adequate reserves of water" for Hawaiian home lands, and to issue permits "upon application" for those with appurtenant water rights on kuleana and taro lands.[238] The Hawaii Constitution specifically obligates the State to "protect all rights, customarily and traditionally exercised for sub-

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(5) Navigation;
(6) Instream hydropower generation;
(7) Maintenance of water quality;
(8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
(9) The protection of traditional and customary Hawaiian rights.

Id.

[233] *Id.* Here an "instream use" may serve the purpose merely of keeping the stream water from being diverted until it reaches a point downstream where the Water Commission has deemed it in the public interest to allow diversion for a consumptive, out-of-stream use or uses. In other words, there may be no resource protection goal as such in the augmentation of instream flows to accomplish such purposes.

[234] *Id.*

[235] CODE § 71.

[236] *See, e.g.,* HAW. CONST. art. XII, § 7; CODE §§ 2(c), 49(a)(7), 49(e), 31n, 63, 101. *See generally* Catherine Vandemoer, Native Hawaiian Water Rights: Quantification, Perfection, and Management of the Native Trust Asset, (February 13, 1993) (address delivered to the Peoples Water Conference, Honolulu, Hawai'i) (on file with the author).

[237] This is footnote number 281.

[238] CODE § 63.

sistence, cultural and religious purposes" of certain Native Hawaiian ahupua'a tenants.[239] The Water Code incorporates a prohibition against abridging such rights.[240] The public interest in conforming Hawai'i's water law to Native Hawaiian tradition was strong enough in the last several decades in both the *McBryde Sugar Co., Ltd. v. Robinson*[241] and *Reppun v. Board of Water Supply*[242] cases to cause a seismic shift in the direction of Hawai'i's water law *away* from historic transferability of water and water rights for large-scale agricultural uses[243] and municipal uses[244]-—uses which were themselves of unquestioned public value.[245] One example will illustrate the force with which the Legislature has also moved to assert this public value, at least with respect to Hawaiian Home Lands reservations: the Legislature amended the Water Code in 1991 to forbid every new use for which a permit is required in a Water Management Area from "interfering" with Department of Hawaiian Home Lands water rights.[246] It made every permit subject to the rights of that department, "whether or not the condition is explicitly stated in the permit."[247] If instream flows are made adequate to transport surface water flows by streams to Native Hawaiians on

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[239] HAW. CONST. art. XII, § 7.

[240] CODE § 101(d).

[241] 54 Haw. 174, 504 P.2d 1330, *aff'd upon reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974).

[242] 65 Haw. 531, 656 P.2d 57 (1982).

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

[244] *Reppun*, 65 Haw. at 536, 656 P.2d at 62.

[245] In *Reppun*, the public interest involved providing a reliable supply of water for municipal purposes, where use of the water was actually being made by the public, the use was held to preclude injunctive relief against the Board of Water Supply for its harmful diversion. *Reppun*, 65 Haw. at 556-63, 656 P.2d at 73-78. The court recognized that the Waihee dike-structure at issue in the *Reppun* case supplied about one-third of the water needs of the 120,000 Windward O'ahu residents. *Id.* at 556, 656 P.2d at 74 n. 17.

The dissent in *McBryde* likewise recognized that there would be "segments in the agricultural economy of Hawaii" which would be "adversely affected" by the *McBryde* ruling, which ruling undercut the legal foundations for the acquisition and transfer of surface water rights and surface waters in Hawai'i. *McBryde*, 54 Haw. at 208, 504 P.2d at 1349. According to the Water Resources and Protection Plan, an average of about 625 mgd is still being diverted statewide from streams throughout the state, mostly for irrigation purposes. COMMISSION ON WATER RESOURCE MANAGEMENT, WATER RESOURCES PROTECTION PLAN 186 (1992).

[246] Act 325, 16th Leg., Reg. Sess., 1991 Haw. Sess. Laws 1013, 1020 (codified in HAW. REV. STAT. § 174C-49(e) (1993)).

[247] *Id.*

home lands and to taro and kuleana lands, then the use of those waters consistent with those rights (as a protected, public interest) is assured under the Water Code by the provision referred to above.[248]

D. Obtaining Maximum Beneficial Uses of Water

The fourth broad area of public importance is the mandate that the Water Code be "liberally interpreted to obtain maximum beneficial use of the waters of this state for purposes such as domestic uses, agricultural uses, irrigation and other agricultural uses, power development, and commercial and industrial uses."[249] This requirement logically would include protection of existing uses that are already making reasonable beneficial use of the waters of the state. It would imply that (1) lack of certainty and stability in the law, including uncertainties over the continuation of existing uses where water management areas are designated, and (2) direct or indirect restrictions on transferability of water or water permits to more efficient uses, would undermine the overall public interest in maximizing the actual use of water.[250] The promotion of maximum beneficial use of the waters of the state would therefore include the definition, clarification, and enforcement of rights to uses of water, including the reasonable accommodation of new uses.[251] This concern embraces dispute resolution

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[248] *Id.*

[249] CODE § 2(c).

[250] *See generally supra* notes 163-172 and accompanying text.

[251] The Review Commission proposed a revision to the Water Code in its Final Report which would clarify the problem of competing priorities to water. The "Hierarchy of Surface Water Uses" and the "Hierarchy of Groundwater Uses" each established a two-part division of proposed uses. FINAL REPORT, *supra* note 206, at 23-26. The first part was referred to as "Reserved Uses" and comprised the elements of the public interest. *Id.* at 24. For streams this meant a conservation reserve—that amount of water necessary to protect the resource itself from contamination and destruction. This water would be set aside from allocation. Next are Native Hawaiian rights uses: appurtenant rights for taro growing and Department of Hawaiian Home Lands reservations. Third in the hierarchy came protection of existing uses. The Review Commission also added a reservation for the Department of Agriculture for water projects sponsored by that department. *See id.* at 25. For groundwater, the conservation reserve was followed by Department of Hawaiian Home Lands reservations and existing correlative uses. *Id.* Quantification of the overall "reserved uses" for both surface and groundwater would effectively "discharge" the public interest in the applicable water resource. The remainder of the water not subject to the reserved use portion of the hierarchy would be freely available for riparian uses not assured by the State Constitution, instream uses for cultural, scenic, and recreational purposes, and all other reasonable beneficial uses. FINAL REPORT, *supra* note 206, at 25-26.

through negotiation, adjudication and alternative means.[252] A process of ready and efficient dispute resolution and finality of decision is essential for obtaining maximum beneficial uses of water. To the extent uncertainty, indecision, and delay plague the management of water resources, the public interest in assuring maximum beneficial use of water will be thereby impaired.

E. Balancing Competing Demands

The public interest in Hawai'i which unifies the others may be summarized in the concept of accommodation among competing public and private values. The common-law riparian concept of reasonable accommodation among competing private uses has survived in the reasonable beneficial use test.[253] But the single reference to consistency with the public interest in the reasonable beneficial use definition does not tell if or how the proposed or existing use is to be balanced against the public interest or what to do if the public interest itself has competing facets. It is however apparent that there is an independent public value in achieving a balance not only between private interests that may complete with public interests, but also among competing public interests. The evidence for this assertion is found in the Water Code. The mandate to obtain maximum beneficial use of water itself means that many users have to be accommodated.[254] Moreover, that mandate is juxtaposed with the requirement that "adequate provision" be made for Hawaiian rights, resource and ecological values, and "the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation."[255] All of these seemingly contradictory objectives are declared in the Water Code to be in the "public interest."[256]

Other parts of the Water Code speak in terms of balancing interests. As noted, the Water Commission must balance instream values with

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[252] The Review Commission recognized the importance of efficient dispute resolution in its Final Report and proposed language that would clarify dispute resolution procedures. *See* FINAL REPORT, *supra* note 206, at 21.

[253] The author of the definition clarified that the "reasonable beneficial use" test incorporated the "best elements" of the riparian reasonable use standard with the "best elements" of the prior appropriation beneficial use standard into a single test. *See generally* Maloney, *supra* note 16, at 269.

[254] *See supra* note 191.

[255] CODE § 2(c).

[256] *Id.*

existing and potential water developments.[257] In the context of permit administration, competing applications must each be "accommodated," if possible.[258] If sharing is not possible, the Water Commission must approve the application "which best serves the public interest."[259] This requirement tracks the public interest element of reasonable beneficial use.[260] Finally, there is a balance implied in the link between obtaining maximum beneficial use of water and deference to regional land use planning. The directive to interpret and apply the Water Code to conform to state and county land use plans, general as that imperative is, nevertheless expresses a clear statement of the public value in placing certain limits upon the Water Commission's exercise of its administrative discretion, insofar as that discretion may affect regional land use and zoning.[261] The many provisions in the Water Code that refer to the "homerule" issue, including most critically for permitting in the definition of reasonable beneficial use, suggest a recognized public value in striking an acceptable balance between regulation of water resources and the needs and desires of the counties to determine or encourage specific land uses.[262]

As is therefore apparent, there are numerous components that make up the set of public values that now affect Water Commission decision-making. These could expand in the future.[263] Certainly, the narrow,

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[257] CODE § 71(1)(E).

[258] CODE § 54.

[259] *Id.*

[260] *See* CODE § 3.

[261] *See* CODE § 2(e).

[262] The Review Commission recognized the importance of coordination with county plans. *See* INTERIM REPORT, *supra* note 206, at 7, 14, which characterized the issue as a question of whether water use should "follow" land use. *Id.* There are many Code provisions which require such coordination. *See, e.g.*, CODE §§ 2(e), 4(b), 31(b)(2), 31(b)(3), 31(h), 32(b), 49(c). This issue is distinct from the question of Water Commission delegation to counties of the authority to allocate water use. The Review Commission recommended that in certain circumstances, the Water Commission should be able to delegate some or all of its water use permitting authority to a county agency, at the request of that agency. *See* FINAL REPORT, *supra* note 206, at 27-28, 64-65. Such delegation presupposes guidelines for exercising the Water Commission's power to rescind or modify the delegation in appropriate cases. *Id.* And unless the county agency has the necessary staffing and technical expertise to undertake the task, delegation would be inappropriate. *Id.*

[263] As water resources become strained in the future, alternative resource use could rise to the level of a key public interest. Current discussion centers on desalination and effluent re-use. *See* INTERIM REPORT, *supra* note 206, at 17. There is nothing in the present Code, however, that promotes development and use of alternative resources, or gives priority to uses obtained from such sources.

historic, judicial functions of protecting the resource from waste and defining, enforcing, and accommodating rights to water use alone present the Water Commission with a monumental task.[264] Yet the

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[264] This task is made even more difficult by the lack of specific planning to assist the Water Commission. *See supra* notes 248 and 250. This author made a proposal to the Review Commission to redefine Water Management Areas as Conservation Management Areas which could be flexibly determined whenever the Water Commission perceived a potential threat to the long-term maintenance of the quality or quantity of a water resource. *See* Review Commission Code Change Proposal No. 005 (February 23, 1994) (on file with the Hawaii Legislative Reference Bureau). Most importantly, the Water Commission would have to prepare a plan unique to the Conservation Management Area, which would articulate specific *management goals* applicable to the area. *Id.* at 1. The Conservation Management Area Plan would define the permitting required for the area by establishing thresholds and criteria for permits appropriate to the problems which led to the designation of the area. Quantification of reserved or priority public interests would be emphasized. *Id.* at 2.

Although the Review Commission did not adopt this proposal, the concept of creating management goals unique to the problem is not new: Arizona incorporates that requirement in the Arizona Groundwater Code. *See generally* ARIZ. REV. STAT. § 45-401 (1994). In the Arizona Groundwater Code, each management area (referred to as "Active Management Areas" or "AMAs") has specific goals which vary depending on the area of the State. *Id.* "The management goals of the Tuscon, Phoenix and Prescott AMAs which contain the State's major urban areas, is to achieve an equilibrium between groundwater withdrawal, and natural and artificial recharge, or 'safe yield.' The management goal of the Pinal AMA, which is predominately rural, is to preserve existing agricultural uses for as long as feasible, consistent with the necessity to preserve future supplies for non-irrigation uses." From Terese Richmond, The Intersection of Water Law and Land Use Law: The Arizona Experience" (February 1994) (presentation to the 12th Annual Water Law Conference, ABA Section of Natural Resources, Energy, and Environmental Law, San Diego, California) (on file with the author).

In Hawai'i, one could envision a variety of goals in Conservation Management Area Plans. The most commonly expected goal for surface waters, for example, might be to protect natural stream environments and the native biota therein. With groundwater, the preservation of the integrity of the aquifer will be the first concern. But in addition to the threshold conservation concerns, other management goals of a Conservation Management Area might include, with respect either to ground or surface waters (as applicable): to quantify present or future appurtenant rights claims or Department of Hawaiian Home Lands reservations in areas where such claims might be expected to be significant; to develop an orderly transition from any anticipated phasing out of existing agricultural uses to other beneficial uses; to shift usage from one type of source to another; to permit a transition from one agricultural use to another while utilizing existing irrigation systems; to plan for the impact of new county land use plans on available water sources; to "clean up" a polluted watershed; to improve county-state coordination within a watershed or aquifer; or to manage the spacing and withdrawals of anticipated new wells.

Water Code compounds this challenge by requiring the Water Commission to make such a determination prior to any allocation—and to determine that such an allocation is consistent with the public interest of balancing all of the foregoing public concerns. It must weigh and determine the needs of the applicant against the public interest in resource conservation and other beneficial instream uses, including allowing traditional and customary Hawaiian practices. The result is that the private applicant asserting a use is now likely to become caught in a squeeze between twin pillars of the dominant public interests in Hawai'i: resource protection and Native Hawaiian rights.

VII. Competing Public Interests

While obtaining maximum beneficial use of water and striking a balance among competing public and private uses are among the general areas of public interest identified above, two specific public interests, protection of the resource and allowing Native Hawaiian rights are the more dominant themes in current water discourse in Hawai'i.[265] This is not surprising. Resource protection is the most fundamental mission of the Water Commission: without a clean and adequate resource there is nothing to allocate. The Water Code declares in its first paragraph that the people of the State have a "right to have

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[265] In response to concerns expressed in public hearings that Native Hawaiian rights were not adequately protected by the Code or implemented by the Water Commission, the Review Commission sponsored a workshop on Native Hawaiian water rights on January 26, 1994, and follow-up public hearing on February 23, 1994. Final Report, *supra* note 206, at 38-39. A call for technical papers was issued, and nine papers were presented to the Review Commission for its consideration. *Id.* at 39. The Review Commission sought and received input on how current state law be implemented or amended to protect: water supplies for Hawaiian Homestead development; streams for subsistence, cultural and religious practices; and appurtenant rights for cultivation of kuleana and taro lands. *Id.* at 38-39. Some of these rights are intimately connected to the ecological health of streams. For example, Native Hawaiian gathering rights include gathering of certain endemic species such as o'ape, hihiwai and opae, which are often scarce or absent in degraded streams. *See generally* Stream Protection and Management in Hawaii: Recommendations and Suggestions, A Report by the Stream Protection and Management (SPAM) Task Force for the Commission on Water Resource Management, State of Hawaii (April 1994). Other rights, for taro growing and irrigation on Hawaiian Home Lands, depend upon high volumes of continuous flowing cool water. *See Reppun v. Board of Water Supply*, 65 Haw. 531, 534, 656 P.2d 57, 60 (1982) (citing Handy & Handy, Native Planters in Old Hawaii, 90-102 (1972)).

the waters protected for their use."[266] The Hawaii Constitution expresses a similar view: that the State must "conserve and protect Hawai'i's natural beauty and all natural resources," including water resources.[267] The Hawaii Constitution, as noted, also specifically refers to the State's duty to protect Native Hawaiian rights and practices.[268] With respect to water, those uses require the implementation of appurtenant rights to grow taro and other traditional products, and to permit the gathering of endemic stream-inhabiting species such as o'opu, opae, and hihiwai.[269] While protection of the resource and Native Hawaiian values are specific and substantive, maximum beneficial use and balancing of competing values are more general or procedural in nature, though no less important in the overall context of water management contemplated by the Legislature.

The specific public values of resource protection and Native Hawaiian rights will conflict with each other. The public interest in balancing existing and planned uses with proposed instream flow standards is clearly stated, but there is no balancing language with respect to Native Hawaiian rights. For example, will established instream flows for conservation purposes limit the exercise of appurtenant rights to divert substantial quantities of stream water for taro irrigation? "Natural stream environments" are required to be protected by the Hawaii Constitution, yet the allowance of the exercise of appurtenant rights is stated in the Water Code in terms of absolutes.[270] Indeed, there is no stated requirement that appurtenant rights be governed by any standard of reasonable use; those rights are theoretically fixed as to quantity, as were the older common-law prescriptive rights.[271] The Water Code grants Department of Hawaiian Home Lands reservations a similar, seemingly "absolute" priority.[272] There is no ordering of priorities in the Water Code of these and other potentially conflicting public values.

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[266] CODE § 2(a).

[267] HAW. CONST. art. XI, § 1.

[268] HAW. CONST. art. XII, § 7.

[269] CODE § 101(c).

[270] HAW. CONST. art. XI, § 7. The Water Code requires water permits for the exercise appurtenant rights to be issued upon application. CODE § 63. *But see supra* note 222 (regarding the public interest in the establishment of minimum streamflow levels).

[271] *See* Reppun v. Board of Water Supply, 65 Haw. 531, 554, 656 P.2d 57, 72 (1982).

[272] *See* CODE § 49(a)(7).

As the contours of the public interest expand or change, through judicial or administrative interpretation of the law or through legislation, in directions not now foreseen, the private applicant will increasingly see the reasonability of his use shifting in light of the mutating "public interest." These public concerns will be the Scylla and Charybdis of the applicant for water use. The challenge to the Water Commission must be to balance not only resource protection and Native Hawaiian rights, but also these with the public interest in obtaining maximum beneficial use of water resources. The problem now is that there is little guidance in the State Water Code on how or when to balance these interests.

The Water Commission has multiple inherent conflicts in its role: the Water Commission must adjudicate permit applications among private interests seeking to maximize the beneficial uses of water, while at the same time attempt to sort out complex and conflicting sets of public values usually asserted by citizens groups, Hawaiian organizations, or agencies within the State itself, each seeking priority for its claim through "reservations" of water for the future.[273] In the Waiahole Ditch matter, for example, the leeward farmers' applications to continue existing agriculture uses of land triggered five separate petitions to reserve the ditch water for other uses.[274] None were competing use applications.[275] Three community groups on the windward side of O'ahu joined in one petition to reserve all of the water from the Waiahole Ditch that was developed on the windward side for windward agricultural uses, including the growing of taro.[276] The same groups, represented by the Sierra Club Legal Defense Fund, petitioned the Water Commission to increase minimum instream flows in the Waiahole Stream.[277] The Office of Hawaiian Affairs Committee on Land

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[273] The Water Code expressly authorizes the Commission on Water Resource Management to make reservations of water, but the statute does not indicate how such reservations should be made. CODE § 49(d). In 1994, the Water Commission adopted procedural rules governing the reservation process. HAW. ADMIN. R. § 13-171-60 (1994). The rules permit the reservation process to be initiated: (1) upon recommendation by the chairperson, or (2) upon written petition to the commission by any interested person with proper standing. *Id.* There is no indication in the statute or in the legislative history of the Water Code that the legislature intended to permit individual "interested persons" to petition for reservations of water.

[274] *See supra* note 139.

[275] *Id.*

[276] *Id.*

[277] *Id.*

and Sovereignty petitioned to reserve substantial amounts of water for present and future Hawaiian uses on the windward side.[278] The Hawaii Department of Hawaiian Home Lands requested ditch water to serve its beneficiaries on over eighty acres of windward land.[279] And the State Department of Agriculture petitioned for most of the ditch water to be used for its agricultural projects in Central and Windward O'ahu.[280] Given the multiple demands for the limited supply of water, it is perhaps right to examine whether consistency with the public interest in the definition of reasonable beneficial use requires every application to become the battleground for warring public interests over which the applicant has little or no control. Under the present statutory and regulatory structure and Water Commission practice, this outcome appears inevitable.[281]

If the Water Commission is faced with a conflict between otherwise reasonable beneficial uses and the public interest, the outcome of the Water Commission's assessment of the application is preordained: the Water Commission will delay the application pending evaluation of public interest considerations.[282] Yet the establishment of the effects of groundwater withdrawals on stream flows, the quantification of appurtenant rights, determination of overall instream flows and fixing quantities of Department of Hawaiian Home Lands reservations is rarely easy or prompt. The Water Commission typically will want to quantify these flows, effects, usages, and reservations, which effort may take months or years of study.[283] While these are worthy, essential concerns,

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[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *See infra* text accompanying notes 299-301.

[282] *See supra* note 161.

[283] Even if the quantification issue was confined to establishing threshold flows to maintain the biological integrity of most streams, the Water Commission views that task alone as daunting, if not impossible. The Water Commission has stated that:

> [t]here is currently not enough information to quantify necessary stream flows for the maintenance of aquatic life. The Division of Aquatic Resources has a research agenda that may result in greater clarity in the future. However, calculating those standards for all streams on a stream by stream basis is a monumental task.

Letter from Keith W. Ahue, Chairman of the Commission on Water Resource Management, to the Review Commission on the State Water Code, attachment at 5 (September 1, 1994) [hereinafter AHUE LETTER]. The Water Commission took the position that instream flows should only be set for selected streams. *Id.* The Water

the consequence is that some aspect or another of the multi-headed public interest is potentially brought into each significant permit application. The unlucky applicant will be caught up in large scale struggles between competing public values, the debate over which will have been triggered by his application, even though the use alone may not raise issues of concern either to the resource or to any competing applicant for the use of the water. Moreover, the intensity of the public conflict may threaten to deny or dispossess the applicant of a use otherwise valid or favored by the county in which his land is located, in order to free up water to satisfy the public value in question. If the applicant does receive a permit, there is even then no assurance of finality: a typical water use permit has over fifteen conditions, most allowing for possible future downward adjustments to one's water use as new aspects of the public interest are asserted.[284]

Resources Protection Plan states that "the establishment of permanent instream standards is an enormous undertaking, although the [Water] Commission has wide latitude in determining whether any given stream would require standards." COMMISSION ON WATER RESOURCE MANAGEMENT, WATER RESOURCES PROTECTION PLAN 191 (1992). The Protection Plan does concede that there is data available: "Sensible use of the extensive stream flow data collected by the [United States Geological Survey] over the past 80 years should be the basis for establishing the physical parameters of minimum stream flow standards." *Id.* at 192.

[284] The standard ground water use permit conditions typically include the following provisions:

1. The ground water described in the water use permit may only be taken from the location described, used for the reasonable-beneficial use described, and at the location described above and in the attachments. . . .
2. The right to use groundwater is a shared right.
3. The water use must at all times meet the requirements set forth in HAR § 13-171-13 which means that it:
   a. Can be accommodated by the available water source;
   b. Is a reasonable-beneficial use as defined in section § 13-171-2;
   c. Will not interfere with any existing legal use of water;
   d. Is consistent with the public interest;
   e. Is consistent with state and county general plans and land use designations;
   f. Is consistent with county land use plans and policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act.
4. The ground water use must not interfere with surface or ground water rights or reservations.
5. The ground water use must not interfere with interim or permanent instream

VIII. Discharging the Public Interest

We may discern some order within the chaos of these varied and competing public values if we understand how they are to be imple-

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flow standards. If it does, then:

a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
b. The interim or permanent instream flow standard, as applicable, must be amended.

* * *

9. The water use permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it necessary to:

a. Protect water sources in quantity, quality, or both;
b. Meet other legal obligations including other correlative rights;
c. Insure adequate conservation measures;
d. Require efficiency of water uses;
e. Reserve water for future uses, provided that all legal existing uses of water as of June 1987, shall be protected;
f. Meet legal obligations of the Department of Hawaiian Homes, if applicable; or
g. Carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

* * *

11. The water use permit shall be subject to the Commission's periodic review of the applicable aquifer's sustainable yield. The amount of ground water use authorized by the permit may be reduced by the Commission if the sustainable yield of the Ewa-Kunia and Waipahu-Waiawa Aquifer, or relevant modified aquifer, is reduced;

12. The water use permit may not be transferred or the use rights granted by the permit sold or in any other way alienated. . . . Any sale, assignment, lease, alienation, or other transfer of any interest in this permit shall be void.

13. The use(s) authorized by law and by the water use permit do not constitute ownership rights.

* * *

15. The permittee shall prepare and submit a water shortage plan. . . . The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage. . . .

16. The water use permit granted shall be an interim water use permit, as allowed under HAR § 13-171-42(c). The final determination of the water use quantity shall be made within five years of the filing of the application to continue the existing use.

17. The water use permit shall be issued only after AG review.

Standard Water Use Permit Conditions (on file with the Water Commission).

The Hawaii Supreme Court's ruling in Aluli v. Lewin, 73 Haw. 56, 828 P.2d 802

mented by the Water Commission. It is reasonable to expect this process to be governed by specific guidelines and standards. Accommodations of public interests by the Water Commission cannot rest within the subjective judgment of the Water Commission on the occasion of each permit application for the reasonable beneficial use of water.[285] A careful reading of the Water Code supports the view that the Legislature intended that the aggregate of public interest values be determined independently of individual permit applications, primarily in the context of planning and administrative rulemaking.

With respect to surface waters, the Water Code arguably resolves the apparent conflicts among conservation, control of beneficial instream uses, allowance of Native Hawaiian uses, and obtaining maximum beneficial use, by requiring the establishment, by rule, of instream flow standards. Instream flows are set according to the amount of water "necessary to protect the public interest in a particular stream."[286] The reference to the public interest should be regarded here as the totality of the public interests in the stream. Regarded this way, the standards would incorporate conservation and all other "beneficial instream uses," including the conveyance of sufficient water down-

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(1992), discussed *supra* note 35, held that permit conditions are rules. Rules must comply with the Hawaii Administrative Procedure Act. The Water Commission has not promulgated rules establishing permit conditions. Thus, these standard permit conditions might be an invalid exercise of rulemaking.

[285] *See supra* note 35 (discussing the Hawaii Supreme Court's ruling in Aluli v. Lewin, 73 Haw. 56, 828 P.2d 802 (1992)). In the *Aluli* case, the supreme court emphasized that *both* the rights of the general public *and* the rights of permits applicants are harmed when an agency acts on permit applications without established written standards that identify the relevant factors that would dictate the ultimate decision on an application:

> This case was initiated by public activists; therefore, the focus is on the lack of input by the general public in a matter of public concern. However, the unbridled discretion exhibited by [the Department of Health] also raises the issues of fairness and possibly constitutional due process rights with regard to future applicants. . .
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> Future applicants will have no official source to turn to for guidance. There will be no avenue to predict [the Department of Health's] actions in permit application procedures. Without established written standards by rules, no one can know whether permit applications will be reviewed fairly and consistently and whether considerations to grant or deny a permit will serve the purpose of the statute or are unlawful. . . .

Aluli, 73 Haw. at 61, 828 P.2d at 805 (citations omitted).

[286] CODE § 71(1)(C).

stream to allow taro growing on kuleana and taro lands.[287] It is because "instream use" is defined so broadly in the Water Code—to include conservation values in the stream as well as its utilitarian function as a conduit of water for later consumptive uses —that enables this broad range of public values to be accommodated or "discharged" by the setting of a single standard, an instream flow, to which all later permits would be subject. Any quantity of water in a stream that is in excess of the established instream flow standards for a particular stream is then available for maximum beneficial use.[288] The sum of the instream flow standard and water available for maximum beneficial use should encompass the entire volume of the water in the stream.[289]

With respect to underground aquifers, the public interest is similarly discharged in setting a limit on the amount of water that can be withdrawn. There is no term of art that is the exact parallel to instream flow standards. But the Water Commission has employed the term "developable yield" to quantify the amount left over (after conservation and other public values are taken into account) which is available for maximum beneficial use.[290] This concept has not yet been formalized into rule, but is conceptually useful.

In each instance, therefore, the determination of instream flows and developable yields will effectively collapse the diffuse and unpredictable elements that comprise the "public interest" in each hydrologic unit into a certain and manageable *quantity*. The reference to consistency with the public interest in the definition of reasonable beneficial use likewise becomes a reference to that quantity: to instream flow standards

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[287] The instream flow provision in the Water Code requires that: "Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential developments. . . ." CODE § 71(1)(C). The Water Code defines "instream use" to include a wide range of uses that serve the public interest in a variety of different ways. *See* note 232, *supra*. The uses named in the definition include: recreational activities, hydropower generation, navigation, maintenance of ecosystems, aesthetic values, and protection of traditional and customary Hawaiian rights. CODE § 3. Traditional and customary rights include taro cultivation. CODE § 101(c).

[288] For a discussion on the meaning of maximum beneficial use, *see supra* note 191.

[289] This is consistent with the doctrine of waste. *See generally supra* note 92. All uses of water must be beneficial. Such beneficial uses may be consumptive beneficial uses or instream beneficial uses.

[290] *See, e.g.*, Staff Submittal to the Commission on Water Resource Management 2 (May 5, 1992) (on file with the Water Commission).

or developable yields. Each quantity tells what must be exempt from allocation to maximum beneficial use.

If the public interest is to be discharged in this way, however, the Water Commission must face the task of quantifying the public values to be protected in streams and aquifers. Particularly with respect to streams, where the convergence of public interests is especially complex, the Water Commission must quantify all the relevant instream uses specified by the statute. The conservation component requires biological and ecological evaluation; the Water Commission must also quantify additional flows necessary to support downstream taro growing or other non-instream consumptive uses (for which specific purposes the water is to remain in the stream and undiverted).[291] As a particular instream flow standard is proposed in the rule-making process, its impacts must be weighed against "the importance of the present or potential uses of water from the stream for non-instream purposes, including the economic impact of restriction of such uses."[292] In other words, the Water Commission must balance the public interest "uses" of steam water, condensed in the Water Code's list of instream uses that the Legislature regarded as beneficial instream uses, against private, consumptive, reasonable beneficial uses.

The foregoing approach of quantifying all elements of the public interest offers some hope for cutting through the tangled thicket of conflicting public and private values that can ensnare the applicant for a water use permit. It implies with respect to streams, however, that the Water Commission must fix instream flow standards adequate to anticipate all potential beneficial instream uses. The approach entails a quantification sufficient not only for conservation values but also to permit expected appurtenant rights uses and reservations for Department of Hawaiian Home Lands purposes. If, however, instream flow standards were to be set only at levels adequate to protect fish and

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[291] The Water Commission's task would be made easier if its plans were more area-specific, focusing first on regions of critical ground or surface water problems. *See generally supra* note 264. Present planning is statewide, and not ordered by priority. *See* CODE § 31. The Code does enable counties to prepare regional plans for water developments, CODE § 31(c)(3), and requires the Water Commission to identify favored or disfavored uses in connection with sources of supply, CODE §§ 31(i), 31(j). These provisions, however, do not constitute the type of localized, comprehensive resource-specific planning that may be needed to quantify needs in areas of most critical concern first, where data is most likely to be needed soonest for resource protection, dispute resolution and permitting.

[292] CODE § 71(1)(E).

wildlife habitats, and maintenance of stream ecosystems, then the conflicts of priority already mentioned would inevitably arise between the public interests in stream conservation and Native Hawaiian rights; the present Water Code does not adequately sort out those priorities. The point is, whether under the present Water Code or proposed versions, adequate quantifications of the public interest uses of water must occur to allow maximum beneficial use of the remainder. But is this workable?

In fact the Water Commission has done very little in the way of setting permanent instream flow standards in Hawai'i.[293] Interim instream flow standards based on existing flows were set by rule on most areas of the Hawaiian Islands shortly after the Water Code was enacted.[294] But this "status quo" approach did not purport to quantify all beneficial instream uses.[295] Since then, biological studies have been few and appurtenant rights for taro grown have not been systematically determined.[296] A stream assessment has surveyed Hawai'i's streams

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[293] In a report prepared for the Review Commission on the State Water Code entitled "The Commission on Water Resource Management: Seven (7) Years of Water Management," the Water Commission summarized the totality of its efforts in setting instream flow standards on Hawai'i's streams in this way:

> The Water Commission adopted statewide "status quo" interim instream flow standards after an extensive investigation of formulas utilized in mainland states proved unreliable for protecting endemic gobies in Hawaii's short steep streams. Studies continue to develop a valid procedure to identify permanent instream standards, including a case study on Maunawili Stream.

AHUE LETTER, *supra* note 283, attachment at 1.

[294] *See, e.g.*, HAW. ADMIN. R. §§ 13-169-49 (1988).

[295] The rules set the interim instream flow standards at:

> [t]hat amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted offstream through new or expanded diversions, and under stream conditions existing on the effective date of the standard. . . .

Id.

[296] *See supra* notes 283 & 293. The Review Commission on the State Water Code recommended that: "The Office of Hawaiian Affairs be requested to prepare a water plan that quantifies. . . adequate amounts of water to (1) maintain stream flow to ensure the propagation of native species and (2) grow taro and other traditional crops on lands that were [traditionally] used for those purposes. . . ." FINAL REPORT, *supra* note 206, at 16. The Water Commission did create a task force to engage in a preliminary survey of appurtenant water rights. The report, entitled "Preliminary Appurtenant Water Rights Survey, Phase I," has not been released to the public—"an advisory group has this survey under consideration at present." AHUE LETTER, *supra* note 283, attachment at 2.

and roughly identified certain pristine streams for special protection.[297] And the Water Commission has set aside some water in certain aquifers to satisfy Hawaiian Home Lands needs.[298] But beyond these attempts, the public interest has not been effectively evaluated and translated into permanent instream flow standards for critical streams.

Given this state of affairs, the Water Commission must process permit applications for streams and aquifers without permanent instream flow standards or developable yields having been set.[299] When an applicant then comes along, there are two likely alternatives from

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[297] STREAM PROTECTION AND MANAGEMENT IN HAWAII: RECOMMENDATIONS AND SUGGESTIONS, A REPORT BY THE STREAM PROTECTION AND MANAGEMENT (SPAM) TASK FORCE FOR THE COMMISSION ON WATER RESOURCE MANAGEMENT, STATE OF HAWAII 1 (April 1994).

[298] *See, e.g.*, HAW. ADMIN. R. § 13-171-61 (1994) (reserving 1.724 million gallons per day of ground water from state lands in the Waipahu-Waiawa aquifer system for use in the Papakolea, Nanakuli, and Waianae-Lualualei Hawaiian Homestead areas); HAW. ADMIN. R. § 13-171-62 (1994) (reserving .124 million gallons per day of ground water from state lands in the Waimanalo Hawaiian Homestead area).

[299] The Review Commission noted the lack of data as a significant problem for the Water Commission:

> A steady refrain heard by the Review Commission is the need for more data of one kind or another: more groundwater data, data on the interaction between groundwater withdrawals and stream flow, on stream flow, and on the connection between stream flow and the life cycle of native species such as the o'ape. Part of the refrain is the need for increased funding to enable the CWRM, in cooperation with the U.S. Geological Survey and other agencies, to gather the information it needs in order to make sound decisions which may have long-term implications on the State's groundwater systems and streams.
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> * * *
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> It has been suggested by members of the Review Commission that even another component is needed to strengthen the Hawaii Water Plan. An additional Data Needs Plan might be desirable to detail important gaps in the CWRM's current understanding of the State's water resources and to coordinate the means of filling those information and data gaps.

INTERIM REPORT, *supra* note 206, at 6-7.

The proposed "Data Needs Plan" was incorporated into the Review Commission's FINAL REPORT, *supra* note 206, at 46. The proposal would add the Data Needs Plan as a component to the Hawaii Water Plan. The component was:

> [A] Data Needs Plan, which shall be prepared by the Commission, in consultation with the counties and appropriate agencies, to classify the reliability of the principal data used in the Hawaii Water Plan, to identify missing data, to devise strategies for developing or improving such data, and to set priorities for improving data, consistent with needs and anticipated costs.

Id.

which the Water Commission must choose. First, it can proceed to issue the permit anyway, but make it subject to revisitation by the Water Commission when time, staffing and funding allow the necessary quantifications.[300] But as mentioned, this alternative provides no assurance of finality to the applicant.[301] At most, such a permit tells its holder: "Your use is not illegal now, but it might be later." Since there has been no assessment of the public interest in the stream, and no certain permit upon which any private expectations may rest, the result is the worst of all worlds: *No* public interest has been adequately accommodated.

The other alternative is for the Water Commission to determine and quantify the public's interest then and there: to determine (in the case of surface water) instream flow standards in the context of the individual's application. Yet if the Water Commission waits for permit applications to be filed before determining instream flow standards (or developable yields) the Water Commission must engage in the weighing of the public and private interests where the private interest has already become highly particularized.[302] An applicant with a project on the drawing board will provide evidence of specific costs which the Water Commission will have to weigh; had the Water Commission acted earlier, those difficulties would be avoided and the public interest more easily quantified. The issue of weighing will, of course, always exist for attempts to augment instream flow standards against existing uses.[303]

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[300] A "reasonable estimate" of uses would probably be adequate. *See* United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 118-19, 177 Cal. Rptr. 161, 180 (1986). The Court stated that the State Water Resources Control Board did not have to define or quantify existing rights before adopting a comprehensive water quality control plan. "Rather, the Board need only take the larger view of the water resources in arriving at a reasonable estimate of all water uses . . . ." *Id.*

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

[302] *See, e.g., State Water Resources Control Board*, 182 Cal. App. 3d at 119-20, 177 Cal. Rptr. at 180. The Court ruled that it was "unwise" to combine water quality and water rights functions in a single proceeding:

> The Legislature issued no mandate that the combined functions be performed in a single proceeding. The fundamental defect inherent in such a procedure is dramatically demonstrated: The [California State Water Resources Control] Board set only such water quality objectives as could be enforced against the [various diversion] projects. In short, the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights. In fact, however, the Board's water quality obligations are not so limited.

Id.

[303] CODE § 71(1)(E).

If apart from these problems instream flows are in fact quantified, the public interest is discharged as against one seeking maximum beneficial use of excess available water. The consistency with the public interest criteria in the reasonable beneficial use standard is thus satisfied by reference to the quantification. And this quantification should relate only to the public interests expressed in the statute. Any temptation by the Commission to enlarge the concept of the public interest beyond such quantified flows—or yields—to encompass goals unrelated to the purposes of the Water Code would be inappropriate. If the public interest were interpreted as a tool for manipulating quantifications and allocations to achieve general, socially desirable results, the public interest component would have no limit, and would be an invitation to arbitrariness.[304]

The public interest language in the Water Code should not be read as an invitation for the Water Commission to make social policy decisions unrelated to the public interests that are discharged in the establishment of instream flow standards and developable yields under the Water Code. In the analogous United States Supreme Court case of *NAACP v. Federal Power Commission*,[305] Justice Stewart wrote on behalf of a unanimous court: "This court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare.[306] Rather, the words take meaning from the purposes of the regulatory legislation."[307] If the quantification of instream flows and developable yields takes into account the water-related public interests set forth in the Water Code, then the Water Commission will have discharged its public interest obligations with respect to the applicable source as the Legislature intended.

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[304] Suppose, for example, the Water Commission concluded that a particular agricultural crop is not in the public interest because it depletes too many nutrients from the soil. Under this view the Water Commission would have the authority to prevent planting of that crop by withholding a water permit. Or the Water Commission would decide that it is in the public interest to maximize the number of employment opportunities in Hawai'i. The Water Commission would then issue permits on the basis of which use would employ the greatest number of people. Or it could decide to control development, and make de facto land use planning decisions by the control of water permits.

[305] 425 U.S. 662 (1976).

[306] *Id.* at 669-70.

[307] *Id.*

IX. Conclusion

In a world in which resource protection were the only issue, the Water Commission's job would be easy. It would primarily determine bulk quantities of water available for use. Its role, protecting the resource, would be simple and straightforward; its budget would be small. All waters not set aside for resource protection would be available for maximum beneficial use, including Native Hawaiian water uses. Even if the Water Code were to be radically altered, its fundamental purpose should remain of protecting the resource for the present and future needs of Hawai'i. It is the first reason for the existence of the Water Code. One could argue that this mission could be accomplished on the county level, but the benefits of uniformity of regulation, staff expertise, and consistency of policy dictate that it should remain a primary mission of the state.

The present Water Code is not so simple; there are competing and complex public values which seemingly require either balance or preference; the question remains how the conflicts are to be resolved. There is no ordering in current law that settles the question. While quantification of all beneficial instream uses would go a long way toward resolving the problem, the Water Commission, hampered by limited staffing and funding, has been able to do very little of that. As a result, every permit question before the Water Commission potentially involves not just quantity and quality, which are pertinent to resource protection decisions, but also *priority*, largely among competing public values. With the hundreds of permit applications now before the Commission, and the many hundreds that will inevitably follow, the Commission could be overwhelmed by priority disputes and requests for reservations of water. Given its rather modest funding, its resource protection mandate may be stretched to the breaking point. It will have potentially dozens of contested cases with no comprehensive legislative guidance as to how to allocate disputed water.

It seems apparent that any conditions, preferences or priorities that govern administrative discretion in the allocation process must be set by law, or by rule consistent with general legal criteria. Ideally, this should occur through establishment of reserved flows or other criteria. This was the conclusion the Review Commission on the State Water Code.[308] With any applicable preferences set in law, the legislative view

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[308] *See supra* note 251.

on what uses are protected (and socially desirable) will guide the Water Commission. Moreover, with preferences clarified, the Water Commission may focus less on priorities and disputes, and more on its first mission of resource protection and enforcement. The focus on permitting for applicants for water use should then become principally issues of quantity and quality. This is not to say that there will not be disputes over priority. There will be, but resolving a dispute in which the ground rules (that is, priorities) are clear is undoubtedly vastly easier, cheaper, and quicker than resolving disputes involving public interests in which there are no ground rules all.

In addition, the ability of citizens or groups to reserve non-instream "uses" of water that are not presently able to be put to actual use creates significant problems for both the Water Commission and applicants with ready, beneficial uses. It conflicts with fundamental common law notions of waste.[309] The beneficial use concept developed in the western United States contemplated a reality of use; non-use was never a beneficial use.[310] The rule allowing citizens to petition for reservations for non-consumptive set-asides of water (other than for instream flows) should be re-examined. Further, for private uses under permit, the Water Commission should encourage the free transferability of water and water uses. The efficient transition of water uses to higher and more productive land uses will discourage waste and economic stagnation. Where the resource is not threatened by a transfer, it should be allowed. Finally, the Water Commission should not evaluate the social desirability of each permit in evaluating whether it is "reasonable and beneficial." As in the case of wholesale re-examination of existing uses, the Water Commission has neither the time, the expertise, nor the authority to make such inquiries.

Clearly, any hypothetical water code is preferable that accomplishes its water resource management goals with the least bureaucracy and unnecessary interference. Beyond threshold resource protection and preference issues, there should be no theoretical need for the state to be greatly involved in issues of the purpose of the use, or to impose needless restrictions on the transferability of water.

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[309] *See supra* text accompanying notes 89-108.

[310] *See supra* notes 96 & 97.

Cultures In Conflict In Hawai'i: The Law and Politics of Native Hawaiian Water Rights

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I. A CRITICAL JUNCTURE IN HAWAIIAN WATER RIGHTS

He huewai ola ke kanaka na Kāne.[1] Ola i ka wai a ka 'ōpua.[2] Water is life. The legends, chants and dances of the indigenous people of Hawai'i[3] express this deeply held spiritual truth. Just as a plant wilts

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[1] "Man is Kāne's living water gourd. Water is life and Kāne is the keeper of water. MARY KAWENA PUKUI, 'ŌLELO NO'EAU, HAWAIIAN PROVERBS AND POETICAL SAYINGS 68 (1983) [hereinafter 'ŌLELO NO'EAU]. Kāne is one of the primary Hawaiian gods. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 128 (1986) [hereinafter HAWAIIAN DICTIONARY].

[2] There is life in the water from the clouds." 'Ōlelo No'eau], *supra* note 1, at 271.

[3] This article focuses upon water issues as they affect nā Kānaka Maoli, indigenous people of Hawai'i, who for purposes of this article are referred to as "Hawaiians."

and loses strength in the absence of water, Hawaiian life has suffered as access to water diminished through the dominance of foreign beliefs, values, practices and concepts of private property.

Water is power.[4] Hawaiians,[5] descendants of the first inhabitants of Ka Pae 'Āina O Hawai'i,[6] are at a critical stage in their struggle for

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[4] On January 23, 1993, State of Hawaii Board of Land and Natural Resources Chairman William W. Paty, in one of his last official acts before retirement, testified before the State House Committee on Energy and Environmental Protection that: "People like to say here in Hawai'i that land is power - but really water is power." *Cf.* 'OLELO NOEAU, *supra* note 1, at 271 ("I kani no ka 'alae i ka wai," "a mud hen cries [out happily] because it has water" and describing its kauna or deeper message as "a prosperous person has the voice of authority"). The significance of water or "wai" to the Hawaiian is reflected in its association with other words such as "Ho'o waiwai" which means "to enrich and bring prosperity to" and "waiwai" which refers to wealth. HAWAIIAN DICTIONARY, *supra* note 1, at 380.

[5] Debates over who "Hawaiians" are, which could ultimately suggest criteria for membership of a sovereign nation, are beyond the scope of this article. For purposes of this article, "Hawaiians" include descendants of the Polynesians who first settled "Hawai'i" and "Native Hawaiian rights" are comprised of those rights provided by the state and federal government, as well as those which inhere in the Hawaiian people as understood for purposes of international law. This article primarily addresses state law and the extent to which it recognizes and enforces these rights. For evolving indigenous human rights norms under international law, *see* United Nations Draft Declaration of the Rights of Indigenous Peoples by the Working Group on Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/993/29 (Aug. 23, 1993) [hereinafter U.N. Draft Declaration of Indigenous Peoples Rights]. Various federal and state laws attempt to define "Hawaiian" and do so differently.

In 1921, the U.S. Congress enacted the Hawaiian Homes Commission Act to return some of the lands claimed by the U.S. Territorial government to "native Hawaiian" people which it defined 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, 1920 (Act of July 9, 1921, ch. 42, 42 Stat. 108), *reprinted in* 1 HAW. REV. STAT. 167 (1985) [hereinafter HHCA]. The HHCA does not explicitly require U.S. citizenship or Hawai'i residency. The U.S. Congress has since described "native Hawaiian" as "any individual whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778." Native American Programs Act of 1974, 42 U.S.C. § 2991a (1980 as amended). The newer language expands "native Hawaiian" membership to include those with less than "one-half part of the blood" (although not for HHCA purposes).

The State of Hawaii established the Office of Hawaiian Affairs ("OHA") after the 1978 Constitutional Convention ("ConCon") to promote betterment of "Native Hawaiians" and "Hawaiians" and to serve as the lead state agency for coordinating Hawaiian programs, assessing the policies and practices of other state agencies impacting on Hawaiians, conducting advocacy efforts on behalf of Hawaiians and receiving reparations from the federal government. HAW. REV. STAT. §§ 10-3, 10-6

self-determination and recognition of their rights as sovereign peoples.[7]

(1993). OHA receives and administers "ceded lands" revenues set forth by section 5(f) of the Hawaii State Admissions Act. *Id.* These statutes define "Hawaiian" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii," and "Native Hawaiian" as:

> [A]ny descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

HAW. REV. STAT. § 10-2 (1993).

Several U.S. statutes differ when defining people of Hawaiian ancestry. Many use the 1778 date of European arrival in the Islands as a reference with varying requirements as to U.S. citizenship and state residency. *See, e.g.*, Native Hawaiian Education Act, 42 U.S.C. § 7901 (1994 as amended) and the Native Hawaiian Health Care Improvement Act of 1988, 42 U.S.C. § 11701-710 (1988). Confusion therefore exists over who falls within the meaning of terms such as "Hawaiian," "native Hawaiian," or "Native Hawaiian."

Defining a nation's membership is one significant aspect of the inherent right of self-determination. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference (entered into force Sept. 5, 1990) [hereinafter ILO 169]. The proposed United Nations Declaration of the Rights of Indigenous Peoples being drafted by the Working Group on Indigenous Population, at its Eleventh Session, set forth that "Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live." U.N. Draft Declaration of Indigenous People's Rights at 58. *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). This is a sensitive issue for Hawaiians as they advance in their struggle for self-determination. *See* Naliielua v. State, Civil No. 90-00063 (D. Haw. 1990) (recognizing Hawaiians are the indigenous peoples of Hawai'i similar to Native Americans).

[6] "Ka Pae 'Āina O Hawai'i" refers to the land of the Hawaiian nation. For a description of the boundaries of the lands of the Hawaiian nation, *see* Jon Van Dyke, *An Overview of the Jurisdictional Issues Affecting Hawai'i's Ocean Waters*, 3 L. SEA INST. SPEC. PUB. 5 (1995); Elizabeth Pa Martin & John Kekoa Burke, *Ocean Governance Strategies: Governance in Partnership with N' Keiki O Ke Kai, The Children of the Sea*, 3 L. SEA INST. SPEC. PUB. 173 (1995) (describing some of the lands of the Kingdom of Hawaii, including the island archipelago of Hawai'i, Palmyra, Midway and Kalama (Johnston Atoll)).

[7] *See* Richard Kekuni Blaisdell, *The Health Status of Kanaka Maoli (Indigenous Hawaiians)*, ASIAN AM. & PAC ISLAND J. HEALTH (1994); Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701- 710. *See also* State Office of Hawaiian Affairs Onipa'a Committee, Onipa'a: Five Days in the History of the Hawaiian Nation

Access to and control over water resources are integral factors in this

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(Eloise U. Tungpalan & Elizabeth Pa Martin eds. 1994) (documenting a broad spectrum of participation in the Queen Lili'uokalani centennial observance marking the one hundredth year from the illegal overthrow); Uncle Joe Chang, *The Return of the Native: Rebuilding the Hawaiian Economy*, 4 KE KIA'I 5-9 (Jan. 31, 1993); Rowena Eberhardt, *"Twenty Somethings" Reaction to the Overthrow*, 4 KE KIA'I 1-4 (Jan. 31, 1993). This struggle has been characterized as having two components:

> [T]he substance of self-determination entails two strains: First, self-determination requires that the governing institutional order substantially be the creation of constitutional processes guided by the will of the people, or peoples, governed. Second, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis. In its remedial aspect, applicable here, self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.

S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994). In describing the principle of self determination, Erica-Irene A. Daes, Chairperson/Rapporteur of the United Nations Working Group on Indigenous Populations (and a World War II Freedom Fighter), coordinating the drafting of the Declaration of Rights of Indigenous Peoples stated:

> Indigenous peoples have insisted, and rightly so, on the right to self-determination. Taking into consideration their justifiable wishes and the comments made in the relevant debates of the Working Group, I included the above-mentioned principles in the revised draft declaration. Of particular importance are the provisions contained in operative paragraph 3, which reads: 'Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria and limitations as applied to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, inter alia, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests.' These provisions should constitute and define, in my opinion, 'the right of indigenous peoples to self-determination', and should comprise a new contemporary category of the right to self-determination. It should be emphasized that this category of the right to self-determination does not constitute a second class exercise or expression of the rights of peoples.

Erica-Irene A. Daes, *Discrimination Against Indigenous Peoples - Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Item 14, U.N. Doc. E/CN.4/Sub.2/26/Add.1 (1993). The principle of self determination of indigenous peoples vis a vis nation states is a generally applicable norm of the highest order within the international system. *See also* S. James Anaya, *A Contemporary Definition of the International Norm of Self Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131, 132 n.7 (1993); set forth in U.N. CHARTER Chap. I, art. 1, para. (2); in art. 1 of the International Covenant on Civil and Political

struggle. While Hawaiians are building their future, agencies of the State of Hawaii and its counties are making and implementing critical water resource management decisions, including allocations of available water which may profoundly impact that future. Although decisions of the Hawaii Supreme Court and state constitutional and statutory law in theory provide extensive protection for Hawaiian water rights,[8] in practice they have provided limited protection.

The state's water law is at a critical juncture. The Water Commission and other key state policy makers are poised, through various legislative and administrative processes, to further develop and refine procedures that are likely to dictate future allocation of and access to water. These decisions will greatly impact the ability of Hawaiian individuals and communities to exercise their rights and to have adequate water resources for supporting cultural and spiritual practices, economic viability, and traditional Hawaiian lifestyles. Hawaiians' participation in these decision-making processes is therefore essential.

Until recently, state agencies have virtually ignored Hawaiian water rights and generally resisted the efforts of grassroots advocacy groups to actively pursue their enforcement. Raising the consciousness of the

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Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc A/6316 (1966); and in art. 1 of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967).

[8] Several of the State's constitutional and statutory provisions set forth the foundation for enforcement of Hawaiian water rights. Hawaiian custom and usage doctrines, including those relating to water, were codified in Hawai'i's statutes as exceptions to the incorporation of the common law of England into Hawai'i law. HAW. REV. STAT. § 1-1 (1993). In clarifying the intent of this statute the Hawaii Supreme Court, Chief Justice William S. Richardson, writing for the court, stated:

> We perceive the Hawaiian usage exception to the adoption of the English common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law.

Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 10, 656 P.2d 745, 750 (1982) (citing O' Brien v. Walker, 35 Haw. 104 (1939) *aff'd*, 115 F.2d 956 (9th Cir. 1940)). *See also infra* notes 220-255, 263-288 and accompanying text.

For recent Hawaii Supreme Court decisions regarding traditional and customary rights and water rights, *see* Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, No. 15460, 1995 WL 515898 (Hawai'i, Aug. 31, 1995) [hereinafter *PASH*]; Reppun v. Board of Water Supply, 65 Haw. 531, 537, 656 P.2d 57, 64 (1982); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 [hereinafter *McBryde I*], *aff'd upon reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) [hereinafter *McBryde II*], *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974).

Water Commission and other policy makers to ensure that they respect Hawaiians' water interests and adequately address their concerns has been and continues to be an important aspect of encouraging the broader community to respect Hawaiians' cultural values and water rights.

Hawaiians must practice and exercise their rights to water resources, or access to available water will continue to be lost. Three major hurdles hinder Hawaiians' exercise of these rights: 1) first-come, first-serve, non-comprehensive water source development permitting and its lack of integration with water resource management planning at both state and county levels, which accelerates the depletion of currently undeveloped water resources;[9] 2) persistent reluctance by the federal,

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[9] As plantations decline and water becomes available for other uses, the emphasis appears to be primarily toward resort and residential development. *See* Commission on Water Resource Management ("Water Commission" or "CWRM"), SUBMITTAL: Applications for Water Use Permits, Ewa-Kunia & Waipahu-Waiawa Ground Water Management Areas, Pearl Harbor, O'ahu (June 2, 1993); Water Commission, RESUBMITTAL: Applications for Water Use Permits, Ewa Caprock Ground Water Management Area, Ewa, O'ahu (April 28, 1993). However, in the 1994 legislative session, the Department of Agriculture and other state agencies lobbied for several proposals that attempt to keep former plantation water available for other agricultural uses. H. R. Res. 2917, 17th Leg., Reg. Sess. (1994); S. Res. 2706, 17th Leg., Reg. Sess. (1994). The 1995 legislature created an irrigation water development special fund to be administered by the State Board of Agriculture. S. 287, 18th Leg., Reg. Sess. (1995) [hereinafter IRRIGATION WATER BILL]. The Office of Hawaiian Affairs ("OHA") opposed this action stating: "Agricultural irrigation systems are also now at the heart of several water allocation controversies. The collapse of large-scale plantation agriculture and the historical pattern of plantation development and private ownership of these irrigation systems is having serious consequences on virtually every island. . . . To short-circuit public participation — as would occur with this measure — ignores and violates the public will and also limits our choices in this critical area of water use and delivery." *Hearings on S. 287 Before the Senate Comm on Planning, Land and Water Use Management,* 18th Leg, Res. Sess. (Jan 30, 1995) (testimony of Kina'u Boyd Kamali'i, OHA Trustee). *See also* Kit Smith, *Del Monte Into Diversified Crops; Planning Potatoes, Produce for Former Sugar Lands*, HONOLULU ADVERTISER, Feb. 24, 1994, at B1.

In some circumstances, golf courses may be classified as an agricultural use. HAW. REV. STAT. § 205(d) (1993). Many argue that golf courses are more properly classified as recreational uses. This is a particular concern because of large water demands associated with golf courses. *But see In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing, No. CCH-OA95-1 (CWRM, Haw. 1995) [hereinafter Waiāhole Water Case] Order Number 8 (Aug. 15, 1995) (Water Commission recognizes water for golf courses is not an agricultural use.).

state and local government to fully implement the public trust doctrine,[10] and 3) the federal and state (particularly, the Water Code's) failure to adequately provide for Hawaiian representation, participation, and informed consent concerning water rights issues.

Pursuing solutions to water disputes through litigation has its difficulties, including cost, delay, and issues related to the "politics" of the courts. Historically, when faced with determining whether Euro-American land use and ownership rights or the traditions and customs of Hawaiians shall take precedence in Hawai'i,[11] the Hawai'i courts have generally supported the predominant economic and political system in Hawaii and have not given traditional and customary Hawaiian beliefs, values and practices their full acknowledgement, respect and protection. Because the courts have consistently blocked efforts by Hawaiian individuals and organizations to enforce state and federal trust obligations to Hawaiians,[12] the judiciary has been viewed as an instrument of oppression of Hawaiians which selectively interprets and applies once dominant Hawaiian custom. In addition, the practical problems of matching corporate and government financial resources in legal battles can be a formidable obstacle. Thus, at this juncture some are hesitant to afford Hawai'i courts the opportunity to revisit and possibly reverse some basic tenets of the Hawai'i common law of water

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[10] Under the public trust doctrine, the government holds the resource in trust for the public; the public are beneficiaries of that trust. *McBryde I*, 54 Haw. at 186, 564 P.2d at 1339. *See also* HAW. REV. STAT. § 174C-2(a) (1993) [hereinafter Hawaii Revised Statutes Chapter 174C will be cited WATER CODE, with section numbers as found in that chapter]; D. C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK - THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES (1990). In implementing the public trust doctrine, government has an obligation to acknowledge the status of a Hawaiian public, distinct from the general public, and to reject notions of water as real property which have served to justify the status quo of water use patterns and practices today.

[11] Ken Kobayashi, *Hawaiian Rights, Western Laws. Basic Conflicts now before the Supreme Court*, HONOLULU ADVERTISER, Apr. 3, 1994, at B1. With regard to this clashing of the two systems, a senior Hawaiian activist feels that "Hawaiian rights do not exist under the American system. Hawaiians must rely on the foreigners' generous nature to select what traditional and customary rights they will allow Hawaiians to possess and exercise." Interview with Louis "Buzzy" Agard, Hawaiian Sovereignty Advisory Commissioner (May 24, 1994) (Mr. Agard is an NHAC Director) [hereinafter Agard interview].

[12] See Eric Yamamoto, Moses Haia and Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994).

rights now favorable to administering water resources as a public trust.[13]

Political solutions are now being debated. In November 1992, the Legislature appointed a Commission to begin the first comprehensive review of the State Water Code and its administrative rules; its findings and recommendations were presented to the 1995 State Legislature which were controversial, particularly because it called for statewide permitting.[14] The 1994 Legislature moved to "re-privatize" major irrigation systems by creating an agribusiness development corporation with powers to acquire, publicly finance and operate public and private irrigation systems originally developed for private plantation industries.[15] This corporation has been funded although Hawaiian Home

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[13] *But see, e.g., PASH,* No. 15460,1995 WL 515898, *18-19 (Hawai'i, Aug. 31, 1995) ("Moreover, Hawaiian custom and usage have always been a part of the laws of this State. Therefore, our recognition of customary and traditional Hawaiian rights . . . does not constitute a judicial taking"). The Deputy Attorney General serving as counsel to the Water Commission has expressed concern over actions under the Water Code that may generate a lawsuit by sugar interests who are likely to argue they have "vested rights" to certain allocations of water, the reduction of which by the Water Commission may constitute a "taking" for which compensation may be required.

[14] Act 45, § 5, 14th Leg., 1987 Reg. Sess., 1987 Haw. Sess. Laws 74 [hereinafter WATER CODE ACT]. See *infra* notes 338-56 and accompanying text for information regarding the Water Code Review Commission. Administrative rules for implementing the Native Hawaiian Water Rights and Instream Protection sections of the Water Code have advanced through an extended public hearing process. On October 11, 1995, the Water Commission decided to schedule another round of hearings. *See infra* notes 357-69 and accompanying text.

[15] Agribusiness Development Corporation Act, Act 264, June 30, 1994, 17th Leg., 1994 Reg. Sess., 1994 Haw. Sess. Laws 810 [hereinafter ADC Act]. *See also* supporting Testimony by Deputy Director Jack Keppeler of the Department of Land and Natural Resources presented to the House Committee on Finance for this Senate bill. Initially, language in the bill to allow this corporation to "make decisions on water rights subject to the Water Commission" raised major concerns among Hawaiian rights and environmental advocates. Concern regarding the potential conflicts of interests which would arise if such powers were extended to a water purveyor were addressed in part through a requirement that all usage of water shall be in accordance with the Water Code. Senate Bill 3045 was signed into law as Act 264 on June 30, 1994. For further information regarding the agribusiness development authority, see HONOLULU ADVERTISER, Apr. 10, 1994 at B-1, B-4; HONOLULU ADVERTISER Apr. 17, 1994, at B-4; *Meet the Agribusiness Development Corporation, or 'What to grow now, if not sugar?'*, 5 KE KIA'I 1-3 (June 1, 1994).

The 1995 State Legislature created the Irrigation Water Development Special Fund, which authorizes the Board of Agriculture to issue bonds, designate irrigation projects, and fix rates for water services. IRRIGATION WATER BILL, *supra* note 9. The Legislature appropriated $1.0 million to establish the Hawaii Agricultural Research Corporation.

Lands water infrastructure problems remain substantively unaddressed due in part to a lack of political will to provide sufficient funding. Some existing water systems could support the residential and commercial water needs of new cities.

Hawaiian domestic and economic water needs now and in the future will be seriously affected by the resolution of these issues. Meanwhile, high levels of skepticism and mistrust deepen at the grassroots levels. Many Hawaiians are wary of cooperating with existing programs, skeptical that their words or their values would make any difference to decisionmakers. Scarred by experience, Hawaiians are increasingly disinclined to participate in "the system's" programs and separatist inclinations are growing within Hawaiian communities.[16]

As Hawaiians advance toward increased self-determination[17] and as the general public becomes more aware of native beliefs, values, and

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[16] For example, on January 17, 1993, the centennial of the illegal overthrow, Haunani-Kay Trask, Director of the Center for Hawaiian Studies at the University of Hawai'i at Mānoa, exhorted a crowd of over 20,000 Hawaiians and non-Hawaiians: "Don't make nice. Never make nice . . . Fight. Fight. Fight." She admonished the crowd, "I am not an American. We are not Americans. Say it in your heart. Say it in your sleep. We will never forget what the Americans have done to us — never, never, never. The Americans, my people, are our enemies." Haunani-Kay Trask, Address at 'Iolani Palace (Jan. 17, 1993), *recorded on* SUDDEN RUSH, *Onipa'a, on* NATION ON THE RISE (Wreckxshop Wreckords 1994); Samuel Alapai, Kaha-Na-Moku III of the Kingdom of Hawaii, Proclamation entitled "Declaration of War" (Jan. 17, 1993) (on file at NHAC office); Joe Chang, *Makapu'u, A Small Victory for Hawaiians*, 5 KE KIA'I 8 (July 1, 1994) (regarding occupation of Makapu'u Beach). For a brief overview of some of the various models of sovereignty being discussed, see Mahealani Kamauu & Bruce Keppeler, *What Might Sovereignty Look Like?, in* Price of Paradise II 295-303 (Randall Roth ed. 1993); OHA LAND AND NATURAL RESOURCES DIV., SOVEREIGNTY HAWAI'I (Juniroa Productions May 19, 1995).

[17] A broad spectrum of efforts have contributed to these advances. *See* Davianna McGregor, *Hawaiians Organizing in the 1970's*, 7 AMERASIA J. 2 (1981); Haunani-Kay Trask, *The Birth of the Modern Hawaiian Movement: Kalama Valley, O'ahu*, 21 HAW. J. HIST. 126-53 (1987); Michael K. Dudley & Keoni K. Agard, A HAWAIIAN NATION II: A CALL FOR HAWAIIAN SOVEREIGNTY 107-27 (1990); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77 (1991); Davianna McGregor, *Redress for Indigenous Peoples' Rights: The Case of Native Hawaiians*, RESTRUCTURING FOR WORLD PEACE: ON THE THRESHOLD OF THE TWENTY-FIRST CENTURY (Katharine Majid Tehranian ed. 1992); Robert Reinhold, *A Century After Queen's Overthrow, Talk of Sovereignty Shakes Hawaii*, N.Y. TIMES, Nov. 8, 1992, at 14; HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER, COLONIALISM & SOVEREIGNTY IN HAWAI'I (1993); ANAYA, *supra* note 7; ONIPA'A, *supra* note 7. Hawaiians have united on several fronts. For example, an effort to increase

customs, support more culturally-sensitive water and land management practices is growing. Nevertheless, entrenched land and resource allocation processes continue seemingly unabated as state and county agencies issue a steady stream of licenses and permits for uses not consistent with such management practices.

This article focuses on struggles over water in Hawai'i and describes a number of critical water management problems and processes confronting Hawaiian communities. It also suggests possible options for more effectively administering Hawaiians' water resources within the context of existing state and county water management structures. As Hawaiians move toward greater self-determination and sovereignty, opportunities to adopt culturally-based and community-based solutions to water resource management and allocation issues increase. Participation in and decision-making authority over water resources planning and management by Hawaiians must be significantly increased in order to ensure that Hawaiian rights will be more than just "paper" rights. Absent substantial progress to assure that Hawaiian custom are integrated into existing water and land management processes, management and governance autonomous from state and federal influence may be the only viable means for Hawaiians as a people to have a real voice in determining Hawai'i's future.

This article examines the State of Hawaii's existing water management policies and practices. Hawaiians extends to management control over natural resources including water. The United States' admitted complicity in the illegal overthrow of the Hawaiian Kingdom further supports Hawaiian management of Hawai'i's natural resources.[18] Pend-

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awareness of Hawaiian sovereignty and self-determination has brought together over fifty diverse Hawaiian groups in Hui Na'auao. Conservative Hawaiian organizations such as the Office of Hawaiian Affairs, Department of Hawaiian Home Lands, Association of Hawaiian Civic Clubs, The Hawaiian Chamber of Commerce, formerly the Business/Professional Association, Kamehameha Schools/Bishop Estate, Royal Order of Kamehameha, and Alu Like have worked together with grassroots organizations such as Ka Pakaukau, Ka Lahui Hawai'i, La Ea O Hawai'i Nei, Ka 'Ohana 'O Ka Lae, Ohana Council and Free Association. *Id.*

[18] For descriptions of the United States' wrongful conduct, see 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 170 Stat. 1510 (1993) *reprinted in* ONIPA'A, *supra* note 7, at 154-55 [hereinafter U.S. Apology Bill]. This law "urges the President of the United States to [also] acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people," after declaring:

Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, gov-

ing re-establishment of the Hawaiian sovereign nation, any political

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ernment and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;

. . . .

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;

. . . .

The Congress . . . (3) apologizes to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.

Id. This resolution apologizing for the United State's complicity and illegal actions in the overthrow failed passage by the U. S. House of Representatives prior to January 17, 1993 (the 100th anniversary of the illegal overthrow of the Hawaiian nation) but was reintroduced as Senate Resolution 19 on January 21, 1993. It passed in the U.S. Senate by a vote of 65-34 on October 27, 1993 and in the House by voice vote of two-thirds of the House members. It was signed into law by President William Clinton on November 23, 1993. *See also* MICHAEL DOUGHERTY, TO STEAL A KINGDOM (1992); RICH BUDNICK, STOLEN KINGDOM, AN AMERICAN CONSPIRACY (1992).

With respect to the actions of the State of Hawai'i, the Legislature established a Hawaiian Sovereignty Advisory Commission to advise the legislature of a process "to facilitate efforts of native Hawaiians to be governed by an indigenous nation of their own choosing" and acknowledged that "the indigenous people of Hawaii were denied the mechanism for expression of their inherent sovereignty and self-determination, their lands and their ocean resources." Act 359, July 1, 1993, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 1010 [hereinafter SAC Act] (evolved to Hawaiian Elections Council in next session). *See* Davianna P. McGregor, *Ho'i Ho'i Ea Hawai'i, Restoring Hawaiian Sovereignty,* NEW POLITICS IN THE SOUTH PACIFIC (Ron and Marjory Crocombe, et al. eds., 1995). The United Church of Christ in the USA apologized to Hawaiians on January 17, 1993 on the grounds of the I'olani Palace. Dr. Rev. Paul Sherry, United Church of Christ Apology at I'olani Palace (Jan. 17, 1993). *See also* Dr. Rev. Paul Sherry, An Apology to Na Kanaka Maoli, Address at the Kaumakapili Church on O'ahu during Onipa'a activities held to recognize the overthrow that had occurred one hundred years earlier. This was the palace of the ali'i, Queen Lili'uokalani, which was invaded one hundred years earlier by an "act of war" of the United States. *See, e.g.*, PUHIPAU & JOAN LANDER, ACT OF WAR: THE OVERTHROW OF THE HAWAIIAN NATION (Na Maka o Ka 'Aina 1993) (on file at NHAC office); PUHIPAU & JOAN LANDER, THE TRIBUNAL (Na Maka o Ka 'Aina 1994) (on file at NHAC office). *Compare* Thurston Twigg-Smith, *Overthrow of the Monarchy Requires No Apology,* HONOLULU ADVERTISER, Jan. 24, 1993, at B-1 (author is the former owner and current chairman of the Honolulu Adverstiser); Thurston Twigg-Smith, *Opposing Viewpoints on Sovereignty,* HONOLULU ADVERTISER, Sept. 3, 1994, at A-6; LORRIN A. THURSTON, A HAND-BOOK ON THE ANNEXATION OF HAWAII (n.d.) (author is Thurston

and legal analysis of water resource management and regulation must take into account the extent to which Hawaiians currently are either empowered or impeded in exercising control over Hawai'i's water resources.[19]

II. HISTORICAL BACKGROUND

A. Traditional and Customary Beliefs, Values and Practices

Belief in the unity of humans, nature, and the gods formed the core of the philosophy, world view, and spiritual belief of early Hawaiians.[20]

Twigg-Smith's ancestor) *with* GROVER CLEVELAND, MESSAGE OF THE PRESIDENT, INTERVENTION OF THE UNITED STATES GOVERNMENT IN AFFAIRS OF FRIENDLY FOREIGN GOVERNMENTS, H. R. REP. No. 243, 53d Cong., 2d. Sess. 10, 12-13 (1893); *Ka Ho'okolokolonui Kanaka Maoli: People's Tribunal Convicts U.S.*, 4 KE KIA'I 1 (Oct. 1, 1993) (1993 verdict of People's International Tribunal convicting U.S. of crimes against Hawaiian people); NHAC Editorial, *Thurston Rebuttal: Another View of the Apology*, 4 KE KIA'I 12-15 (Mar. 10, 1993); Kaha'i Topolinsky, *Opposing Viewpoints on Sovereignty*, HONOLULU ADVERTISER, Sept. 3, 1994, at A-6; Robert M. Rees, *Curiouser and Curiouser*, HONOLULU WEEKLY 8 (Oct. 11, 1995)(criticizing the Honolulu Advertiser for its lack of "independent intelligence").

[19] A discussion of the many aspects of and points of view regarding sovereignty and self-determination is beyond the scope of this article. For a more comprehensive analysis of these issues, see Anaya, *supra* note 7; *see also* Daes, *supra* note 7. Injustice in water resource management processes combined with decreasing availability of water resources may, independent of any other political and legal justifications, represent substantive breaches of the Compact of Statehood and may therefore justify Hawaiians' rejection of existing State and Federal governance. *See, e.g.*, Anaya, *supra* note 7, at 158, n. 108 (stating that "Secession may be an appropriate remedy in limited contexts [as opposed to a generally available 'right'] where substantive self-determination for a particular group cannot otherwise be ensured").

The State has acknowledged its trust responsibility to native Hawaiian beneficiaries of the Hawaiian Home Lands Commission Act of 1921. The legal basis and the source of the obligation is in the act itself. Moreover the Admissions Act and the Organic Act further support a trust obligation to all Hawaiians. *Hawaiian Homes Commission Act: Hearings Before the Committee on Energy and Natural Resources*, 102d Cong., 2d Sess. 241-54, 303-20 (1992) (statements of Alan T. Murakami, Native Hawaiian Legal Corporation litigation director, and Warren Price, former Attorney General to State of Hawai'i).

[20] The Kumulipo (a Hawaiian creation chant) is a celebration of the Hawaiian way, according to which humankind is all part of a family of beings living in unity and respect:—Whether the sea cucumber, the seaweed, the slug, human, or the dolphin — all have equal right to respect. *See* DAVID MALO, HAWAIIAN ANTIQUITIES 2-5 (Dr.

Lōkahi (unity in harmony) expresses this fundamental relationship. Aloha (love,, kindness, compassion, mercy, respect), the consolidation of many values, is a central ethic of Hawaiians and guides conduct in the home and community. Related terms expressing these fundamental relationships are aloha 'āina a me mālama 'āina (love, care for, and protect the land). Through disciplined practice of these values and a holistic relationship with nature, individuals and communities achieve the valued condition or state of pono (goodness, uprightness, morality, correct or proper procedures, excellence).[21]

The main social unit in early Hawaiian civilization was 'ohana (family, relative or kin group) who lived and worked upon portions of land within ahupua'a.[22] Ahupua'a are land divisions typically running

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Nathaniel B. Emerson trans. 1898); MARTHA WARREN BECKWITH, THE KUMULIPO, A HAWAIIAN CREATION CHANT (1951); RUBELLITE KAWENA JOHNSON, KUMULIPO, THE HAWAIIAN HYMN OF CREATION (1981); HAWAIIAN DICTIONARY, *supra* note 1, at 182. Importantly, it is not any "one" that is central to this world view; rather it is the community, the many — places, people and creatures living and beyond life, and the natural resources with which we live all constitute our spiritual kin. *See generally* Davianna McGregor, *Kupa'a I Ka 'Āina: Persistence on the Land* 92-95 (1989) (unpublished Ph.D. dissertation, Hawaiian Pacific Collection, Hamilton Library, University of Hawai'i (Mānoa)). *See also Hearings on the Report of the Native Hawaiians Study Commission Before the Senate Committee on Energy and Natural Resources*, 98th Cong., 2d Sess. 104 (1984) (statement of Marion Kelly).

[21] A contemporary practitioner of Hawaiian religion who has been instrumental in achieving legal recognition of traditional religious beliefs, values, and practices by the U.S. courts explains the relationship of the Hawaiians to land and nature as follows:

> At its root, *Aloha 'Āina* is the belief that the land is the religion and the culture. Native Hawaiians descend from a tradition and genealogy of nature deities: *Wākea, Papa, Ho'ohākūkalani, Hina, Kāne, Kanaloa, Lono* and *Pele* - the sky, the earth, the stars, the moon, water, the sea, the natural phenomena such as rain and steam; and from native plants and animals. The native Hawaiian today, inheritors of these genes and *mana* [spiritual power] are the *kino lau* or alternate body forms of all our deities.

Noa Emmet Aluli, *Aloha 'Āina: Without the Land We Are Nothing*, HONOLULU STAR BULLETIN 25 (1987) (Ho'olako Year of the Hawaiian Progress Edition). *See also* SAMUEL M. KAMAKAU, TALES AND TRADITION OF THE PEOPLE OF OLD NA MO'OLELO A KA PO'E KAHIKO 32-35 (1991) [hereinafter KA PO'E KAHIKO].

[22] *See, e.g.*, JON J. CHINEN, ORIGINAL LAND TITLES IN HAWAII 55 (1961); Emma Metcalf Nakuina, *Ancient Hawaiian Water Rights And Some of the Customs Pertaining to Them, in* THRUM'S HAWAIIAN ANNUAL 79 (1984) [hereinafter NAKUINA, REPORT ON HAWAIIAN CUSTOM]; Territory v. Gay, 31 Haw. 376, 379-80 (1930), *aff'd*, 52 F.2d. 356 (9th Cir), *cert. denied*, 248 U. S. 677 (1931).

The 'ohana (extended family) concept has been characterized as follows:

> Between households within the 'ohana there was constant sharing and exchange of foods and of utilitarian articles and also of services, not in barter but as

from the sea up into the mountains which functioned as integrated natural resource systems.[23] Ali'i nui (ruling chiefs), believed to be descended from na Akua (gods—and thus responsible for stewardship over the land) divided and re-divided control over the districts of the islands among themselves through war and succession.

Chiefs delegated authority to lesser ranking chiefs called konohiki who supervised cultivation and use of the lands and waters by maka'ainana (people of the land, commoners, native tenants).[24] While

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voluntary (though decidedly obligatory) giving. 'Ohana living inland (ko kula uka), raising taro, bananas, wauke (for tapa, or barkcloth, making) and olona (for its fibre), and needing gourds, coconuts and marine foods, would take a gift to some 'ohana living near the shore (ko kula kai) and in return would receive fish or whatever was needed. The fisherman needing poi or 'awa would take fish, squid or lobster upland to a household known to have taro, and would return with his kalo (taro) or pa'i'ai (hard poi, the steamed pounded taro corm) . . . In other words, it was the 'ohana that constituted community within which the economic life moved.

Mary Kawena Pukui & E. S. Craighill Handy, *The Polynesian Family System in Ka'u, Hawaii* 5-6 (1958). *See generally* Davianna McGregor, Traditional Hawaiian Cultural, Spiritual, and Subsistence Beliefs, Customs, and Practices (Nov., 1995) (on file with Native Hawaiian Advsory Council).

[23] An ideal *ahupua'a* is generally outlined by ridges which define Hawai'i's valleys:

Although often mentioned as the 'unit' of land, the ahupua'a was not a measure of an area, as is the acre, for the ahupua'a varied in size from 100 to 100,000 acres of land. The ideal ahupua'a extended from the sea to the mountain, thereby enabling the chief and his followers to obtain fishes and seaweeds from the ocean, raise taro and bananas in the lowlands, and to take forest products from the mountains. However, often times, because of the off shapes of some ahupua'as, others were cut-off either from the mountains or the sea. Many of the ahupua'as were divided into smaller units of land called 'ilis'.

See CHINEN, *supra* note 22, at 52.

[24] Communal rights of Hawaiians allowed all people access to land administered by chiefs and cultivated by commoners:

In the traditional system, a hierarchy of *Ali'i, konohiki,* and *maka'ainana* (Chiefs, Land stewards, and commoners) administered and cultivated any given piece of *'Aina.* The *Ali'i* and his *konohiki* in this hierarchy were appointed by the *Mo'i* (paramount Chief) upon his coming to power. This arrangement ensured co-ordinated cultivation by the *maka'ainana,* with each level of people having overlapping rights to, and interests in, the products of the *'Aina.*

LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? 9 (1992) [hereinafter L. KAME'ELEIHIWA].

In practical terms the *maka'ainana* fed and clothed the *Ali'i Nui,* who provided the organization required to produce enough food to sustain an ever-increasing population. Should a *maka'ainana* fail to cultivate or *malama* his portion of the *'Aina,* that would be grounds for dismissal. By the same token, should a *konohiki*

their tenure was dependent upon their benefactors, in practice maka'ainana stayed on the land despite changes brought about by wars or chiefly succession. The tenure of chiefs and konohiki was often less secure and more directly dependent upon who was in power. Konohiki were often related to chiefs and might be appointed in recognition of loyal or outstanding service.[25] However, unlike elsewhere in Polynesia, konohiki were less frequently related to maka'ainana who lived on the land under their supervision.[26] Konohiki represented the collective political interests of the ali'i (chiefly class) as well as the individual land-based interests of patron chiefs and coordinated use rights and obligations of the maka'ainana with these chiefly interests.[27]

Taro, a spiritual and nutritional center of Hawaiian culture, was raised by early native planters to a higher state of cultivation than anywhere else in the world.[28] Successful wetland cultivation of taro

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fail in proper direction of the *maka'ainana,* he too would be dismissed—for his own failure to *malama.* The *Ali'i Nui* were no better off in this respect, for if any famine affected the *'Aina,* they could be ousted for failing to *malama* their religious duties. Hence, to *Malama 'Aina* was by extension to care for the *maka'ainana* and the *Ali'i,* for in the Hawaiian metaphor, these three components are mystically one and the same.

Id. at 30-31. Each chief was expected to make the ahupua'a under his control productive which was impossible without a stable work force. The ahupua'a chief could not ill-treat maka'ainana without running the risk of losing this labor, which would result in failing his obligations to support the ali'i nui (high chiefs) and the kahuna nui (priests). Should he fail, his position as ahupua'a chief was thus in danger as he could be replaced by the high chief with someone who could work well with maka'ainana. Therefore, the political structure of the early Hawaiians instinctively provided for a balance of power to encourage harmonious behavior in the social hierarchy. *See also* MELODY K. MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 4 (1991).

[25] See L. KAME'ELEIHIWA, *supra* note 24, at 274-85 for a comprehensive analysis of konohiki, the lands they received in the Mahele, and their ascendancy through the paths of Lono and Ku.

[26] *See* C. Ralston, *Hawaii 1778-1854: Some Aspects of Maka'ainana Response to Rapid Cultural Change,* 29 J. PAC. HIST. 23 (1984).

[27] Although the traditional role of the *maka'ainana* has been compared to that of serfs in Europe, this is inaccurate; maka'ainana had much greater liberties than European feudal systems allowed. For example, if maka'ainana were treated unfairly, they were free to move and offer their labor to a different ahupua'a chief. MACKENZIE, *supra* note 24, at 4.

[28] E. S. CRAIGHILL HANDY & ELIZABETH G. HANDY, NATIVE PLANTERS IN OLD HAWAII, THEIR LIFE, LORE AND ENVIRONMENT 80 (1978). Taro's spiritual significance to Hawaiian culture is reflected in its origin: Taro was created when the first born son of Wakea (Sky Father) and Ho'ohokukalani (his daughter by Papa, Earth Mother),

depends upon steady flows of cool, fresh water. The large-scale taro production necessary to support large pre-contact Hawaiian populations required building and maintaining extensive 'auwai (ditch, canal) systems to effectively distribute the water.[29] The engineering and water management mastery of Hawaiians is renowned, particularly with respect to building and operating flooded terraces, irrigation ditches, and fresh and salt water fishponds. The need for cooperation and for coordination of tasks associated with planting, watering, tending, and harvesting taro shaped relationships between individuals, families, and communities.[30] "The streams and ditches were the regulators, the law givers in the communal relationship — not directly, but because upon their water depended the taro, and upon the taro depended man."[31]

The Hawaiian word for law, kānāwai,[32] has been literally translated as "belonging to the waters."[33] Water is a life-giving force identified with Kāne.[34] Kapu (codes of behavior) ensured that all community

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had a premature baby named Haloa-naka (longstalk). Haloa-naka died and was buried in the earth and from Haloa's body came the first taro plant. Later from the same parents, a second child, also named Haloa, became the ancestor of Hawaiians. Thus, taro, the staple food for Hawaiians is the elder brother of the Hawaiians. King David Kalakaua traced his lineage to the second Haloa and used the taro leaf symbol in his crown. *Id.*

> Taro (Colocasia escylenta) is a kind of aroid cultivated since ancient times for food spreading widely from the tropics of the Old World. In Hawaii taro has been the staple from earliest times . . . and its culture developed greatly including more than 300 forms. All parts of the plant are eaten, its starch root principally as *poi*, and its leaves as *lu'au*. It is a perennial herb consisting of a cluster of long-stemmed, heart shaped leaves rising a foot or more from underground tubers or corms.

Reppun v. Board of Water Supply, 65 Haw. 531, 534 n.2, 656 P.2d 57, 60 n.2 (1982) (*citing* HAWAIIAN DICTIONARY at 115 (1971)).

[29] HANDY & HANDY, *supra* note 28, at 27, 58 & 62.

[30] *Id.* at 60.

[31] *Id.* at 76.

[32] HAWAIIAN DICTIONARY, *supra* note 1, at 127.

[33] HANDY & HANDY, *supra* note 28, at 58. "A person's right to enjoy his privileges, and conceding the same right to his fellow man, gave the Hawaiians their word for law, *kanawai*, or the equal sharing of water." *Id.* Many early laws concerned water and has led some to believe the word "kanawai" derived from "wai," water. HAWAIIAN DICTIONARY, *supra* note 1, at 127. However, given the many ancient edicts of gods that have no relation to water, that view is doubtful. *Id.*

[34] HAWAIIAN DICTIONARY, *supra* note 1, at 128; *see also* Samuel M. Kamakau, The Works of the People of Old, *Na Hana a ka Po'e Kahiko* 35 (1976) (reciting a planter's prayer: "E kulia e ikumaumaua e ke akua (Praise and receive thanks, O God), E Kāne e Kaneikawaiola (O Kāne, O Kāne-of-lifegiving water).")

members would avoid polluting the streams. Konohiki ensured that all tenants of the ahupua'a enjoyed equal access to water. Disputes over water were rare.[35] Hawaiians' use of water was accompanied by correlative responsibilities to maintain the 'auwai systems and lo'i'ai (taro pond fields).[36] The authority of the Konohiki to oversee land use and water distribution was correspondingly accompanied by duties to maka'ainana.[37] Thus, for early Hawaiians, principles of property and law were based primarily upon use of land and water, rather than upon concepts of ownership.[38]

In 1894, Emma Metcalf Nakuina, a Commissioner of Private Ways and Water Rights for the Kona O'ahu district, described ancient Hawaiian water rights and some customs pertaining to them. While this by no means describes the full range of beliefs, values and practices

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[35] For a limited summary of customary Hawaiian water management, see NAKUINA, REPORT ON HAWAIIAN CUSTOM, *supra* note 22, at 79. *See also* Jon Van Dyke, Williamson Chang, Nathan Aipa, Kathy Higham, Douglas Marden, Linda Sur, Manabu Tagomori and Ralph Yukimoto, *Water Rights in Hawaii*, *in* LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141 (Hawaii Institute for Management and Analysis in Government 1977) (presented to State Dept. of Budget & Finance) [hereinafter LAND & WATER].

[36] In *Reppun*, the Hawaii Supreme Court described this duty:

> Under the ancient system both the self-interest and responsibility of the konohikis would have created a duty and to maximize benefits for the residents of the ahupua'a. In other words, under the ancient system the "right" of the konohiki to control water was inseparable from his "duty" to assist each of the deserving tenants. The private division of land and the subsequent division of water allowed for the separation of this "right" from the concomitant "duty."

Reppun v. Board of Water Supply, 65 Haw. 531, 547, 656 P.2d 57, 69 (1982).

[37] H. A. Wadsworth, *A Historical Summary of Irrigation in Hawaii*, 37 HAWAIIAN PLANTERS RECORD 134 (1933); MACKENZIE, *supra* note 24, at 150. *See supra* note 24 (discussion of ahupua'a chiefs' interrelationship and dependency on maka'ainana).

[38] *See generally* MACKENZIE, *supra* note 24.

> In our English parlance we speak of "the law of the land," possibly because our Anglo-Saxon forebears were cultivators of unirrigated lands, and the earliest laws had to do with farming and grazing lands. Taro, which grew along streams and later in irrigated areas, was the food staple for Hawaii and its life and productivity depended primarily upon water. The fundamental conception of property and law was therefore based upon water rights rather than land use and possession. Actually, there was no conception of ownership of water or land, but only of the use of water and land.

Id. at 58.

which existed from time to time and place to place in early Hawai'i, it is one of the few written descriptions available from these times:

> All auwais tapping the main stream were done under the authority of a Konohiki of an Ahupua'a, Ili or Ku. In some instances the konohikis of two or three independent lands—i.e., lands not paying tribute to each other—united in the work of auwai making, in which case the konohiki controlling the most men was always the recognized head of the work.
>
> . . . .
>
> No auwai was permitted to take more water than continued to flow in the stream below the dam. It was generally less, for there were those living makai or below the same stream, and drawing water from it, whose rights had to be regarded.
>
> Any dam made regardless of this well recognized rule, were levelled to the bed rock by the water right holders below, and at any rebuilding, delegates from each dam below were required to be present to see that a due proportion of water was left in the stream.[39]

Water was the province of the gods and its use was considered a sacred privilege.[40] The opening of taro lo'i was a sacred and festive occasion when people asked their gods or goddesses for protection of their source of water, food, and life.[41] Today, more people are drawn to the taro lo'i,[42] but taro is still scarce.[43] Fortunately, there are numerous efforts underway to encourage and revive wetland taro cultivation in Hawai'i.[44]

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[39] NAKUINA, REPORT ON HAWAIIAN CUSTOM, *supra* note 22, at 79-83. Disputes about the amounts of water allocated by the stream were usually settled in the lowest possible level of the chiefly hierarary. Riley, Thomas J., Where Taro is King, Native Planters: Hookupa Kalo, Vol. 1 No. 1 at 40.

[40] *Id.*

[41] *Id.*

[42] *See infra* note 44. *See also* Edwin Tanji, *Taro Grows Amid Legal Tangle: A Question of Water Rights at Maui Farmer's Patch,* HONOLULU STAR BULLETIN, Mar. 20, 1994, at A5.

[43] Barbara Burke, *Lawmaker Calls for More Growing of the Traditional Staple,* HONOLULU STAR BULLETIN, Mar. 30, 1994, at B1.

[44] For example, on Kaua'i, the Waipā project acquired a lease of Bishop Estate land in Waipā for community taro farming. On O'ahu, the Ka'ala Cultural Learning Center (Wai'anae) is expanding its lo'i and its long-standing educational programs. In 1990, Waiāhole Poi Factory reopened as a community-based outlet for taro and other food products primarily for distribution to the local Windward community. *See* Patrick Johnston, *Up and Running! Community-Based Initiative Behind Poi Factory Renaissance,* KA WAI OLA O OHA, July 1993, at 7. Several businesses operate out of the

B. Colonization

With the arrival of foreigners and their imposition of Euro-American land ownership concepts,[45] highly developed systems of 'auwai, fish-

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Waiāhole Poi Factory, Hui Ulu Mea 'Ai, a non-profit group run primarily by the Reppun family which produces poi and Hale Kealoha Catering, the Hoe family business, which caters Hawaiian foods and sells plate lunches. On the North Shore, NHAC's Mala'ai o Pa'ala'akai project in Waialua, O'ahu and other community groups are restoring wetland agricultural systems in Waialua and Hale'iwa. Taro product development has expanded with business ventures such as Pa'i'ai Poi's Vonn Logan and Ho'ai's Aimoku McClellan. *See Teaming Up to Sell Taro*, KA WAI OLA O OHA, Oct. 1995, at 10.

On Maui, taro farming is growing steadily in Kahakuloa, Honokohau, Ke'anae, Wailua, and other west and east-side valleys, and Moloka'i continues to be a stronghold of both dryland and wetland taro cultivation. On Hawai'i, Waipi'o Valley lo'i are flourishing, with restoration efforts extending to wetland and dryland field systems in Hamakua, Kohala, Ka'u, Puna, and Hilo.

[45] Since wai (water) is a primary focus of this article, only a brief synopsis of land issues is provided as background to assist in understanding changes in land tenure and water allocation that have occurred during Hawai'i's history. At the time of European "discovery" of Hawai'i, the Hawaiian population was self-reliant. Integral to its unique community lifestyles was a functioning economic system. Sovereign control was exercised over the land under the land tenure system that did not include the concept of private ownership. *See generally* KAME'ELEIHIWA, *supra* note 24, at 8-16; RALPH S. KUYKENDALL, 1 THE HAWAIIAN KINGDOM 1778-1854 at 9-10 (1938).

A series of legal acts transformed Hawaiian land tenure and private fee simple ownership in land was established:

1) The first act on 10 December 1845 created a five-member Board of Commissioners to Quiet Land Titles, their appointment by King Kamehameha III in January 1846, and the adoption in April 1846 of a set of principles by which the Commission members would adjudicate land claims placed before them.
2) The second act concerned a series of land divisions between King Kamehameha III and about 245 chiefs that took place between 27 January 1848 and 7 March 1848 and were recorded in a book called the "Mahele Book."
3) The third act, commonly called the Kuleana Act of 1850, paved the way for the Land Commission to make awards of small pieces of land to commoners for subsistence purposes.

Marion Kelly, *Land Tenure in Hawaii*, 7 AMERASIA J. 57, 61-62 (1980) [hereinafter Kelly on Land Tenure]. These acts are often referred to as the "Great Mahele," interpreted as the "Great Division of Land." Most Hawaiians do not agree that the Mahele was "Great" because out of the one-third of Hawai'i lands that were intended to go to the commoners only one percent went to the commoners. However, some feel the Mahele served a useful purpose to the King, chiefs, and advisors when they created it. Hawai'i had been seized by foreign powers for six months in 1843, a few years before the Mahele, and the King thought if Hawai'i were seized again under

ponds and lo'i water distribution and irrigation infrastructure conceived and built by Hawaiians were besieged and, for the most part, destroyed.[46] Since then, water rights issues have consumed extensive

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the land system existing at that time, the conqueror could seize all of the land in Hawai'i. Under a fee simple system, it was believed that private lands would remain in the owner's possession; thus the Mahele was initiated for protection from aggression. Agard interview, *supra* note 11.

King Kamehameha III controlled 2.5 million acres, which were in two parts. The larger portion or 1.5 million acres granted "forever to the chiefs and the people" of the kingdom were designated "Government Lands" and "set apart as the lands of the Hawaiian government, subject always to the rights of the tenants." Kamehameha III kept for himself one million acres known as the "King's Lands" which were also subject to the rights of native tenants. MACKENZIE, *supra* note 24, at 7.

On December 17, 1905, Queen Lili'uokalani petitioned the United States Congress to claim lost revenues from 985,000 acres of "Crown Lands" taken away from her when the Hawaiian monarchy was illegally overthrown in 1893. S. REP. No. 66, 59th Cong., 1st Sess. 25 (1905). Many years later the U. S. Court of Claims ruled the Crown Lands belonged to the office of the crown and not to the individual monarch. Liliuokalani v. United States, 45 Ct. Cls. 418 (1910). President Grover Cleveland attempted to restore the sovereignty of the nation of Hawai'i after initiating an investigation through former Congressman James Blount; however, it was never carried through. Blount's four-month investigation found the U.S. and its minister guilty of wrongdoing for the overthrow, the landing of the Marines and the recognition of the provisional government. On December 18, 1893, President Cleveland's message to Congress characterized the coup as an "act of war . . . without the authority of Congress . . ." and a "substantial wrong . . . that we should endeavor to repair." President's Message Relating to the Hawaiian Islands, 53rd Cong. 2d Sess., Ex. Doc. 47, Dec. 18, 1893, Washington: Government Printing Office 1893.

When the United States annexed the Republic of Hawai'i in 1898, approximately 1,750,000 acres of "Government and Crown Lands" were ceded by the provisional government to the federal government without compensation. *Native Hawaiian Issues*, Submitted by the House Majority Staff Office, Hawaii State Legislature, at 13 (January 1993). Subsequently, title to 1.2 million acres of crown and government lands were returned to the state government when the terms of the Admissions Act for the State of Hawaii were agreed upon. Admission Act of March 18, 1959, Pub. L. No. 86-3. *See generally* JON J. CHINEN, THE GREAT MAHELE, HAWAII'S LAND DIVISION OF 1848 (1957) [hereinafter CHINEN ON MAHELE]. See MACKENZIE, *supra* note 24; LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 8-10 (1989).

[46] The history of Hawaiians is replete with examples of foreign influences, be they governments, religious institutions, or mercantile interests, imposing their values and practices upon society. Many Hawaiians were pressured to accept Christian beliefs and corresponding obligations to adhere to certain commercial ideals:

> After 1820, when American settler, missionary, and trader immigration increased and became the dominant segment of the foreign community in the islands,

institutional resources and individual energies. As with land, foreign economic, political and legal systems introduced to Hawai'i have advanced foreign interests at the expense of Hawaiians by imposing Western concepts of private property, legal practices, common law doctrines, and legislation that departed from actual traditional and customary Hawaiian practices.[47] The courts, dominated by Anglo-

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most of the new arrivals perceived the indigenous people to be uncivilized, lazy pagans. Americans believed Hawaiians would become civilized only when they adopted allodial (freehold) tenure, used the soil according to Christian principles of commerce, and converted to Protestantism. Man's natural right to own private property and the American's ability to exploit the soil to its highest utility justified acquisition of Hawaiian lands. American belief in free exercise of commercial rights led to continual requests to their home government for warships to enforce their assumed prerogative to engage freely in trade, to own land, and to be secure in their property.

PARKER, *supra* note 45, at 8-10.

Colonists from foreign nations who claimed dominion over native peoples and their lands reflected imperialistic mind-sets. When they came into contact with native communities, they were committed to exploiting the "newly found" lands' human and natural resources. The testimony of U. S. Senator Johnson of Indiana during the 1893-94 annexation debates at the Senate clearly reveals the depth of American prejudice and belief in their own superiority:

> Side by side on their islands were two civilizations, higher and a lower civilization. On the side of the higher civilization were ranged the intelligence, the progress, the thrift, the aspirations for enlarged liberty and for the legalization of a great destiny for Hawaii. On the other side was ranged the monarchy, with its narrow, contracted view of human rights, with its semi-barbarous face turned toward the past, unwilling to greet the dawning sun. . . . From the very nature of things these two civilizations could not exist together forever. One was to survive and the other would have to perish.

53 CONG. REC. 1879, 1885 (1894).

[47] In Territory v. Gay, 31 Haw. 376 (1930), the Territorial Court of Hawai'i held that Gay and Robinson, a sugar company owning land within an ahupua'a, owned the "normal surplus water" of the stream and could use the waters however it wished, regardless of impacts to downstream users. *Id.* at 388. Thus, the Court overturned earlier decisions favoring shared-use approaches based upon the riparian principles and traditional native practices. *See* Carter v. Territory, 24 Haw. 47 (1917). This legal interpretation excluded the significance of the maka'ainana and the chiefs who played far more critical roles in the success of the ahupua'a than the konohiki who was clearly replaceable. *See infra* note 65. See also MACKENZIE, *supra* note 24, at 150-165 for a comprehensive discussion of the effects of Western influence and analysis of cases.

In a 1983 decision the Supreme Court of the State of Hawaii established principles of riparian rights which included protection of downstream landholders. The court noted its decision "was premised on a firm conviction that prior courts had largely ignored the mandates of the rulers of the Kingdom and the traditions of the Hawaiians

American-trained attorneys, often misinterpreted Hawaiian traditions, customs, and practices to foreign advantage, and achieved ends inconsistent with the scope of customary water rights.[48]

More recently, in Public Access Shoreline Hawai'i v. Hawaii County Planning Comm'n, No. 15460, 1995 WL 51598 (Hawaii Aug. 31, 1995) the Hawaii Supreme Court acknowledged that neither the Western concepts of private property nor common law definitions of custom were necessarily applicable in Hawai'i.

For example, konohiki stewardship over vital water resources of ahupua'a was extracted from its societal context and treated as exclusive ownership rights that could be freely sold.[49] This legal treatment of

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in their zeal to convert these islands into a manageable western society." Reppun v. Board of Water Supply, 65 Haw. 531, 545, 656 P.2d 57, 66 (1982).

[48] Under Hawaiian custom, the extent of an individual's right to water related to the needs of the community.

> The system based on this "spirit of mutual dependence" was a stable one. While the authority for the distribution of water ultimately rested in the King, the chiefs, or their agents (Konohiki), "the aim of the Konohiki and all others in authority was to secure equal rights to all and to avoid quarrels."

Reppun, 65 Haw. at 540-45, 656 P. 2d, at 60-66 (citing PERRY, A BRIEF HISTORY OF HAWAIIAN WATER RIGHTS 7 (1912)). *See supra* note 24 and accompanying text.

The Hawaii Supreme Court has recognized that courts during the territorial period misconstrued Hawaiian custom:

> Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.

Reppun, 65 Haw. at 547, 656 P.2d at 68. *See also McBryde I*, 54 Haw. 174, 193, 197, 504 P.2d 1330, 1344 (1973); AM. INST. OF ARCHITECTS, 1872 - 1977 ALI'IOLANI HALE: A CENTURY OF GROWTH AND CHANGE 92-145 (1977) (demonstrating Hawai'i courts were dominated by Euro-American-trained attorneys).

[49] In Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904), the Territorial Court, purportedly relying on ancient Hawaiian custom, permitted the private ownership of surplus waters by explaining:

> Surplus water. This, in our opinion, is the property of the konohiki, to do with as he pleases, and is not appurtenant to any particular portion of the ahupua'a. By ancient Hawaiian custom this was so. Originally the King was the sole owner of the water as he was of the rest of the land and could do with either or both as he pleased. . . . An argument based upon public policy or upon the necessity or wisdom of encouraging the cultivation of the soil upon a scale unknown and impossible in ancient times, cannot be of assistance, for a determination that the surplus water belongs, in accordance with ancient Hawaiian custom, to the konohiki is not less in favor of an enlarged measure of cultivation that would

water as a commodity served the needs of Hawai'i's increasingly powerful sugar industry which required large amounts of water for irrigation to the detriment of Hawaiians.[50] Those who purchased or

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be a determination that such water belongs to the present holder of a particular portion of the ahupua'a.

Id. at 680-81. The early Court's misinterpretation of Hawaiian tradition and custom resulted in a concept of ownership of "konohiki water rights."

> Under the ancient system both the self interest and responsibility of the konohikis would have created a duty to share and to maximize benefits for the residents of the *ahupua'a*. In other words, under the ancient system the "right" of the *konohiki* to control the water was inseparable from his "duty" to assist each of the deserving tenants. The private division of land and the subsequent division of water allowed for the separation of this "right" from the concomitant "duty."

Reppun, 65 Haw. at 547, 656 P.2d at 68; *see also McBryde I*, 54 Haw. at 180-87, 504 P.2d at 1335-39; MACKENZIE, *supra* note 24, at 153. A key factor in *McBryde I* and *Reppun* was the recognition of the traditional custom by which *konohiki* were entrusted with privileges to the water, not ownership of the water.

[50] *Hawaiian Commercial*, 15 Haw. at 680-81. Beginning in the 1870's, water was diverted and extracted to service plantation irrigation. Water use doctrines of Hawai'i common law are derived from a complex mix of the traditions and customs of early Hawaiians and their various judicial and legislative interpretations, the common law of England, and judicial constructs. During the royal and territorial periods (circa 1848-1959), interpretations reflecting prior appropriation law were applied with regard to surplus water, konohiki water, prescription and interbasin water transport and appartenant water. *See* Peck v. Bailey, 8 Haw. 658 (1867); *Hawaiian Commercial*, 15 Haw. 675; Stephen F. Williams, *The Law of Prior Appropriation: Possible Lessons for Hawaii*, 25 NAT. RESOURCES J. 911 (1985). These interpretations, formulated by justices of foreign ancestry and education, are indicative of the political power of foreign interests in Hawai'i during those times. One Euro-American legal commentator has erroneously rationalized the application of these principles as "hardly surprising" because "Hawaii's geography is quite similar to that of western states dominated by the law of prior appropriation." *Id.* at 912. The Hawaii Territorial Court made a different pronouncement:

> Private water rights in this Territory are governed by the principles of the common law of England *except so far as they have been modified by or are inconsistent with Hawaiian statutes, custom or judicial precedent. The law of priority of appropriation which prevails in the arid sections of the mainland of the United States has never been recognized in this jurisdiction.*

Carter v. Territory, 24 Haw. 47, 57 (1917) (emphasis added). Today, many water users are claiming ownership of water as though it were real property. *See, e.g.*, Water Use Permit Applications submitted to the Water Commission by Dole Food Co., Inc. on October 5, 1994 and Bishop Estate on September 28, 1994. Bishop Estate also filed a reservation request on December 15, 1994. *See also* Indenture of Lease entered into on January 18, 1966 between Bishop Estate and the Waiāhole Water Company Ltd. *But see McBryde I*, 54 Haw. 174, 504 P.2d 1330; HAW. CONST. art. XI, § 7; WATER

obtained land from konohiki following the Mahele,[51] such as sugar plantations, typically exercised "konohiki water rights" in a manner consistent with Euro-American concepts of property and withdrew unlimited quantities of water regardless of the consequences to the environment and other water users.[52] Euro-American settlers ignored the basic precept that Hawaiians' traditional life support systems depended upon the integrity of manka-makai (mountain to sea) resources.[53]

As plantations invoked "konohiki rights" to use surface water, flows necessary for downstream irrigation and instream uses were reduced, thus compromising the integrity of physical and cultural systems.[54] The resulting substantial reduction of taro acreage and aquatic resources, coupled with new consumer economies, uprooted Hawaiian communities. Many Hawaiians living traditional subsistence lifeways were forced to abandon their homes, fishponds and taro lands and migrate

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CODE § 2. The common law of the State of Hawai'i, the State's constitution and statutes have clearly articulated that all waters of the State are held in trust for the benefit of the citizens of the State. Hence, unlike land, water cannot be "owned."

See also LAND AND WATER, *supra* note 35, at 160-176; MACKENZIE, *supra* note 24, at 151; Williamson B. C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts 'Take' Property?*, 2 U. HAW. L. REV. 57 (1979); Jennifer C. Clarke, Comment, *Hawaii Surface Water Law: An Analysis of* Robinson v. Ariyoshi, 8 U. HAW. L. REV. 603, 607-13 (1986). The sugar industry was especially influential in the annexation of Hawai'i to the United States. The best way the industry could protect its investments was through annexation which would allow them a stable and secure market for sugar and would save them from paying heavy American import duties on sugar. Great wealth was accumulated by the industry. The rule of thumb is that one pound of sugar requires one ton of water. *See, e.g.,* HAWAIIAN SUGAR PLANTERS ASSOCIATION, HAWAII'S SUGAR 4 (circa 1986) (noting that it takes "150 gallons per day of water over a two year crop cycle to grow enough sugarcane for one pound of sugar").

[51] For historical accounts of changes in Hawai'i's land tenure by the Mahele, see CHINEN ON MAHELE, *supra* note 45; KAME'ELEIHIWA, *supra* note 24; Kelly on Land Tenure, *supra* note 45.

[52] *See* Williamson B. C. Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 GOLDEN GATE U. L. REV. 123 (1986); MACKENZIE, *supra* note 24, at 153; LAND AND WATER, *supra* note 35, at 153-166.

[53] "Inalienable title to water rights in relation to land use is a conception that had no place in old Hawaiian thinking . . . Water, then, like sunlight, as a source of life to land and man, was the possession of no man, even the *ali'i nui* or mo'i ." HANDY & HANDY, *supra* note 28, at 63.

[54] *See generally* Davianna McGregor, *Kupa'a I Ka 'Aina: Persistence on the Land* 92-95 (1989) (unpublished Ph.D. dissertation, Hawaiian Pacific Collection, Hamilton Library, University of Hawai'i (Mānoa)).

to cities to look for work, leaving lands unproductive and idle. These lands became increasingly vulnerable to sale, forfeiture, and adverse possession.[55] The "enlightened" self interest of the foreigners became the driving force of the Hawai'i economy as they adeptly and vigorously exploited this situation.

Groundwater resources were also exploited. Over 1000 wells were installed islandwide between 1879, when Campbell Estate patriarch James Campbell drilled the first well in Hawai'i to tap the Pearl Harbor basal aquifer, and 1975. Most early wells supplied water for sugarcane irrigation. Within fifty years, intense drilling in southern O'ahu reduced artesian heads from 43 feet to 25 feet above sea level and potable water in wells near O'ahu's southern coast turned brackish.[56]

Military and urban water needs intensified dramatically during World War II and the years of development that followed. Following statehood in 1959, urban growth and tourism accelerated, first on O'ahu and then on all other islands. With the decline of both sugar and pineapple industries beginning in the 1970's, tourism joined militarism as a mainstay of Hawai'i's economy.[57] County boards of water supply, particularly on O'ahu, became the most active developers and transporters of water.

Two conditions evolved from these changes. First, increasing amounts of agricultural lands became urbanized. Second, resort and residential developments increasingly encroached on rural areas of all islands, the same areas in which Hawaiian traditional and cultural practices are most firmly established.[58] The majority of current development is

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[55] *See, e.g., "Link" McCandless and the Waiāhole Ditch Tunnel,* 5 KE KIA'I, Dec. 1994, at 4 (paraphrasing from *Water for Development: McCandless Constructs the Waiahole Ditch Tunnel,* HAWAII OBSERVER, Mar. 5, 1993).

[56] K. J. Takahashi, *Summary Appraisals of the Nation's Ground-Water Resources—Hawaii Region* M2 (1978) (Geological Survey Professional Paper 813-M).

[57] STATE OF HAWAII DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, DATA BOOK (1990).

[58] *See* HAWAII WATER PLAN (HWP) — WATER RESOURCE PROTECTION PLAN (Vol. I & II, Review Draft March 1992); HWP O'AHU WATER USE & DEVELOPMENT PLAN (Review Draft Feb. 1992); HWP KAUA'I WATER USE & DEVELOPMENT PLAN (Review Draft Feb. 1992); HWP HAWAI'I WATER USE & DEVELOPMENT PLAN (Review Draft Feb. 1992); HWP MAU'I WATER USE & DEVELOPMENT PLAN (Review Draft Feb. 1992) (describing resort and residential water needs and their specific locations).

planned for dryer leeward areas where most ground and surface water sources are already under great stress.

Throughout these times of change, Hawaiian rights and practices were primarily ignored, dismissed, or misconstrued. Still, Hawaiian practices and resource management techniques provide a helpful basis for long-term planning to protect the integrity of water resources in Hawai'i.

(C) Development of Common Law

Not until after statehood in 1959, when a popularly elected governor appointed the Hawaii Supreme Court, was the doctrine of private ownership of water judicially overturned.[59] Previously territorial justices, purporting to rely on traditions and customs of the Hawaiians, tended to misinterpret or recast Hawaiian traditions and customs to serve other interests.[60] While under U.S. Territorial rule, justices were appointed thousands of miles away in Washington, D.C. by the U.S.

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[59] *McBryde I*, 54 Haw. 174, 504 P.2d 1330 (1973); Robinson v. Ariyoshi, 65 Haw. 641, 667 n.25, 658 P. 2d 287, 306 n.25 (1982) (certified questions from the U.S. Court of Appeals for the Ninth Circuit); *see also* Chang, *supra* note 52, at 15, 165.

[60] In *Robinson v. Ariyoshi*, Chief Justice William Richardson wrote:

> The only cases treating 'surplus water' as private property are to be found during the territorial period, when the judiciary was not a product of local sovereignty. While the decisions of the territorial courts were unquestionably binding upon the parties before it, we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state. So long as the federal government was sovereign its authority to frame the law was unquestionable, but upon our assumption of statehood our own government assumed the whole of that responsibility, absent any explicit federal interest. And it is from our authority as a state that our present common law springs.

Robinson, 65 Haw. at 667 n.25, 658 P.2d at 306 n.25.

Major water rights cases decided by the Territorial Supreme Court include Territory v. Gay, 31 Haw. 376 (1930) (surplus surface water rights); Carter v. Territory, 24 Haw. 47 (1917) (surplus surface water rights); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904) (surplus surface water rights); Wong Leong v. Irwin, 10 Haw. 265 (1896) (appurtenant water rights); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895) (prescriptive water rights); Peck v. Bailey, 8 Haw. 658 (1867) (appurtenant water rights).

President with the advice and by the consent of the U.S. Senate.[61] After statehood, justices were appointed by the popularly elected state governor with the advice and by the consent of the state senate.[62] Because the Territorial justices derived their power and authority from their presidential appointment, and because most of them either lacked an understanding of Native Hawaiian customs or could not or would not reconcile older Hawaiian laws with the demands of newer commercial interests, their decisions were "uncertain and inconsistent" and "tended to uphold the position of the sugar companies."[63]

The Hawaii Supreme Court in *McBryde Sugar Co. v. Robinson*[64] is generally described as having set aside many prior misinterpretations of Hawaiian traditions made by courts from earlier politically distinct regimes.[65] In *McBryde I*,[66] the supreme court reexamined the water

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[61] Organic Act for the Territory of Hawaii, Act of April 30, 1900, ch. 339, § 82, 31 Stat. 141 (1900). See also *Robinson*, where the court stated:

> Our reference to "Hawaii's case law" governing water is perhaps misleading for the volumes of Hawaii Reports represent four separate political regimes. The first was the period prior to 1893, during which Hawaii was a constitutional monarchy and the justices of the Supreme Court were appointed by the king. In 1893, the monarchy was overthrown and a republican form of government was substituted. During this period, the justices were appointed by that government. In 1897, Hawaii was annexed by the United States and until 1959 was a territory with our judges and justices appointed by the President of the United States with the advice and consent of the United States Senate. In 1959, Hawaii became a state.

Robinson, 65 Haw. at 667 n.25, 658 P.2d at 306 n.25 (certified questions from the 9th Cir).

[62] HAW. CONST. art. VI, § 3. In 1978, the Hawaii Constitution was amended to require that the governor's nominees be selected from a list provided to him from the Judicial Selection Commission. *Id.* § 4.

[63] LAND AND WATER, *supra* note 35, at 144. For example, Justice Antonio Perry referred to ancient Hawaiian customs and prior case law in Territory v. Gay, 31 Haw. 376 (1930) although the Court's decision was based primarily on policies related to the needs of the sugar industry for irrigation. The primary goal was to limit the riparian doctrine which the court said would pose a major danger to the whole economic and political system in Hawai'i. LAND AND WATER, *supra* note 35, at 190.

[64] 54 Haw. 174, 504 P.2d 1330 (1973).

[65] "[O]ur decision there was premised on the firm conviction that prior courts had largely ignored the mandates of the rulers of the Kingdom and the traditions of the native Hawaiians in their zeal to convert these islands into a manageable society." Reppun v. Board of Water Supply, 65 Haw. 531, 548, 656 P.2d 57, 67 (1982). "We cannot continue to ignore what we firmly believe were fundamental mistakes regarding one of the most precious of our resources. *McBryde* was a necessary and proper step

rights law and rejected the concept of private ownership of water,[67] holding, *inter alia*, that: 1) section 7-1 of the Hawaii Revised Statutes imposed the "natural flow" doctrine of riparianism upon the waters of the State;[68] 2) riparian water rights attach only to land adjoining a natural watercourse;[69] and 3) the right to use water by virtue of riparian

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in the rectification of basic misconceptions concerning water 'rights' in Hawaii." *Id.* See also *Robinson*, where the court commented:

> The *McBryde* opinion, however, did not supplant the konohikis with the State as the owner of surplus waters in the sense that the State is now free to do as it pleases with the waters of our lands. In *McBryde*, we indeed held that at the time of the introduction of fee simple ownership to these islands the king reserved the ownership of all surface waters. But we believe that by this reservation, a public trust was imposed upon all the waters of the kingdom. That is, we find the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and the flow of our water for future generations and to assure that the waters of our land are put to reasonable and beneficial uses. This is not ownership in the corporeal sense where the State may do with the property as it pleases, rather, we comprehend the nature of the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good.

Robinson, 65 Haw. at 673-74, 658 P.2d at 310 (certified questions from the 9th Cir.) (citations omitted).

[66] *McBryde I*, 54 Haw. at 174, 504 P.2d at 1330; *McBryde II*, 55 Haw. 260, 260, 517 P.2d 26, 26 (1973).

[67] *McBryde I*, 54 Haw. at 186-87, 504 P.2d at 1338-39.

[68] *Id.* at 192-93, 504 P.2d at 1342. "Riparian rights in Hawaii are a product of the people's statutory rights to 'flowing' and 'running' water currently embodied in HRS § 7-1 (1976). HRS § 7-1 was originally enacted in 1850 as section 7 of what has come to be known as the Kuleana Act." *Reppun*, 65 Haw. at 549, 656 P.2d at 69. "In *McBryde* meaning was given to this language for the first time when we ruled that the statute, at the time of its passage, imposed the 'natural flow' doctrine of riparianism upon the waters of the Kingdom. We continue to find this interpretation to be appropriate and proper." *Id.* at 545, 656 P.2d at 67. However, Judge Levinson, dissenting in *McBryde II*, notes the discrepancies between the Hawaiian and English language versions of the Kuleana Act to suggest that this statutory right also extends to irrigation water ("wai e ho'okahe" - "water made to flow"). *McBryde II*, 55 Haw. at 291, 517 P.2d at 43. *See also* NAHEKEAUPONO KAI'UWAILANI, THE EROSION AND RESURGENCE OF NATIVE HAWAIIAN RIGHTS: A RE-EXAMINATION OF THE RIGHT RESERVED TO NATIVES UNDER HRS § 7-1 AND ITS PREDECESSOR, SECTION 7 OF THE KULEANA ACT OF 1850 AS AMENDED) (1994) (unpublished paper on file at the University of Hawaii Law Library) (asserting that the original legislative intent of the Kuleana Act was to limit these statutory rights to native tenants).

[69] *McBryde I*, 54 Haw. at 192-93, 504 P.2d at 1342; *but see* Carter v. Territory, 24 Haw. 47, 61 (1917), where the court likened traditional 'auwai to natural water

rights or by virtue of its application to the land at the time of the Māhele (*i.e.* appurtenant water rights) applies only for its use on those same riparian and appurtenant lands.[70] The *McBryde I* Court ruled that for all waters flowing in natural courses, the ownership remained in the citizenry with the State as trustee.[71]

The *McBryde I* court extensively reviewed English common law riparianism and its understanding of Hawaiian usage and held that riparian lands (property along streams) carry rights to use water flowing within the stream as long as such use does not prejudice the riparian rights of other lands.[72] The court decided that under the public trust

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courses, thereby creating the potential for riparian water rights to also appertain to land adjoining traditional 'auwai.

In a subsequent case, the Court explicitly held that riparian water rights could not be transferred to other lands. *Reppun*, 65 Haw. at 550, 656 P.2d at 70. The court declared that "the nature of the water rights provided in section 7-1 are limited by the purposes for their establishment. We are equally convinced that the creation of an independent source of profit for the possessors of water rights was not included among such purposes." *Id.* The court then held that:

> [R]iparian water rights created by HRS § 7-1 [the Kuleana Act] were not intended to be, and cannot be, severed from the land in any fashion. Their sole purpose is to provide water to make tenant's lands productive—no other incident of ownership attached. The trial judge in this case thus correctly ruled that all attempts to sever or extinguish the riparian rights of the plaintiffs were ineffective.

Id.

[70] *McBryde I*, 54 Haw. at 190, 198, 504 P.2d at 340-41, 1344. *See infra* note 289 for definition of an appurtenant water right.

[71] *McBryde I*, 54 Haw. at 174, 504 P.2d at 330. The court also ruled that property owners could no longer transfer their appurtenant or riparian share of water to kula land. *Id.* at 191, 504 P.2d at 1341. "An act of 1884 distinguished dry or *kula* land from wet or taro land." HAWAIIAN DICTIONARY, *supra* note 1, at 178. Property interests in the water itself were extinguished as owners merely had appurtenant or riparian rights to use, not to own water. However, we assert under Hawaiian tradition and custom, the right of lands to have water for appropriate cultivation and domestic use could never be extinguished.

[72] Section 7-1 of the Hawaii Revised Statutes was originally enacted in 1850 as section 7 of the Kuleana Act. This section was intended to rectify problems of the maka'ainana (commoners) in obtaining items they needed to subsist, such as firewood and water. Privy Council, Minutes (July 13, 1850).

Concern for the rights of all users of water from a particular source are also evident in City Mill v. Honolulu Sewer and Water Commission, 30 Haw. 912, 925 (1929) ("Each is entitled to a reasonable use of the waters with due regard to the rights of his co-owners in the same waters."). Although, at the time of the *City Mill* decision "no reason occurred to the Court that would sustain the view that the Territory is, or that its predecessors were, the owners of all artesian waters in the Territory," *id.*

doctrine, the state was required to hold established riparian rights superior to other water use rights.[73] Although under *McBryde I*, the state gained wider latitude in administering and allocating streamflows remaining after appurtenant and riparian water rights were satisfied, rights to divert water away from watersheds of origin and concepts of prescriptive rights obtained through adverse use are inconsistent with *McBryde I*.[74]

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at 934, this is no longer true today. To the extent that *City Mill* suggests that owners of land overlying artesian aquifers are owners of the artesian waters, it has been impliedly overruled by subsequent amendment to the Hawaii Constitution, the Water Code and *McBryde I*.

[73] *McBryde I*, 54 Haw. at 200, 504 P.2d at 1345. Other water use rights can only attach to water surplus to that required to fulfill riparian rights. Under the natural flow riparianism imposed by McBryde "there can be no 'normal daily surplus' water." *Id.*

[74] Rejection of rights to interbasin water transport stems from two aspects of the decision: 1) such transport would violate natural flow riparian principles imposed by the decision; 2) any previous legal protection of such transport was extinguished by (a) the abolition of konohiki and prescriptive rights, and (b) the clarification and restriction of appurtenant and riparian rights.

The Water Code partially reverses *McBryde I* to allow for transport of water out of the watershed of origin in designated water management areas:

> [C]ommon law of the State to the contrary notwithstanding, the commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed from which it was taken if the commission determines that such transport and use are consistent with the public interest and the general plans and land use policies for the State and counties.

WATER CODE § 49(c).

The practice of transporting water out of non-designated source watersheds continues, as do efforts to change the statutory law to allow water transport generally. *See, e.g.*, S. 1213, 17th Leg., Reg. Sess. (1993) (unenacted bill attempting to amend Water Code by adding a new section stating "[t]he common law of the State to the contrary notwithstanding, the commission shall allow the transport and use of surface water or ground water beyond overlying land or outside the watershed from which it is taken in areas other than designated water management areas.") *But see* IRRIGATION WATER BILL, *supra* note 9.

Earlier Hawai'i courts held that water could be acquired through prescription. Prescriptive rights arose in favor of the first appropriator and were in the nature of private property interests. *See also* Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904). *McBryde*'s reversal of the earlier court's prescriptive rights analysis partially returned Hawai'i water law to its customary roots in the kanawai or pre-contact period before the deformations of colonialism. *See supra* notes 65 and 69.

A long series of challenges followed the *McBryde I* decision. Plantations argued that the State had deprived them of property without just compensation, contrary to the due process clause of the U.S. Constitution.[75] After a pitched legal battle spanning nearly fifteen years, the U.S. Supreme Court held that the case was not "ripe" for its decision because the plantations had not shown that the State was actually depriving them of water pursuant to the *McBryde I* decision.[76]

During the course of the *McBryde* appeals, the Hawaii Supreme Court reaffirmed and expanded the *McBryde I* principles in *Reppun v. Board of Water Supply*.[77] The court held, *inter alia*, that under limited circumstances a riparian owner harmed by an extraction of ground water in Waihe'e, O'ahu by the Honolulu Board of Water Supply for public purposes might be entitled to limited injunctive relief.[78] The

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[75] The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." This prohibition against takings without just compensation applies to the states through the Fourteenth Amendment. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). *See also* HAW. CONST. art. I, § 4.

Because the *McBryde I* decision sets forth the court's interpretation of what had always been Hawai'i water law, a strong argument can be made that no private property interests were affected by the decision. Because customary Hawaiian water law never recognized prescriptive rights, *Peck, Hawaiian Commercial & Sugar Co.*, and *Gay* were simply wrongly decided. *See also* Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n., No. 15460, 1995 WL 51598* 14 (Hawai'i, Aug. 31, 1995) ("In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by Western concept of property."). The question of whether property interests or expectations can arise from a wrongly decided line of cases is beyond the scope of this article. *See generally* Chang, *supra* note 52; LAND AND WATER, *supra* note 35, at 145.

[76] Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977); Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982), *reconsideration denied,* 66 Haw. 528, 726 P.2d 1133 (1983), *aff'd* 753 F.2d 1468 (9th Cir. 1985); *vacated* Ariyoshi v. Robinson, 477 U.S. 902, 91 L.Ed. 2d 560, 106 S.Ct. 3269, 54 USLW 3840 (1986); *remand* Robinson v. Ariyoshi, 796 F.2d 339 (9th Cir. 1986); *remand* Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987); *motion denied* Robinson v. Ariyoshi, 854 F.2d 1189 (9th Cir. 1988); Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989); *rev'd* Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989); *rev'd vacated* Robinson v. Ariyoshi, 933 F.2d 781 (9th Cir. 1991).

[77] 65 Haw. 531, 537, 656 P.2d 57, 69 (1982).

[78] With regard to the enjoining of ground water diversions that interfere with established streamflow rights, the Court held that:

> Where surface and ground water can be demonstrated to be interrelated as parts of a single system, established surface water rights may be protected against

Reppun court further held that appurtenant water rights can be expressly extinguished in the transfer of the land title and implicitly extinguished when a grantor attempts to retain the right to water when conveying land title.[79]

The *Reppun* court affirmed the riparian doctrine of *McBryde*,[80] commenting that riparian rights in Hawai'i are more akin to federally reserved water rights for Indian reservations than true riparian rights: Riparian rights in Hawai'i are thus analogous to the federally reserved water rights accruing to Indian reservations pursuant to *Winters v. United States*, 207 U.S. 564 (1908). The Hawaii Supreme Court has described that decision as follows: "The Court in Winters concluded that the Government, when it created [an] Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless."[81]

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diversions that injure those rights whether the diversion is of surface water or ground water. Board of Water Supply diversions that interfered with plaintiff's established rights were therefore properly the subject of an injunction.

Id. at 564-65, 656 P.2d at 76.

With respect to the appropriateness of injunctive relief against a "public use," the Court stated:

> As a general rule, where water has been improperly diverted by a public entity for actual public use, a complainant may not obtain injunctive relief against the diversion of water to which a public use has attached at the time the suit is filed, unless the court finds that a public interest of substantially the same magnitude will be advanced by injunctive relief.
>
> 1) *Where, however, there is a gradually increasing diversion, the critical point at which the doctrine becomes operational is when the diversion causes actual harm to the plaintiffs.*

Id. at 565, 656 P.2d at 76 (emphasis added).

[79] *Id.* at 552, 656 P.2d at 71 (holding that "while no appurtenant rights were effectively transferred in this case, the deed that attempted to reserve such rights had the effect of extinguishing them").

[80] *Id.* at 550, 656 P.2d at 69-70. *See also* Valerie J. Lam, *Beach Access: A Public Right?*, 29 HAW. B. J. 83 (1991).

[81] 65 Haw. at 549, 656 P.2d at 69-70 (quoting Arizona v. California, 373 U.S. 546, 600 (1963)). In Winters v. United States, 207 U.S. 564 (1908), the U.S. Supreme Court recognized an implied reservation of water to support farming on tribal lands set aside as an Indian reservation. Even though settlers to the area began using water before the Indians started irrigating, the court held that the Indians had superior rights to that water. The Supreme Court later defined those rights to include water for all lands that were "practicably irrigable." *Arizona*, 373 U.S. at 600-601. Noting that without water the Indians could not survive on arid and valueless lands, and that therefore the purpose of the reservation could not be achieved, the Court held that Congress, in creating the reservation by treaty, guaranteed the Indians the necessary

The court also stated that the kings and chiefs had a duty to equitably distribute the waters among the people for mutual benefit, and the state assumed that duty.[82]

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amount of water.

In reaffirming the *Winters* doctrine, the Supreme Court held that the volume of water rights retained by the tribes included not only the amount necessary to meet present needs but also to meet future requirements. The Court declared that the amount should be calculated based on the practicably irrigable acreage of the reservation. Reserved water rights pertained to executive-order reservations as well as reserves created by treaties. 373 U.S. at 596-601. The Ninth Circuit, in Colville Confederated Tribes v. Walton, held that Indian allottees are entitled to pro rata shares of the reservation's reserved water right. 460 F. Supp. 1320 (E.D. Wash. 1978), *aff'd in part, rev'd in part*, 647 F.2d 42 (9th Cir. 1981), *cert. denied* 454 U.S. 1092 (1981), *appeal after remand*, 752 F.2d 397 (9th. Cir. 1985). The scope of reserved water rights is not entirely defined. A number of issues, such as whether tribes are entitled to certain quality water, to minimum stream levels, to sell or lease their reserved water rights, and to have reserved rights for purposes other than agricultural development, remain unresolved. *But see* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684 (1979) (applying *Winters* doctrine to fish, and providing that Indian rights in scarce natural resources which are not available to non-Indians are not equal protection violations).

The application of the *Winters* doctrine in Hawai'i is the subject of considerable controversy. On one side, several Hawaiian rights advocates (such as Alan Murakami, Native Hawaiian Legal Corporation's litigation director, and professors of law Williamson B. C. Chang and Jon Van Dyke, William S. Richardson School of Law) assert its applicability. Murakami argues that the *Winters* doctrine supplements those explicit provisions of the HHCA regarding water for Kaua'i and Moloka'i's Home Lands; water is an indispensable resource without which the Home Lands would be worthless and unusable. Therefore, Congress intended to imply water reservations for all of the Hawaiian Home lands. Interview with Alan Murakami in Honolulu, Hawai'i (July 1, 1993). *See also* LAND & WATER, *supra* note 35, at 141 (asserting that water rights provisions of the HHCA itself are consistent with the implied-reservation-of-water-rights doctrine). In contrast, State Deputy Attorney General William Tam argues that the *Winters* doctrine applies only to treaty lands, and that none of these treaties or lands exist in the case of native Hawaiians: Furthermore, Tam argues that since the HHCA, an act of Congress, explicitly describes certain water rights for the Home Lands in section 221, there is no basis or authority for a court to provide for an implied water reservation for Hawaiians. Telephone interview with William Tam, Deputy Attorney General (July 1, 1993). *See also* Letter from Tam to Rowena Eberhardt (July 1, 1993) (on file at NHAC office).

[82] *Reppun*, 65 Haw. at 544-47, 656 P.2d at 66-68. The responsibility was passed on to the contemporary sovereign entity. Many in the Hawaiian movement for sovereignty and self-determination maintain that the State of Hawaii is not a legitimate sovereign entity. Thus the illegal overthrow of the monarchy and subsequent actions of the Provisional Government (and succeeding governing entities) carry with them an illegitimacy that has not been corrected since the illegal overthrow was committed.

The *McBryde* and *Reppun* decisions completely re-transformed water law in Hawai'i.[83] From the viewpoint of sugar planters and others who had previously used the courts to secure water, the entire 140-year history of judicial water rights was "unraveled and turned on its head retroactively."[84] In contrast, many believe that these decisions support revitalization of centuries-old systems of Hawaiian cultural beliefs, values and practices which were "unraveled and turned on their head" by colonialism. Feeling insecure by their perceived loss of water rights, major water users focused efforts toward developing a state water code.

In *Pele Defense Fund* and *PASH*, the Hawaii Supreme Court unanimously upheld the primacy of Hawaiian custom in determining the extent of what constitutes property in Hawai'i.[85] Acknowledgment by the Hawaii bench of the non-commercial character of land recognized in Hawaiian custom and the relationship between man and the use of the environment embodied in Hawaiian tradition will surely have an impact on Hawai'i water law.

III. The Hawaii Water Code

A. Enacting the Code

The *McBryde* and *Reppun* decisions motivated large water users to vigorously pursue political solutions to restore their visions of an

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[83] Hawaiian water law falls into several distinct time periods. The first period, pre-contact water law, emphasized shared use rights. The second period, royal water law under the influence of colonialism, illustrates a gradual transition toward individualized property rights. The third period, territorial water law, represents the triumph of this individualized water rights model. During this period, territorial courts rejected the shared use values and group rights assumptions of pre-contact water law. Until the fourth period of Hawaiian water law, statehood water law (ushered in by the *McBryde* decision in 1973), prescriptive rights recognized by the territorial supreme court remained largely unquestioned, with major investments and expectations built up around them. *See also* A. Dan Tarlock, Law of Water Rights and Resources 3-80 (1992) which delineates these periods as: 1) royal or pre-statehood water law; 2) post-territorial water law; and 3) post-1973 water law. However, even before territorial days (and more specifically before and after the Māhele), there were significant differences in how the Kingdom and its predecessors treated water.

[84] J. Russell Cades, Remarks at the Hawaii State Association of Counties Conference Regarding Water Regulation in Hawaii: The State Water Code II-3 (Sept. 28, 1984) (attorney for McBryde in *Robinson v. McBryde*) (transcript available in Legislative Reference Bureau, State of Hawaii and on file at the NHAC office).

[85] Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); Shoreline Hawaii v. Hawaii Planning Comm'n, No. 15460, 598*16 (Hawaii, Aug. 31, 1995) ("customary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty.").

appropriate "legal" balance. The 1978 Constitutional Convention ("ConCon") provided a forum for them and for other interest groups seeking to achieve political solutions balancing private and group rights in water.[86]

A constitutional amendment was adopted articulating the State's obligation "to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people."[87] The amendment mandated a water resources agency and a statutory scheme to protect and manage water resources.[88] In adopting this amendment, ConCon delegates

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[86] *See* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 688-89 [hereinafter 1 CONCON PROCEEDINGS].

[87] The Constitution provides, in pertinent part:

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

HAW. CONST. art. XI, § 7.

The amendments also established OHA as an autonomous government agency, HAW. CONST. art. XII, §§ 4-6. Implementing legislation is found in Hawaii Revised Statutes Chapter 10. OHA, a self-governing corporate body, is governed by its nine trustees, who are elected for four-year terms by persons of Hawaiian ancestry. OHA serves "as principal public agency in this State" to develop and coordinate programs related to native Hawaiians and Hawaiians, HAW. REV. STAT. § 10-3(3) (1993), and "to coordinate federal, state and county activities relating to native Hawaiians and Hawaiians." *Id.* § 10-6(4). OHA's responsibilities include the duty to take action for the betterment of conditions of native Hawaiians and Hawaiians, *id.* § 10-3, and "to formulate policy relating to the affairs of native Hawaiians and Hawaiians," pursuant to article XII, section 6 of the Constitution. Further, OHA has a statutory responsibility to "[a]ssess the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and [to conduct] advocacy efforts for native Hawaiians and Hawaiians." HAW. REV. STAT. § 10-3(4). OHA has a special responsibility to participate in decisions made by a state agency (which would include Water Commission) when such decisions affect resources and lands that are owned by, generate revenues, or impact the interests of Native Hawaiians. HAW. CONST. art. XII §§ 4-6.

[88] It is clear from ConCon debates that this political solution was not achieved without a fight from special interest lobbyists. Delegate Frenchy De Soto, a member of the drafting committee (and current OHA trustee), testified that:

> [A]s I understand it . . . there's a fight for determining ownership. . . . What we just did was . . . say that this agency shall be responsible. In the Committee . . . we were besieged by lobbies, by opinions from all kinds of attorneys, all kinds of people, people who said they were experts in water . . . [W]hat we just did a few minutes ago will show historically, down the road, that we at least

shifted much of the power to control water resource regulation, management, and planning from county governments and boards of water supply to the State.[89]

Reaching agreement at the ConCon to direct the legislature to pass a Water Code was a long and difficult process reflecting tensions between two basic factions.[90] One faction, advocating preservation of private rights, sought to safeguard their control over existing water infrastructure and institutions,[91] including mechanisms for transporting water and transferring water rights. The other faction strongly advo-

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had the nerve and the gumption to look into the future and protect the water resources for generations that are just being born and those not yet born.

2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 863 [hereinafter 2 CONCON PROCEEDINGS],

After adopting the amendment, delegates debated the merits of "constitutional one-liners" versus detailed amendments that possibly infringed on tasks better performed by the legislature. Delegate Mike Crozier's attempts to drastically simplify the language of the amendment were soundly rejected by a vote of 59 to 17. Most delegates opposed the idea of diluting the language mandating the legislature to provide a state agency. *Id.* at 868. Delegate John Waihe'e (who later became Governor of the State of Hawaii) stated the amendment as worded would create an agency to protect "the small taro farmer as well as the agricultural users of water." *Id.* at 870.

[89] Delegate Carol Fukunaga and many others spoke in favor of a state agency. In a speech on the convention floor prior to vote, she summarized the battle over county home rule versus a controlling state agency:

> The county boards of water supply also have conflict, in that their main concern is water supply for domestic use; they too are water users and cannot be expected to regulate in a completely unbiased manner. Thus, the main purpose in requiring the legislature to establish a water resources commission is to provide one central authority that can assess the needs of all the people—from sugar plantations to small taro farmers to residential users—and begin to plan so that our precious water resources will be able to meet future needs.

Id. at 858.

[90] For a comprehensive review of issues raised in the development of the Hawaii State Water Code see STATE WATER COMMISSION, REPORT TO GOV., HAWAII'S WATER RESOURCES: DIRECTIONS FOR THE FUTURE, 10TH LEG. SESS. (Jan. 1979); LAND & WATER, *supra* note 35, at 66; Intergovernmental Relations Committee of the Hawaii State Association of Counties, Presentations of Conference Speakers, Water Regulations in Hawaii: The State Water Code (Jan. 9, 1985) (transcript available from the Intergovernmental Relations Committee of the Hawaii Association of Counties); ADVISORY STUDY COMMISSION ON WATER RESOURCES, REPORT TO THE 13TH LEG. OF THE STATE OF HAW. (Jan. 14, 1985) [hereinafter ADVISORY REPORT]; H. R. CONF. COMM. REP. No. 119, 14th Leg., 1987 Reg. Sess. (1987), *reprinted in* 1987 HAW. HOUSE J. 1067-70 (relating to a State Water Code) [hereinafter WATER CODE BILL].

[91] *See* 2 CONCON PROCEEDINGS, *supra* note 88, at 855-881. *See also* Chang, *supra* note 52.

cated public trust principles and a statewide system of regulation and permitting.[92] These factions continued through the legislative process which culminated in enactment of the Hawaii Water Code which was signed into law by Governor John Waihe'e on May 29, 1987.[93] Neither faction could claim total victory. The Water Code established a process through which existing water uses could be "declared" or described in order to be "certified" as "reasonable and beneficial" by the Water Commission.[94] A separate permitting system was established for sensitive water management areas based on a modified form of prior appropriation or "first come-first served principles."[95] The compro-

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[92] Telephone Interview with Charlene Hoe, ConCon delegate and Water Code Review Commissioner (Apr. 3, 1994). *See also* 2 CONCON PROCEEDINGS, *supra* note 88, at 865-66, 873.

[93] WATER CODE ACT, *supra* note 14, § 2. Governor John Waihe'e was the State's first governor of Hawaiian ancestry.

[94] The legislative history of the Water Code indicates that "[c]ertificates of use shall be subject to appurtenant rights, existing riparian uses and existing correlative uses" and "[r]iparian and correlative uses are protected in designated areas." WATER CODE BILL, *supra* note 90, at 4-5. Thus, the certification process potentially allows significant recognition of water uses existing at the time of Water Code enactment. While a certificate of water use is not an acknowledgement or award of water rights, "the confirmed usage shall be recognized by the commission in resolving claims relating to existing water rights and uses including appurtenant rights, riparian and correlative use." WATER CODE § 27(a). Article XI, section 7 of the State Constitution requires the Commission to assure appurtenant rights and existing correlative and riparian uses. Thus, to some it remains unclear to what extent pre-code water uses that are not appurtenant, riparian or correlative are "assured" under the Water Code.

Whether a distinction was intended in the use of the word "assuring" rather than "guaranteeing" is unclear. Delegate Charlene Hoe proposed initial language calling for "guaranteeing" appurtenant rights which was changed to "assuring" those rights instead. 2 CONCON PROCEEDINGS, *supra* note 88, at 869-70 (proposal 678). Delegate John Waihe'e (later elected as State's Governor), in trying to clarify the difference between the two terms, stated that 'assuring' did not constitute an absolute guarantee." *Id.*

[95] *See* ADVISORY REPORT, *supra* note 90, at 18. *See generally* WATER CODE, part IV-Regulation of Water Use. Under a modified form of "first-come first-served," permit applicants are subjected to reasonable and beneficial use tests and permitted uses must not interfere with existing and future legal uses. It appears that new permit applications may be denied because of effects on existing uses which themselves may not be legal uses. The permitting system is also tempered by provisions that competing uses that cannot be accommodated in any other fashion must be subject to public interest balancing tests. WATER CODE § 54. The Code also incorporated protection for appurtenant rights. *Id.* § 101(d). *See also* Douglas W. MacDougal, *Testing the Current: The Water Code and the Regulation of Hawaii's Water Resources*, 10 U. HAW. L. REV. 206, 241 (1988). MacDougal was subsequently appointed to the Water Code Review Commission.

mises resulted in what is frequently described as a "crisis management" Water Code rather than a uniform system of water regulation and management.[96]

The administration of the Water Code is delegated to a six member Water Commission established within the Department of Land and Natural Resources ("DLNR"). To empower the Water Commission to meet its primary responsibility to protect, control and regulate use of Hawai'i's surface and ground water resources,[97] the Water Code gives the Water Commission broad latitude to develop rules and procedures for meeting its responsibilities.[98] The Water Commission is

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[96] The legislature, however, did not intend for it to become a "crisis management" Water Code:

> [A]vailable fresh waters on our islands is limited, our very existence depends on its careful management. Judicious use of this essential resource will promote the most efficient use of our lands and help insure continuation of our high quality life. To ensure that the availability of this precious resource will meet the present and future needs of the people, your Committee is of the opinion that the Water Code should serve as a tool and an incentive for planning the wise use of Hawaii's water resources, rather than as a water crisis and shortage management mechanism.

H. R. STAND. COMM. REP. No. 348, 14th Leg., 1987 Reg. Sess., 1987 HAW. HOUSE J. 1262-64 (Water, Land Use, Development and Hawaiian Affairs on House Bill No. 35). Water Commission staff has described the Water Code as a "crisis management" Water Code. *See* Water Code Review Commission Meeting (Feb. 2, 1993) (statement of Rae M. Loui, Water Commission Deputy Director) (videotape on file at NHAC office). *See also* L. Stephen Lau, *State Water Code - A Masterpiece of Compromise, reprinted in* 23 WILIKI O HAWAI'I (Engineer of Hawai'i) (Jan./Feb. 1988) (Nos. 8/9).

[97] HAW. CONST. art. XI, § 7.

[98] WATER CODE § 8. The Water Commission is tasked with preparing all necessary regulations and providing full administrative support for implementing the Water Code. WATER CODE § 7(a). Originally the Water Commission was under the jurisdiction of the Division of Water and Land Development (DOWALD). This was contrary to the statutory requirement that the deputy to the Water Commission will be in addition to any other first deputy. WATER CODE § 6(a). Contrary to this code provision, DOWALD Manager-Chief Engineer Manabu Tagomori performed the function of deputy to the Water Commission even while continuing to perform unrelated deputy functions. In part because of public concern that a water development agency (DOWALD) was in effect regulating itself, DOWALD staff was separated from Water Commission staff and a new Water Commission deputy was hired in March 1992. However, many still question whether the separation of regulatory functions from water use and development functions has been complete, particularly in view of the DLNR chairperson's position as the chair of both BLNR and the Water Commission. *See also infra* notes 181 and 327 and accompanying text regarding DLNR's conflicting role as co-applicant for a water use permit with Waiahole Irrigation Company and its role on the board of the Agricultural Development Corporation.

also required to develop a Hawaii Water Plan ("Water Plan").[99]

Water Commission authority is paradoxically broad yet fractionated. It extends to both surface and ground water, but excludes coastal waters[100] and domestic consumption by individual water users..[101] Administrative responsibility for many other aspects of water management remains disconnected.[102] Water quality responsibilities are delegated to the Department of Health.[103] Administrative responsibilities for watershed management and protection remain within the DLNR's Division of Forestry and Wildlife.[104] Coastal zone management planning functions appear to be handled primarily by the Office of State Planning within the executive branch. Authority to permit and lease water source extraction on state lands remains with the State Board of Land and Natural Resources ("BLNR") and these permits and leases are administered by DLNR's Division of Land Management.[105]

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[99] *Id.* § 31. *See infra* note 311-25 and accompanying text. The Water Code Review Commission report submitted to the 1995 State Legislature recommended that the OHA and DHHL develop a Native Hawaiian Water Plan as a component of the Hawaii Water Plan. REVIEW COMM'N OF THE STATE WATER CODE, FINAL REPORT TO THE HAW. STATE LEG. 23 (Dec. 28, 1994) [hereinafter REVIEW COMM'N FINAL REPORT].

[100] *See* WATER CODE § 3 (defining the "water" to which the Water Code applies as "any and all water on or beneath the surface of the ground, including natural and artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground"); WATER CODE § 4 (excluding coastal waters).

[101] *Id.* § 48. No permit required for "domestic consumption by individual user nor for catchment system." *Id.*

[102] *See also* MacDougal, *supra* note 95, at 214 nn.37 & 39, 225 nn.98 & 99; 228 nn.113 & 114, 229 n.118 (illustrative of disconnectedness between different sections of the Water Code); *see generally* NELL CAMMACK, STUDY OF LAWS, ADMINISTRATIVE RULES, AND REGULATIONS RELATING TO THE PROTECTION, REGULATION AND MANAGEMENT OF WATER RESOURCES IN HAWAI'I (1994) (report to the Water Code Review Commission).

[103] WATER CODE § 66. The Department of Health negotiates and issues discretionary permits directly to applicants. Thus, public participation has been restricted. HAW. REV. STAT. § 342D-6 (1993) (Water Pollution). Although the Code appears to allow for Water Commission oversight and overruling in water quality issues, this has not been implemented or tested.

[104] HAW. REV. STAT. § 183-31 (1993).

[105] HAW. REV. STAT. § 171-58 (1993). Leases are disposed by public auction, while month-to-month permits are being directly negotiated with the BLNR. *See infra* notes 260-61 and accompanying text. Water leases are subject to legislative veto in the session immediately following issuance. Month-to-month permits are not subject to legislative review.

The Water Code provides the Water Commission with state-wide jurisdiction to hear disputes and make final decisions regarding water resource protection, water permits, constitutionally protected water rights, designation of water management areas, and allocation of water to meet competing needs where there is insufficient water.[106] The scope of judicial review of Water Commission decisions is unclear.[107] Not surprisingly, the tensions which plagued the enactment of the Water Code between those asserting private rights to develop water and those

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[106] WATER CODE § 10. It was anticipated that the Water Commission would develop a statewide dispute resolution structure with hearings officers familiar with specific geographical areas who could quickly and inexpensively adjudicate conflicts both within and outside of designated water management areas. WATER CODE BILL, *supra* note 90, at 16. However, the Commission has often rejected requests for dispute resolution and has been ineffective in attempts to resolve disputes. The only hearing officers appointed have been staff members (for Moloka'i public hearings) and members of the Native Hawaiian Water Rights Task Force (for public hearings on draft administrative rules for implementing the Native Hawaiian rights section of the Water Code). A very heavy staff workload and perceptions by the Hawaiian community of pro-development bias have compromised the Water Commission's dispute resolution efforts.

[107] The Water Code is not clear regarding contested case hearing and judicial review processes. The Code and regulations provide that "when required by law the Commission shall hold a contested case hearing." WATER CODE § 60; HAW. ADMIN. R. § 13-167-51. The Code should more explicitly state when a contested case is permitted. For example, the well construction section of the Code should specifically provide that a decision by the Commission is subject to a contested case hearing consistent with the Hawaii Administrative Procedures Act, Chapter 91. Currently, contested case language is only included in the water use section. WATER CODE § 60.

Judicial review of Water Commission decisions is unclear because the Water Code and the Hawaii Administrative Procedures Act failed to distinguish between two types of agency decisions adjudicating parties rights: formal adjudication and informal adjudication. A contested case hearing constitutes formal adjudication subject to trial type procedures and decisions are rendered by neutral decisionmakers. Contested case hearing decisions are subject to judicial review under both the Hawaii Administrative Procedures Act and the Water Code. In contrast, agency decisions that determine the rights and obligations of parties, but that are not subject to contested case hearing, constitute informal adjudication. The Water Code is silent as to the right to appeal such decisions. Neither the Hawaii Administrative Procedures Act nor the Water Code appear to authorize judicial review of those decisions. In light of the recent Hawaii Supreme Court decision in Bush v. Hawaiian Homes Commission, 76 Haw. 128, 870 P.2d 1272 (1994), courts appear only to have jurisdiction to review contested case hearing decisions and lack jurisdiction to review informal adjudication. The apparent absence of statutory authorization for judicial review of informal agency adjudication may violate due process requirements which generally require some form of meaningful judicial review of agency adjudicatory actions.

asserting public trust responsibilities to protectively manage water resources have impacted its implementation.

B. Designation of Ground Water Management Areas

The original draft of the Water Code provided for a comprehensive statewide water use permitting system.[108] A primary compromise required to pass the Water Code reduced the originally intended scope and extent of the State's water allocation authority. In deference to a strong home rule posture by the counties and agribusinesses, a process was developed to allocate water resources through water use permitting only in specifically designated water management areas.[109] The ground water basins of Honolulu, Wahiawa, and Waialua, previously designated as "ground water control" areas under the Ground Water Use Act of 1961, continued as designated ground water management areas under the Water Code.[110]

The legislature protected the "home rule" objectives of the counties primarily through establishing criteria suggesting high thresholds for

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[108] *See* Advisory Report, *supra* note 90.

[109] Home rule positions of the counties impacted other parts of the Water Code as well. For example, issues related to the legitimacy of transport of surface water out of its watershed of origin were left unresolved. The original draft Water Code's statewide permitting process regulated transport of water. As enacted, however, the law specifically addresses only transporting water in respect to designated water management areas. Thus, the common law principles of *McBryde* prohibiting inter-basin water transfers would apply in respect to non-designated areas. This was an unpleasant surprise to representatives of mainstream water and land development interests. At the February 5, 1993 meeting of the Water Code Review Commission, Kazu Hayashida (Manager and Chief Engineer, Honolulu Board of Water Supply) stated "We assumed the Code would allow water transfer in both designated and non-designated areas." *Cf., e.g.*, S. 1213, 17th Leg., Reg. Sess. (1993) (relating to transport and use of water to and in areas other than designated water management areas).

[110] WATER CODE § 41(c). Designated critical areas at this time on O'ahu included Pearl Harbor, Wahiawa, and Waialua. Areas that had been under consideration include Kahuku (O'ahu); Lahaina, Waiehu, Wailuku (Maui); Pōipō, Kekaha (Kaua'i). State Water Resources Development Plan, Department of Land & Natural Resources, State of Hawaii, III-i18, 48 (1980)). For a brief synopsis of Hawai'i's ground water resources and pre-Water Code management, see K. J. TAKASAKI, GEOLOGICAL SURVEY PROFESSIONAL PAPER 813-M, SUMMARY APPRAISALS OF THE NATION'S GROUND-WATER RESOURCES—HAWAII REGION (1978).

designation.[111] The Water Code requires the Water Commission to designate an area as a "water management area" when it can be reasonably determined "that water resources in an area may be threatened by existing or proposed withdrawals or diversions of water."[112] The primary criterion for groundwater designation decisions thus far has been whether total withdrawals from the aquifer (actual use or authorized planned use) reach 90% of its sustainable yield.[113] Since most decisionmaking about water allocation occurs well before areas are designated as water management areas,[114] it would appear that the intention of the ConCon and the Legislature to protect and regulate Hawai'i's water resources in a comprehensive manner is not being met.

The water use permitting process has been the primary forum for water allocation policy-setting and decision-making. To obtain a permit, applicants must prove that a water use 1) can be accommodated by the available water;[115] 2) is a reasonable-beneficial use[116] which will not

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[111] *See* WATER CODE § 44 (Ground Water Criteria for Designation); WATER CODE § 45 (Surface Water Criteria for Designation). The eight groundwater criteria that the Water Commission "shall consider" are 1) water uses or authorized planned use reaching ninety percent of sustainable yield, 2) actual or threatened water quality degradation as determined by Department of Health, 3) excessively declining ground water levels, 4) encroachment of salt water, 5) increasing chloride levels — to the extent they "materially reduce the value of their existing use," 6) excessive preventable waste, 7) serious disputes, and 8) whether any approved water development projects may result in a condition described in anyone of the other criteria. WATER CODE § 44.

The three surface water criteria that the Water Commission "shall consider" are 1) diminishing surface water supply as evidenced by excessively declining surface water levels not related to rainfall variation, or increasing or proposed diversions of surface water to levels which may detrimentally affect existing instream uses or prior existing off stream uses 2) diversions reducing the capacity of the stream to assimilate pollutants and 3) serious disputes. WATER CODE § 45.

[112] *Id.* § 41(a). In addition, it appears that the Commission has the discretion to designate other areas.

[113] *Id.* § 44(1).

[114] *See, e.g.*, MacDougal, *supra* note 95, at 222. An exception to this general practice is the action by the Water Commission denying a permit in a non-designated area for the Makaleha Stream Project which would have had an adverse impact on Makaleha springs and the endangered species that rely upon those waters. *See* Water Commission, Minutes (Aug. 2, 1995) (Submittal, Item 4).

[115] WATER CODE § 49(a).

[116] "Reasonable and beneficial use" means the use of water in such a quantity as is "necessary for economic and efficient utilization, for a purpose, and in a manner

interfere with any existing legal use;[117] 3) is consistent with both the

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which is both reasonable and consistent with the state and county land use plans and the public interest," WATER CODE § 3, "and in a manner which is not wasteful." HAW. ADMIN. R. § 13-167-3. *See also* MacDougal, *supra* note 95, at 227 (referring to ADVISORY REPORT, *supra* note 90, at Appendix F at 4) ("The words 'beneficial,' 'for a purpose' and references to 'economic and efficient utilization' most probably mean: not wasteful"). "Waste" is not defined in the Water Code; however, it was defined in a statute relating to wells which was repealed by the Water Code:

> [T]o be causing, suffering, or permitting the water in any well to reach any porous substratum or to flow from the well upon any land, or directly into any stream, or other natural watercourse or channel, or into the sea, or any bay, lake, or pond; or into any street, road, or highway unless to be used for beneficial use of water by direct flow, or from storage reservoirs served by wells, for irrigation, domestic and other useful purposes, except for driving machinery; provided that water may be used for driving machinery in case it is utilized afterwards for irrigation or other useful purposes.

HAW. REV. STAT. § 178-3 (1985) (repealed).

Whether a water use is "wasteful" depends upon the evaluator's perspective. Many Hawaiians do not feel it is wasteful to allow fresh stream water to follow its natural course and flow into the sea because this water serves to maintain and enhance aquatic, riparian, and near-shore ecosystems. Others might consider this "wasteful" because the water could instead be diverted and used to support mainstream economic development. At a minimum, water uses should 1) not degrade natural systems; 2) be ecologically sustainable; and 3) be in the best interests of the host community.

In response to allegations that water transferred through the Waiāhole irrigation system was being dumped into dry leeward gulches, the Water Commission accepted a mediated settlement and ordered Waiahole Irrigation Company to substantially decrease the amount of water being transferred through the Waiāhole system to the Leeward side. As a result, the water no longer being diverted returned to the Waiāhole stream on the Windward side. *In re* Waiāhole Ditch Water Releases, Oahu, No. C-0A94-22B (CWRM, Haw. 1994) [hereinafter Waiāhole Waste Case] Decision and Order (Dec. 19, 1994); *see also id.* Decision and Order (May 22, 1995) (extending effective date); Water Commission, SUBMITTAL: Waiāhole Ditch Water: Order to Show Cause to Waiāhole Irrigation Company Why It Should Not be Ordered to Cease Wasting Water and Preliminary Action on the Petition by Kahalu'u Neighborhood Board, Waiāhole-Waikane Community Ass'n and the Hakipu'u Ohana to Amend the Interim Instream Flow Standards (Sept. 28, 1994); Water Commission, Minutes (Sept. 28, 1994); Water Commission, SUBMITTAL: Staff Petition on Proposed Operational Release Order of Waiahole Ditch Water, and Commencement of Contested Case Proceedings on Operational Releases from Waiahole Ditch (Nov. 16, 1994); KALO PA'A O WAIĀHOLE, HARD TARO OF WAIĀHOLE (Nā Maka o ka 'Āina 1995 (video produced in association with NHAC); Pat Tummons, *Waiāhole Water: Where Will It Go When the Cane Fields Are Gone*, ENV'T HAWAII, Sept. 1994, at 1-5; *Dumping Versus Restoring Windward Streams, Waiāhole Ditch Water is Troubled Water*, 5 KE KIA'I 1-3 (Dec. 1994); *Temporary Halt to Total Diversion, Windward Streams Get 16 MGD of Waiāhole Ditch Water*, 6 KE KIA'I 1-2 (Feb. 1995); *COWRM Lumps All Waiāhole Ditch Issues Together*

public interest and state and county general plans and land use policies; and 4) will not interfere with the rights of Department of Hawaiian Home Lands ("DHHL").[118] A determination that a proposed water use is "reasonable and beneficial" and "in the public interest" requires comprehensive legal and technical analysis. The Water Code does not require a specific finding that the proposed use be consistent with the Hawaii Water Plan.[119]

Individuals wishing to continue water uses existing at the time the Water Code was enacted are required to apply for water use permits within one year from the effective date of designation of a management area.[120] Failure to apply for permits within one year creates a presumption that the use has been abandoned, and the applicant must reapply as a new, rather than an existing user.[121] However, water use

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for Single Contested Case Hearing, 6 KE KIA'I 1 (Mar. 1995).

The Water Commission contracted the University of Hawai'i Water Resources Research Center ("WRRC") to "develop guidelines for the determination of reasonable water use." COMM'N ON WATER RESOURCE MANAGEMENT, SCOPE OF WORK FOR CONSULTANT SERVICES CONTRACT — GUIDELINES FOR DETERMINATION OF REASONABLE WATER USE, Attachment to "Agreement for Research Project" (1991). The scope of work undertaken by WRRC includes: 1) reviewing declared water use summaries prepared by CWRM staff; 2) conducting a literature search for information on standards for quantity of water use; 3) assessing regional variabilities such as precipitation and soil type; 4) developing a framework to establish the guidelines which will determine reasonable water use; and 5) meeting with the Commission to discuss the preliminary evaluation. A draft of the final report was submitted to the Water Commission but it appears that no briefing or other further action has taken place.

[117] What constitutes an "existing legal use" is not clear. *See, e.g.*, MacDougal, *supra* note 95, at 228 n.117 (a certified use under § 27; a use for which a permit has been issued under § 50; a use the Commission deems "legal," such as a use consistent with Hawaii common law; or any combination thereof). Existing uses could also be interpreted to mean a use in existence prior to the 1978 Constitutional amendments or a use in existence prior to the enactment of the Water Code or certain of its administrative rules. *But see* 2 CAMMACK, *supra* note 102, at ch. 1, 2-3 ("It is unrealistic to ask COWRM [the Water Commission] to determine whether an existing use of water in a designated management area is allowable under the common law of the State.")

[118] WATER CODE § 49(a).

[119] *See, e.g.*, MacDougal, *supra* note 95, at 225.

[120] WATER CODE § 50(c). *See also In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing, No. CCH-OA95-1 (CWRM, Haw. 1995) [hereinafter Waiāhole Water Case] Order Number 8 (Aug. 15, 1995) (relating to "existing uses").

[121] WATER CODE § 50(c).

permits must be issued to users exercising appurtenant rights regardless of the application submittal date.[122]

Initially, the Water Commission appeared reluctant to designate water management areas. However, after extended hearings, they designated two water management areas—Windward O'ahu and the entire island of Moloka'i.[123] The Water Commission designated the areas as ground water management areas only, reserving the possibility of surface water designation.[124]

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[122] *Id.* § 63. Although specific protection for Hawaiian traditional and customary rights is not articulated in this section of the Water Code, article XII, section 7 of the Hawaii Constitution requires similar recognition. HAW. CONST. art. XII, § 7.

[123] A petition to designate Windward O'ahu, filed on December 12, 1988 by the Sierra Club Legal Defense Fund, was granted with respect to ground water on May 5, 1992. A petition to designate Moloka'i filed on Feb. 8, 1990 by twenty-nine Moloka'i residents was granted with respect to ground water on May 13, 1992. A petition to designate the island of Lana'i filed on March 3, 1989 was denied on March 29, 1990. The Commission has exercised its authority to initiate designation action in only one instance, that of the Iao aquifer in central Maui, which has been under consideration since June 19, 1991. The Commission unanimously approved the continuance of the process of designating the Wailuku (Iao) aquifer as a water management area in order to complete the analysis of existing data, conduct additional hydrologic investigations, and to afford the public the opportunity to comment on the use and condition of the Wailuku aquifer. No final action has been taken with respect to designation of the Iao aquifer.

[124] Residents of Moloka'i and Windward O'ahu presented petitions to the Commission generally requesting designation of both ground and surface water in their respective areas. Although there is a strong hydrologic inter-relationship between surface and ground water in these areas, the staff examined them separately. *See* WATER CODE §§ 174C-44, 174C-45 (designation criteria of surface and ground water). For example, staff analysis of Windward O'ahu designation was split into two parts. It recommended designating five aquifers in Windward O'ahu as special management areas for ground water—Kawailoa, Ko'olauloa, Kahana, Ko'olaupoko, and Waimanalo. Water Commission, RESUBMITTAL: Petition to Designate Windward O'ahu as a Water Management Area 4 (May 5, 1992).

With respect to surface water, staff recommended that only certain basins be designated as special management areas. The Kahana, Ko'olaupoko, and Waimanalo areas were acknowledged to exhibit direct interactions between ground and surface water. *Id.* The first staff recommendation noted that "ground water withdrawals from tunnels and wells in some of the aquifer systems would result in a corresponding reduction in stream flow almost directly." The recommendation continued: "Proposed uses, left unregulated, may detrimentally affect existing instream uses or prior existing off stream uses." Water Commission, SUBMITTAL: Petition to Designate Windward O'ahu as a Water Management Area, 8 (Aug. 22, 1990)(Staff Submittal, Item 3).

The Commission designated the five ground water aquifers listed above, but deferred

In its designation decision, the Water Commission considers whether all authorized planned uses of groundwater will exceed 90% of the sustainable yield of the affected aquifer. In each designation case, the Water Commission took an expansive view of "authorized planned use." The Water Code defines "authorized planned use" as "the use or projected use of water by a development that has received the proper state land use designation and county development plan/community plan approvals."[125] However, the Commission went on to clarify:

> By this definition, it should be noted that authorized planned use includes all existing and projected developments with the proper land use classification and county development plan/community plan approvals even if they do not yet have the zoning or building permits.
>
> Moreover, where water is or may be used or transported through existing or projected infrastructure out of the area of the water's origin, the "authorized planned uses" must be calculated not only for the area from which the water is taken but also those areas to which the water may be transported.[126]

"Sustainable yield" as defined by the Water Code "means the maximum rate at which water may be withdrawn from a water source

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the decision regarding surface water designation for ninety days. Water Commission,. RESUBMITTAL: Petition to Designate Windward O'ahu as a Water Management Area for Surface Water 1 (Sept. 16, 1992) (Staff Submittal, Item 6). At a subsequent meeting, staff recommended not designating any of the surface water areas since the developable yield assumes a one to one relationship between ground and surface water. Staff reasoned that "the designation of ground water protects surface waters and is essentially comparable to designation of surface water in these three aquifer systems." Staff concluded: "Therefore, regulation through surface water designation is not necessary to preserve and protect surface waters." The Commission denied the petition to designate the Windward area for surface water management. Water Commission, Minutes 3-4 (Sept. 16, 1992).

In the Petition to Designate the island of Moloka'i as a Water Management Area, staff again evaluated ground water and surface water separately. Staff recommended the Commission designate all ground water aquifer systems on Moloka'i but defer designation of surface waters pending further study. The Commission approved staff's recommendation. Water Commission, Minutes (May 13, 1993).

[125] WATER CODE § 3.

[126] Water Commission, RESUBMITTAL: Petition to Designate Windward O'ahu as a Water Management Area 2 (May 5, 1992). Under the proposed administrative rules for Native Hawaiian Rights, DHHL's planned use would constitute an "authorized planned use" for determining whether an area should be designated a water management area by the Water Commission. *See* Water Commission, Minutes (July 19, 1995) (Item 10).

without impairing the utility or quality of the water source as determined by the commission."[127] Some experts argue that the impacts of ground water extractions upon legally-protected streamflows and other legal interests also must be considered.[128] "Developable yield" is a term used to describe such analysis, which accounts for the impacts of groundwater extraction upon streamflows and generally considers the potability and cost of extracted water. For instance, in the designation decision for Windward O'ahu, the Water Commission assessed sustainable yields against relationships between groundwater and streamflows.[129] Such consideration of a developable yield in the analysis

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[127] WATER CODE § 3. According to geohydrologist Dr. John Mink, sustainable yield is "precisely defined: the pumpage that can be sustained indefinitely without affecting the quality or quantity of the water pumped." Water Commission Meeting (Dec. 7, 1992) (Dr. John Mink Testimony regarding *Ko'olau Ag. v. CWRM*).

> In contrast, the United States Geological Survey has taken the position that: Generally, the amount of water that can be taken out of the ground on a long term basis is referred to as sustainable yield. Sustained yield is actually a very vague term. If a value for sustained yield is adopted for an area, people generally think that this is the amount of water that can be taken from an aquifer without hurting the aquifer. In fact, if you adopt a value for sustained yield for an area you are really saying that this is the amount of water I'm willing to develop and for which I'm willing to accept the hydrologic consequences of this development. The hydrologic consequences will be a lowering of the water table and a reduction of naturally occurring ground-water discharge from the area equal to the amount being pumped.

William Meyer, *Quantifying Ground Water Resources*, 3 KE KIA'I 13-15 (July 2, 1993) (U.S. Geological Survey District Chief for the Pacific presenting speech at Native Hawaiian Water Law Symposium, Apr. 9, 1993).

[128] *See* DAVID K. TODD, GROUNDWATER HYDROLOGY (1980).

[129] This decision is being challenged in Ko'olau Agriculture Co. v. Commission on Water Resource Management, No. 92-3007-08 (1st Cir. Haw. filed Nov. 19, 1992) (admin. appeal) Ko'olau Agriculture Co. v. Commission on Water Resource Management, No. 92-3008-08, (1st Cir. Haw. filed Aug. 17, 1992) (declaratory judgment); Ko'olau Agriculture Co. v. Commission on Water Resource Management, No. 16473 (S. Ct. Haw. filed Aug. 17, 1992). Ko'olau Agriculture ("Ko'olau Ag") holds a Master Lease for Bishop Estate land in Punalu'u Valley. Ko'olau Ag Founder, Fred Trotter, a Campbell Estate beneficiary and former trustee, transferred ownership of Ko'olau Ag to Valerie Mendez who now serves as Ko'olau Ag President. Mr. Trotter served as Chairman of the Water Code Review Commission, a legislatively mandated and selected body which conducted a comprehensive two year study of the Water Code and related issues and developed recommendations for amendments to the Water Code and other state law. *See also infra* notes 341, 364.

underlying designation of water management areas better ensures that extraction of a new ground water source will not be permitted to adversely affect streamflows and thus is more consistent with the overall goals of the Water Code.[130]

Although the Water Commission established a procedure which requires public participation in future decisions regarding the Moloka'i management area, it did not do so for Windward O'ahu. In its Moloka'i designation decision, the Water Commission established the Moloka'i Working Group consisting of water users, community representatives and Water Commission staff to prepare a plan for the future development and allocation of water within the designated water management area.[131] Despite repeated requests for such a working group for Windward O'ahu by community groups, the Commission has not established one.

One factor in the establishment of the Moloka'i group may be the tremendous amount of community participation in the Water Commission's Moloka'i designation decision which occurred, in part because of broad community opposition to Molokai Golf's proposed Highlands Golf Course project and other water resource development initiatives. While the petition for designation was pending, Moloka'i Golf applied for permits to construct wells in the Kualapu'u aquifer, Central Moloka'i's only potable water source. The Moloka'i community was united

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[130] The Commission considered developable yield in its decisions to designate all four Windward O'ahu aquifers as ground water use management areas. Developable yields of the Kahana, Ko'olaupoko, and Waimānalo aquifers were determined to be "effectively zero" because of direct effects upon streamflows by any additional extractions. However, thus far the Commission has been reluctant to require the reduction of existing groundwater extractions that adversely affect stream flows. *See* Water Commission, RESUBMITTAL: Petition to Designate Windward O'ahu as a Water Management Area 4 (May 5, 1992).

[131] The members of the Moloka'i Working Group were first appointed by former Water Commission Chairman William Paty in October 1992. To ensure continued participation, Hawaiians and other members of the Moloka'i community have requested that the legislature establish a Moloka'i Water Resource Advisory Committee to provide input to the Water Commission and to assure Moloka'i residents that their concerns will be heard. H. R. STAND. COMM. REP. No. 615, 17th Leg., 1993 Reg. Sess., 1993 HAW. HOUSE J. 1221. Although the bill passed the House of Representatives, it was held in the Senate Committee on Planning, Land and Water Use Management because of the DLNR contends that the advisory committee would duplicate the existing advisory group within DLNR. The bill was reactivated and heard during the 1994 session and "died" in the Planning, Land and Water Use Management Committee of the Senate.

on the crucial importance of community control over water development and water allocation on Moloka'ī, but divided on whether designation was a preferable way to gain that control.[132] Some argued that designation was not necessary and that simply shifting the decision-making forum from the county to the state would not assure community control over water allocation.[133] On the other hand, designation proponents argued that designation was the best way to secure additional legal and

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[132] *See, e.g.,* Water Commission Special Meeting (May 13, 1992) (Moloka'i) (videotape on file at NHAC office). For example, Mililani Trask, Kia'āina (Governor) of Ka Lāhui Hawaii (a self-governance initiative seeking domestic dependent sovereign status similar to Native American "Nation within a Nation" models) testified in favor of autonomy from state agency control of Moloka'i's water resources and in opposition to designation because it would place more power in a state agency that had not previously protected Hawaiian water rights. *See* S. Res. 198, 209, 17th Leg., Reg. Sess. (1994). Trask threatened to file suit to enjoin official action implementing the Water Code. *Id.*

[133] Residents argued forcefully for the Water Commission to commit to positions on 1) the standing of Hawaiian Home Lands beneficiaries, as independent from the Hawaiian Homes Commission, to bring their disputes about Hawaiian Homes water before the Water Commission; 2) the Water Commission's probable post-designation action with respect to Moloka'i Golf's well construction permits and other operational activities; and 3) adoption of some type of local community-based decision-making body with authority over water management and development. Many sovereignty advocates opposed acknowledging or adding to any Water Commission authority over water resources. NHAC requested a contested case hearing on the Moloka'i Golf well drilling permit on behalf of the West Maui-Moloka'i Taro Farmer's Association and the Sierra Club Legal Defense Fund made a similar request on behalf of Hui 'O Pakele 'Āina. The Commission denied the permit making the contested case hearing issue moot.

At the Commission on Water Resource Management meeting on Moloka'i, May 13, 1992, Liko Grambusch, (President of the Kalamaula Homestead Association), testified that:

> It is the State of Hawai'i who should be appearing before us, a water commission made up of elected homesteaders that control the waters necessary for our use. . . . We have no desire, nor any legal obligation to submit to the supervision, control or power of the state water commission. The rights of Hawaiian homesteaders to these waters existed long before any Water Code or commission was created.

See also testimony of NHAC at the April 5, 1992 meeting of the Maui County Council on the subject of Moloka'i designation, pointing out the Moloka'i Water Use and Development Plan Executive Summary recommendation to establish a Moloka'i Water Authority. NHAC encouraged Maui County to adopt this recommendation as an alternative to designation. *See also* Water Commission Special Meeting, Minutes (Apr. 14, 1994) (noting contested case hearing filed by Matthew Adolpho when Kuku'i Moloka'i requested a reservation of water from the Kualapu'u aquifer).

procedural protections, such as shifting the burden of proving a reasonable and beneficial use to the developer, improving public notice requirements, and imposing higher levels of trust responsibility upon the Water Commission.[134] In addition, varying beliefs regarding Hawaiian sovereignty influenced whether groups and individuals were willing to work within the framework of the Water Code designation process. Despite a wide range of viewpoints, the Moloka'i community demonstrated that Moloka'i residents would relentlessly seek to control water allocation and development decisions affecting the Moloka'i community.

The Moloka'i Working Group produced a report in July 1993 setting forth recommendations for water development on Moloka'i, and stating that Water Commission permitting decisions should reflect the goals of this Working Group.[135] This report is a positive illustration of the effectiveness of community-based water planning. A permitting program based upon such a community-based approach could introduce greater equity and order into water allocation proceedings in other areas.

In contrast, the water allocation procedures in the water management areas grandfathered into the Water Code (Pearl Harbor, including Ewa Caprock and Waialua) have not been community-based, appear to follow no long-range plan for the area and do not demonstrate a recognition of all of the interests in the area. There appear to be no procedures, guidelines or criteria for determining what constitutes a "reasonable-beneficial use," or at least none have been publicly developed or articulated.[136] Further, the state and county components of

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[134] *See, e.g.*, Water Commission Meeting (May 13, 1992) (Testimony of Alan Murakami); Maui County Council Meeting (Apr. 5, 1992) (Testimony of Isaac Hall, DeGray Vanderbilt and Sarah Sykes); Water Commission Meeting, (Jan. 13, 1992) (Testimony of Sarah Sykes). The effective date of designation of the island of Moloka'i was May 5, 1992.

[135] MOLOKA'I WORKING GROUP FINAL REPORT (July 1993). The recommendations of the working group were adopted but were misinterpreted with respect to the amount of water reserved for DHHL on Moloka'i. *See* Water Commission, Minutes (Apr. 14, 1994) (Special Meeting on Moloka'i); Water Commission Special Meeting (Apr. 14, 1994)(Testimony of Toni Bissen, NHAC staff attorney)(on file at NHAC office).

[136] The Deputy Attorney General to the Water Commission recently recommended that each permit include a specific finding that the permitted use is a "reasonable beneficial use provided it remains efficient." Memorandum, Rae M. Loui, Water Commission Deputy Director (May 13, 1993) (on file at NHAC office). There was no direct response to Commissioner Richard Cox's query: "What guidelines does the

the Hawaii Water Plan do not provide guidance for prioritizing competing uses, considering water requirements for ceded lands, nor ensuring that the rights of Native Hawaiians will be protected.

A large proportion of Hawai'i's ground water resources underlie ceded lands.[137] Unfortunately, in the first five years, the interests of Hawaiian beneficiaries in ceded lands did not receive vigorous government protection. For example, ceded lands water resources were implicated when in late 1991 Oahu Sugar voluntarily agreed to reduce its permitted allocation in the Pearl Harbor water management area by about 10 mgd and the Commission announced that this water would be reallocated.[138] Although ceded lands overlie the Pearl Harbor Water Management Area, neither the Office of Hawaiian Affairs ("OHA") nor the Hawaiian Homes Commission ("HHC") applied for water use permits or water reservations during this initial period.[139] In

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Water Commission have to make this determination?" *See* Water Code Review Commission Meeting (Mar. 19, 1993) (videotape on file at NHAC office). *See supra* note 116 for further discussion on "reasonable and beneficial use."

[137] Of the approximately 4.2 million acres of lands that make up Hawai'i, 1.4 million acres are the "ceded lands" base. *See generally supra* note 18 (acknowledging 1.8 acres were "ceded" originally, although many Hawaiians consider these lands "stolen" not "ceded"). Many of Hawai'i's watersheds are in conservation areas within "ceded lands." OHA and DHHL planning staff have no inventory of water resources for ceded lands. OHA is developing a "ceded lands" inventory of the water resources using a geographic information system (GIS) utilizing three-dimensional mapping technology. *See, e.g.*, OFFICE OF HAWAIIAN AFFAIRS, INVENTORY AND LAND ACQUISITION OF PUBLIC TRUST LANDS (Jan. 13, 1994) (study conducted by PBR Hawaii presented to the OHA Committee on Land and Sovereignty).

In addition, many sugar and pineapple irrigation systems and cultivated areas are on ceded lands leased from the state. The demise of these plantations and the expiration of their leases of state land was the motivating force behind the establishment of DLNR's Hawai'i Agricultural and Rural Redevelopment Program (HARRP). This program helped draft and lobby passage of the ADC enabling legislation. This process and activities of the ADC to date have no distinct representation or input from OHA or the Hawaiian community. *See supra* note 15, *infra* notes 177-82 and accompanying text.

[138] *See* Water Commission, SUBMITTAL, *supra* note 9, at 2.

[139] OHA has since entered into several critical water controversies potentially impacting Native Hawaiian interests in the area. OHA has an obligation to engage in water allocation or water reservation processes in order to protect the interests of native Hawaiians. OHA has a constitutional and statutory mandate to work for the betterment of the Hawaiian people. Moreover, OHA has announced plans to convert proceeds from its $112 million ceded land back rents settlement to acquire land for economic and residential development for Hawaiians. Jerry Tune, *OHA Using $500,000*

contrast, by early 1993 large developers and the Board of Water Supply had submitted applications for almost 40 mgd of water use.

Community concerns over priority of water uses have in part focused on what appears to be a lack of criteria for "reasonable and beneficial" use.[140] Particularly prior to May 1993, there was little discussion in Water Commission proceedings about how the "reasonable and beneficial use" test was being applied.[141] The terminology was not used in Water Commission staff recommendations (submittals) and was not explicitly used during Water Commission meetings.[142] However, in May 1993, the Water Commission amended its standard water use permit language to provide: "The Commission finds this use to be reasonable and beneficial provided it remains efficient."[143] Since that time Water Commission discussion about "reasonable and beneficial" uses (and "efficiency") has not significantly increased, generally no

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Grant for Housing, HONOLULU STAR BULLETIN, July 1, 1994, at C-1. In its integral role of pursuing breach of trust claims and back rent reparations at both the State and Federal level, OHA should fully assess and advocate for all the water required to develop ceded lands and closed military bases potentially available to Hawaiians, (for example, Barber's Point, Lualualei, Bellows). Such advocacy should be given special consideration by the Water Commission because of OHA's unique relationship to the Hawaiian people and its legal obligations to them. OHA's Land and Sovereignty Committee has established a technical advisory committee on management of Hawaiian Water Resources, including representatives from the NHLC, DHHL, WRRC and NHAC. *See* letter from OHA Trustee Kina'u Boyd Kamali'i to David Martin (Sept. 26, 1994) (on file at NHAC office).

[140] *See supra* note 135.

[141] *See supra* note 116.

[142] *See, e.g.*, Water Commission, Minutes (Oct. 13, 1993) (Item 5); Water Commission, SUBMITTAL: Water Use Permit Application Poamoho A Well (Well No. 3205-02), Lopez Well (Well No. 3407-02), Waialua Ground Water Management Area, Oahu (Oct. 13, 1993) (Item 5). According to section 54 of the Water Code, when two applications such as these "are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve the application which best serves the public interest." WATER CODE § 54. The Water Commission approved 100% of Poamoho's requested new use, 100% of NHAC's existing use, and 0% of NHAC's requested new use. This seems to imply that Poamoho's fully approved application better serves the public interest than NHAC's partially approved application, but Water Commission records and NHAC's videotaped records of the 10/13/93 meeting reveal no discussion of either application in public interest terms. Water Commission Meeting (Oct. 13, 1993) (videotape on file at NHAC office).

[143] Water Commission, Minutes (May 19, 1993).

basis for such findings have been articulated, and the Water Commission has not developed standards by which to determine "reasonable and beneficial" or efficient uses.[144]

There has been little public or Hawaiian input or influence in the process of prioritizing ground water uses. This is of particular concern to Hawaiians because Hawaiian Home Lands are frequently in dry locations lacking water transport infrastructure and the Water Commission has been slow in developing rules and procedures for allocating ground water to these arid lands.[145] DHHL has also been especially slow in developing and securing access to the needed water infrastructure. Inasmuch as water management areas are areas in which water resources are limited or otherwise threatened, these failures are likely to result in more intense conflicts related to water allocation, increasing development risks and costs, and continuing failure to assure protection of Hawaiian water rights. More importantly to Hawaiians as development of water resources becomes more expensive, future settlements of Hawaiian may be burdened with much higher water development costs if adequate prioritization and reservation systems are not implemented by the Water Commission in cooperation with other state and county agencies in the immediate future.[146]

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[144] It is unclear whether other criteria for evaluating whether a use is a "reasonable and beneficial use" have been established. There has been no public procedure (*e.g.*, rulemaking) and criteria have not been publicly articulated at Commission meetings. Dick Cox (one of the original Water Commissioners) has suggested that long-existing uses be considered more reasonable than newer uses (in talking about water management during water shortage, he stated that it seemed new users should have to reduce their use first). This also may reflect the view of sugar planters with long-existing water uses.

[145] *See generally* U.S. COMM'N ON CIVIL RIGHTS HAW. ADVISORY COMM., 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 43, 46 (Dec. 1991)[hereinafter A BROKEN TRUST]. Hawaiian Home Lands defined as "available lands" all lands given the status under the provisions of sections 203 and 204 of the Hawaiian Homes Commission Act. Because all cultivated sugar-cane lands were excluded, Hawaiian Home Lands did not include the state's finest agricultural lands. *See also* Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Indadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 542 (1992).

[146] Advocates of transferring water from the Windward ground water management area through the Waiāhole ditch to Leeward O'ahu lands refer to high-level dike-compounded water from Windward O'ahu as "cheap water" because of its gravity flow distribution system, and argue that pumping costs for alternative groundwater sources would significantly reduce profits and make diversified agriculture infeasible.

Some Hawaiian concerns coalesced in April 1993 at a Hawaiian Water Law Symposium convened by NHAC and the William S. Richardson School of Law. Two resolutions drafted by participants resulted in specific requests to the Water Commission to suspend action on water use permitting in the Pearl Harbor aquifer until reservations of water were made for native Hawaiian uses.[147] In May 1993, DHHL submitted a formal request to the Water Commission to reserve 3,265,000 gallons per day (3.265 mgd) from the Pearl Harbor aquifer for Hawaiian Home Lands needs under its right to first call on "government-owned" water.[148] On June 2, 1993, the Water Commission approved a 1.409 mgd water reservation for DHHL from the Waipahu-Waiawa aquifer system within the Pearl Harbor water management area.[149] In its decision to reduce DHHL's allocation, the Water Commission staff opined that 1.887 of the 3.265 mgd requested reserve was already supplied by the Honolulu Board of Water Supply (BWS) municipal system, and that to reserve the amount now in that use would constitute double counting.[150] The Water Commission ac-

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See Water Commission Public Hearing, Transcript (Apr. 18, 1995) (Washington Intermediate School) (on file with Water Commission). In contrast, Joyce Uemura, a member of the Hakipu'u 'Ohana in Windward O'ahu described the subject Waiāhole water as "priceless." *Id.*

[147] See WATER COMMISSION, WATER RESOURCE BULLETIN (May 1993) (listing water use permit applications for Pearl Harbor aquifer and noting the resolution petitioning the Water Commission "to suspend any action on the water use permit applications pending before the commission until it has determined the specific quantity of water that should be reserved for native Hawaiian use from the 10 mgd being released by O'ahu Sugar Co. from Pearl Harbor aquifer.")

[148] Letter from Hoaliku Drake, Former DHHL Chairperson to Keith W. Ahue, Former Chairman of the BLNR and the Water Commission 3 (May 7, 1993) (copy on file at NHAC office). On January 25, 1995, DHHL also submitted a request for a reservation of 0.410 mgd of water from Waiāhole stream to serve DHHL beneficiaries on homestead lands in Waiāhole, O'ahu that it received in a settlement with the State over breaches of the Hawaiian Home Lands trust. DHHL was encouraged to submit its request by the many petitions and requests which have been consolidated into the Waiāhole. Water Case generally DHHL has not vigorously asserted many of its other rights and powers which could be used to support its beneficiaries and future beneficiaries ability to enjoy and develop Hawaiian Home Lands in an ecosystem that supports full and meaningful 'exercise of their' culture. *See also infra* note 228.

[149] Water Commission, Minutes 9 (June 2, 1993) (regarding decision on Applications for Water Use Permits Ewa-Kunia & Waipahu-Waiawa Ground Water Management Areas). For further discussion on this decision to reserve water for Hawaiian Home Lands and its implications, see *infra* notes 225-242 and accompanying text.

[150] *See infra* notes 225-42 and accompanying text.

cepted this analysis but provided no legal basis for its decision not to establish reserves for current DHHL uses as required under Act 325's mandate to establish reserves for both current and foreseeable future water needs. Although the Water Commission commented that this issue needed further consideration, no further action has been taken.[151] An administrative rule to effectuate the reservation was adopted by the Commission on October 13, 1993.[152]

Oahu Sugar closed in 1995.[153] This and other plantation closures raise a number of critical technical and policy issues with island-wide and statewide effects.[154] Oahu Sugar's former ground water allocations in the Pearl Harbor aquifer are available for reallocation since their irrigation has been discontinued.[155] If and when pumping ends, water

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[151] See Water Commission Meeting (June 2, 1993)(videotape on file at NHAC office).

[152] HAW. ADMIN. R. §§ 13-171-60, 61.

[153] *See 96 Year Old Oahu Sugar to Close*, HONOLULU ADVERTISER, Aug. 5, 1993, at A1 and related articles at A1, A2, and A4. *See also* Water Commission, SUBMITTAL: Applications for Water Use Permits - Ewa Caprock Ground Water Management Area 1 (Mar. 17, 1993); Water Commission, Minutes (Mar. 17, 1993) (Item 6),

[154] During exchanges between Office of State Planning [hereinafter OSP] Director Harold Masumoto and former Water Commissioner Robert Nakata about the decline of sugar and the continuation of water transfers from Windward O'ahu, it became evident that the traditional paradigm where land use planning determines water use planning is problematic for both of them. Masumoto suggested that this paradigm is open to reconsideration and potentially to revision, particularly in areas approaching the available water source limit. *See* Water Commission Informational Meeting (Apr. 2, 1993) (Testimony of OSP director Harold Masumoto (videotape on file at NHAC office). One year later (and over 10 years after decline of sugar began), OSP's Harold Masumoto and DLNR Deputy Director Jack Keppeler testified in support of a senate bill (3045) creating an agribusiness development corporation because the State had no plan to address the agricultural transition. *See* ADC Act, *supra*, note 15.

[155] Reallocation of this water to Leeward landowners could significantly alleviate demands for the transfer of high level Ko'olau dike water from the Windward O'ahu water management area through the Waiāhole Ditch system. *See* letter from William Meyer, U.S.G.S. District Chief for Pacific region, to Keith W. Ahue, Former Chairperson to BLNR and Water Commission (Nov. 4, 1994) (on file at NHAC office); Letter from William Meyer, U.S.G.S. District Chief, to Rae M. Loui, Water Commission Deputy Director (Nov. 2, 1994) (on file at NHAC office). Letter from William Meyer, U.S.G.S. District Chief, to Rae M. Loui, Water Commission Deputy Director (Dec. 2, 1994) (on file at NHAC office).

Oahu Water Management Plan, Appendix B, Existing Water Use by Aquifer System lists 13 Oahu Sugar Co. well sources with a "total authorized use" of 72.81 mgd and an actual 1990 use of 50.33 mgd. *See also* Water Commission, Minutes (Mar. 17, 1993), *supra* note 146, at 3 (describing the 'Ewa Caprock Regional Plan references to

levels should rise. However, most new uses of this water would contribute less recharge than sugar cane irrigation. Thus, new uses of this water could have greater overall impacts on aquifer sustainability.

Brackish water sources have become increasingly valuable as various state and county policies mandate application of non-potable water for agricultural, landscape, and golf course irrigation. State and county general plans have directed urban development on O'ahu to the 'Ewa area and may require separate water systems to supply potable and non-potable uses. The Pearl Harbor basal aquifer is underneath and next to the brackish 'Ewa Caprock aquifer.[156] Recharge of this caprock aquifer came primarily from Pearl Harbor basal groundwater formerly applied by Oahu Sugar Company and other users to lands overlying the caprock aquifer for sugar cane irrigation and other non-domestic uses.[157]

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efforts to find feasible alternatives to caprock aquifer recharge). Alternatives identified are 1) construction and operation of tertiary sewage treatment plant and drilling and maintaining reinjection wells for injection of Class A quality waste water, 2) percolation basins, and 3) direct piping. Reinjection is considered the "most desirable distribution solution despite the fact it will most likely be the most expensive delivery system." Although percolation basins may be the most inexpensive and sustainable solution (and is the one promoted by DOH,) it appears that participants developing the 'Ewa Caprock Regional Plans are rejecting this option because it "may require significant land area." Although numerous Native Hawaiian organizations have developed, or are in the process of developing, plans to construct taro pondfield, aquaculture, and polyculture (combining taro and aquaculture) projects, they have not yet been consulted in the 'Ewa Caprock Regional planning process, nor have they marshalled enough of the technical skills or resources to participate as independent players in a field dominated by large developers and governmental agencies.

U.S. Department of Defense ("DOD") plans to close the Barbers Point Naval Air Station may allow more creative solutions to this problem. Presently the State of Hawaii and the City and County of Honolulu are developing plans to purchase or otherwise acquire the Barbers Point land to which DOD acquired fee simple title after it was condemned from Campbell Estate. A cooperative approach to secure these lands as a part of a Federal reparations package toward the settlement of Hawaiian claims for military base back rents and other Federal breaches of trust could be beneficial for all parties. Hawaiians could expand their presently limited land base on O'ahu, where most Hawaiians reside, and could then more effectively participate in the pondfield solutions to the 'Ewa Caprock recharge problem.

[156] The 'Ewa caprock aquifer is also a designated groundwater management area. *See infra* note 160 and accompanying text.

[157] See Water Commission, SUBMITTAL: Applications for Water Use Permits - Ewa Caprock Ground Water Management Area 1 (Mar. 17, 1993)(Item 6); Water Commission, Minutes (Mar. 17, 1993)(Item 6).

The permits issued by the Water Commission for water management areas have for all practical purposes manifested in a "first come-first served" regime of water management.[158] A "first come-first served" regime is essentially a prior appropriation system which as a result of *McBryde* and the Water Code is no longer the law in Hawai'i.[159] Permittees gain apparently higher levels of state recognition of water use rights through interim permits in water management areas[160] and then through final permits that are for all practical purposes perpetual,[161] although subject to review "[a]t least once every twenty years" and subject to reduction after four years of underuse.[162]

Designation of water management areas offers the Water Commission opportunities to start water allocation processes with a clean slate. Before the Water Commission issues temporary water use permits in designated water management areas, it must determine what existing and future uses in that area are legally protected and if these legally

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[158] *See* Letter from Rae M. Loui, Water Commission Deputy Director, to David Martin (Nov. 17, 1992) (on file with the NHAC office). As noted in the introduction, this policy is problematic, *see supra* note 7. The State Constitution requires the State to protect, control, and regulate the use of all of Hawai'i's water resources, both ground and surface water, for the benefit of its people. HAW. CONST. art. XI, § 7. The first- come-first-served system of allocation may be inconsistent with that mandate. At a minimum, the Commission should be developing (with public participation) and implementing policies that are designed to protect group rights to lands and resources for both present and future generations. ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 385-412 (Edith Brown Weiss, ed. 1992) (discussing the challenge of defining and implementing the group rights of future generations in the context of environmentally sustainable development).

[159] ADVISORY REPORT, *supra* note 90, at 18-23 (describing alternative approaches considered for the state's permit system).

[160] The Water Code provides for interim permitting of uses existing as of July 1, 1987. WATER CODE § 50(e). This allows the Water Commission to issue the interim permit for an estimated, initial allocation provided the use meets the "reasonable-beneficial" test and is allowable under common law. A final determination of the water allocation and the issuance of the permanent water use permit is to be made after verification of the actual quantity of water being consumed and within five years of the filing of the original permit application. The Water Commission has inexplicably and perhaps illegally expanded the interim permitting process beyond existing uses to all new use permit applications. The Water Commission has also established the practice of issuing "temporary" water use permits, such as the permits issued in the Ewa Caprock Aquifer in May 1993.

[161] The Water Code provides: "Each permit for water use in a designated water management area shall be valid until the designation of the water management area is rescinded . . . ." WATER CODE § 55.

[162] *Id.* §§ 56, 58.

protected uses are being or will be "interfered" with or "harmed" now or in the future.[163] The Water Commission must also address questions of reserving water to support special land uses (such as agriculture and affordable housing), traditional and customary, riparian, appurtenant and ceded lands uses and Hawaiian water rights generally.[164] The Water Commission can then implement a comprehensive plan to manage ground water use as usufructuary rights[165] in a way that better respects Hawaiian customs and traditions.

This opportunity is juxtaposed against the Water Commission's apparent reluctance to cut back plantation and municipal allocations or to modify existing uses. Ideally, all existing and proposed ground and surface water uses should be the subject of comprehensive, open, community-based review to equitably determine and prioritize "reasonable and beneficial" uses and the public interest. This would allow the Water Code to function as an integrated water management system which best protects water resources and community interests in them.

The transition from plantation argiculture to other land uses and associated groundwater issues also have significant implications for surface water management. The Commission's reluctance to reduce existing ground water allocations and uses is especially troubling where ground water source development has already seriously impacted the quality and quantity of groundwater, springs and streamflows important to the practice of Hawaiian tradition and custom and maintenance of the integrity of the Hawaiian culture.

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[163] *Id.* § 49; HAW. ADMIN. R. § 13-171-13. *See also* Water Commission, Minutes, (Mar. 17, 1993) (Item 6); Water Commission, SUBMITTAL: Water User Permit Applications for 'Ewa Caprock Ground Water Management Area (Mar. 17, 1993), Water Commission Meeting Mar. 17, 1993) (NHAC Testimony) (videotape of file at NHAC office).

[164] *See supra* note 8 (discussing existing common and statutory law protections).

[165] Water rights have been described as usufructuary rights:

> A right to a particular quantity of water is private property because it is unique to the rightholder, but it is a different mode of property than that in a plot of land or an automobile. Water in a natural waterbody is so important to society that it cannot be privately owned. It is owned by each state as trustee for its citizens. In other words, water in natural bodies is "public property"; it belongs to citizens of the state. A private citizen can only own the right to use such water . . . a "usufructuary right."

WILLIAM GOLDFARB, WATER LAW 11 (2d ed. 1991). *But see* Chang, *supra* note 52, at 127 ("While there is no serious talk about private ownership of the corpus of water in other states, some parties contended that Hawaiian law allowed parties to 'own' the physical corpus of water.")

C. Stream Protection & Management

The Water Code requires the Water Commission to establish and administer a statewide instream use protection program to "protect, enhance, and reestablish, where practicable, beneficial instream uses of water."[166] The Water Commission is also required to establish instream flow standards on a stream-by-stream basis "whenever necessary to protect the public interest in the waters of the State."[167] To establish interim instream flow standards for individual streams according to the schedule set forth in the Administrative Rules, the Water Commission adopted blanket interim instream flow standards for all streams, under which "status quo" flow must be maintained.[168]

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[166] WATER CODE § 5(3).

[167] *Id.* § 71(1).

[168] Status quo flow is "that amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted off stream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard." HAW. ADMIN. R. §§ 13-169-44 to 49.1.

The Commission was required to adopt interim instream flow standards by certain dates, WATER CODE ACT, *supra* note 14, § 4, to become effective as Administrative Rules ten days after filing with the Office of the Lieutenant Governor and set dates for determining "status quo" stream flow (effective dates establishing instream flow standards). Adoption of interim stream flow standards occurred as follows:

1) In Windward O'ahu, flows standards were to be established by July 31, 1987; were adopted on April 19, 1989; and took effect on May 4, 1992.
2) In East Maui and Kaua'i, standards were to be established by December 31, 1987; were adopted on June 15, 1988; and took effect on October 8, 1988.
3) In Hawai'i and Moloka'i, standards were to be established by July 1, 1988; were adopted on June 15, 1988; and took effect on October 8, 1988.
4) In West Maui and Leeward O'ahu, standards were to be established by December 31, 1988; were adopted on October 19, 1988; and took effect on December 10, 1988.

Id.; HAW. ADMIN. R. § 13-169-49.

In the case of windward O'ahu, whose plentiful water sources interest many developers, the interim instream flow standard adopted by the Water Commission on April 19, 1989 was filed promptly with the Lieutenant Governor's office but was not approved until April 24, 1992 and took effect on May 4, 1992. The Water Commission staff says the three year delay was "due to administrative delays." Water Commission, SUBMITTAL: City and County of Honolulu, Board of Water Supply Reconsideration of Permit Condition and Non-Compliance with Permit Condition Various Streams between Hau'ula and Lā'ie, O'ahu (Jan. 26, 1994) (exh. B-2, 3). During the interim, water use, well construction and pump installation permits have supported extractions that are likely to have adversely impacted streamflows. *See infra* note 183 (regarding the direct relationship between ground and surface water).

The Water Commission has encountered a wide range of competing demands on its budget and staff, as well as technical and administrative difficulties in developing so called "permanent" instream flow standards. In February 1989, the Water Commission began the process of upgrading interim instream flow standards for the Maunawili watershed and Kawainui marsh on O'ahu, its first such action to replace the "status quo" or interim instream flow standards with more precise standards.[169] The Maunawili and Kawainui work remains incomplete.

Expressing serious concerns about years of minimal progress on stream protection, environmental advocates pressed the issue at the 1992 legislative session. This resulted in passage of Senate Concurrent Resolution No. 130, requesting the adoption of an environmental protection system for Hawai'i's streams. In response, the Water Commission initiated efforts to develop a stream management process by establishing a relatively small O'ahu-based task force to develop a stream protection and management plan.[170] The Stream Protection and Management Task Force (SPAM) which evolved from the Resolution seems to have tacitly conceded that the Water Commission will be unable to develop in the foreseeable future permanent instream flow standards for all of Hawai'i's streams. They considerd a broad range of stream management alternatives. Thus, almost six years after passage of the Water Code there are no "permanent" instream flow standards. The status quo standard prevails.

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[169] A University Research Council funded a project to develop and investigate value-based methods for establishing more precise yet flexible instream flow standards entitled, "Instream Flow Standards: Developing, Applying, and Assessing Methodologies," (Principal Investigator: Dr. Mark A. Ridgley, Associate Professor of Geography, University of Hawai'i at Mānoa). A presentation to the 1995 People's Water Conference in Hawaii showed how these methods could be applied to the Waiāhole water controversy. Students from Dr. Ridgley's Spring 1995 class continued this applied work and provided their results as public testimony in the April 18, 1995 Public Hearing on the Waiāhole water controversy. *See* Water Commission Public Hearing, *supra* note 146. *See also* Mark Ridgley, *Multicriterian Approach to Settling Instream Flow Standards,* 24 J. ENVT'L SYSTEMS 69-86 (1995); Mark Ridgley and David C. Penn, *Multiobjective Decision Support for Water Reallocation Agricultural Development, and Conflict Resolution on O'ahu, Hawaii,*—J. APPLIED MATH & COMPUTATION (forthcoming 1996).

[170] WATER CODE § 71. In March 1993 the Water Commission received additional staff support from the Office of State Planning to focus efforts on stream management planning processes. The stream protection and management task force includes Guy Fujimura, Marjorie Ziegler, Andy Yuen, Bill Devick, Meredith Ching, Alan Murakami, Ron Kouchi and Oswald Stender. *See infra* notes 368-72 and accompanying text (discussing Task Force).

A major shortcoming of the "status quo" approach to instream flow standards is that all existing out-of-stream uses are treated as "reasonable and beneficial," irrespective of whether all such uses are legal uses or whether certain of these uses adversely affect the stream. This has made it difficult to promote instream uses by reducing existing out-of-stream uses. In addition to the Commission's lack of jurisdiction over water leasing, which resides in the BLNR, and the overall lack of planning for transitional use of water transported by agricultural irrigation systems, impedes processes which could facilitate restoration of water to dewatered streams. When water is transported across watershed boundaries, it is unclear how the values and needs of the community or region from which water is taken are weighed against the needs of the community which receives the transported water.[171] It is important to note that there is no right to transport water out of its

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[171] *See, e.g,* Joseph L. Sax, *Editorial,* 7 U.C.D./AGRICULTURAL ISSUES CENTER QUARTERLY 2 (1993) (remarks regarding impacts of water transfers):

> My observations are based on two premises: (1) that the claim for a community stake in water is legitimate and is reflected in a wide range of responses to water problems over a very long time; and (2) that legitimate community claims too often have been neglected in the effort to facilitate water transfers.
>
> First, water in place is a type of wealth. That wealth accrues not only to the owner of a water right, but to many other people in the place where the water is located — in the form of employment, direct and indirect, in lower prices for water because of its relative abundance, and in natural values, such as recreation and fisheries, that arise as a result of water's presence.
>
> Second, when water is sold as a mere commodity, only the formal owner of a water right is compensated. For that individual, there is a transformation of wealth from one form to another — from water to cash. Indeed the seller is likely to be significantly enriched, particularly in ag-urban transfers, since water has been under-priced and, from the perspective of economic efficiency, under-utilized. Payments for water frequently exceed the profits that sellers could have obtained from using the water for irrigation.
>
> Third, while such sales are, for the owner-sellers, transformational — that is, wealth is transformed from water to cash — for everyone else who has been benefitting from the presence of that water, the sales are redistributional. That is, others in the community who have up to that point benefitted from wealth in the form of water in place will be made poorer since the water is gone and they get nothing in return. Moreover, it is likely that the redistribution will be especially adverse to the poorer people in the communities, since they are often the least mobile residents. They are unlikely to move and find equivalent work and amenities elsewhere.

Id.

watershed of origin under the common law of Hawai'i.[172] Yet, the "status quo" approach protects existing offstream uses even to the detriment of beneficial instream uses.

In practice, the status-quo approach is counter to the Water Code requirement that the Commission "protect, enhance, and re-establish, where practicable, beneficial instream uses of water," one of which is Hawaiian traditional and customary practices.[173] One of the most basic principles of Hawaiian traditional and customary water law, that "no ditch was permitted to divert more than half of the water in the stream," remains relatively disregarded.[174] The Water Commission's failure to develop comprehensive stream management and restoration programs[175] has reinforced many Hawaiians' belief that the Water

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[172] In *McBryde I*, the court determined none of the parties "has any right to direct water . . . into other watersheds." McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 200, 504 P.2d 1330, 1345 (1973). The court asserted that "the riparian right appertains only to land adjoining a natural watercourse for its use." *Id.* at 198, 504 P.2d at 1344. Further, the court held "appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant." *Id.* at 191, 504 P.2d at 1341. In *Reppun*, the court concurred with its earlier decision in *McBryde I* that "appurtenant water rights . . . by virtue of their appurtenant nature, may not be transferred or applied to lands other than those to which the rights appertain." Reppun v. Board of Water Supply, 65 Haw. 531, 564, 656 P.2d 57, 69 (1982).

[173] WATER CODE § 5(3), *restated in* HAW. ADMIN. R. §§ 13-169-1, 13-161-22, 13-169-22. *But see* HAW. ADMIN. R. § 13-169-20 (Principles and Guidelines for Instream Use Protection). *See also* Williamson B. C. Chang, *Instream Flow Protection in Hawaii, in* INSTREAM FLOW IN THE WEST, ch. 12 (MacDonnell et al. eds., 1989).

[174] *See* NAKUINA, REPORT ON HAWAIIAN CUSTOM, *supra* note 22; HANDY & HANDY, *supra* note 28, at 58; Antonio Perry, A Brief History of Water Rights 5 (1912) (speech by Associate Justice Perry at the Annual dinner of the Hawaiian Bar Association (June 15, 1912)). Contemporary implementation of this approach was suggested by co-author David C. Penn on behalf of NHAC in an invited presentation to the Water Code Review Commission workshop on Native Hawaiian water rights. David C. Penn, First Step Implementation of Hawaiian Water Rights Using the Half-Half Principle to Level the Playing Field (1994) (manuscript submitted to the Water Code Review Commission on file at the Legislative Reference Bureau).

[175] In December 1990, the Commission on Water Resource Management in conjunction with The National Park Service released the project report *Hawaii Stream Assessment — A Preliminary Appraisal of Hawaii's Stream Resources*. The purpose of the project was to have a readily available database to assist with stream-related management and decision making. In the report, recommendations were made ranking Hawai'i streams deserving protection. For streams with high rankings, the rankings were usually derived from relatively abundant available information. In contrast, low stream rankings were usually based on scant information, and were generally less reliable

Commission does not understand their concerns and will not take initiative to protect Hawaiian rights.[176]

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assessments of stream quality. Although the Water Commission never formally adopted the stream assessment report, its staff tends to rely on the report's assessments without expressly taking into consideration the quality of the information used. The probability of the report being used in such a manner was noted by the authors of the report as they cautioned: "The common concern was that users of the report would interpret all streams not ranked Outstanding as being unworthy of protection. This was not the design or intent of the Hawaii Stream Assessment, and neither this report nor the ranks should be used in that way."

The report's preface warns that "existing information, while limited, was sufficient to conclude that the state's surface water resources are limited, fragile, and in need of protective management now." Significantly, the preface concludes that "it is important to note that . . . this study does not initiate any action, protection, designation or zoning changes." The preliminary report proposed "future actions" to 1) refine data in the report and complete an inventory on minor streams; 2) adopt a Hawaii Stream policy; 3) establish a Hawaii Stream Plan with guidelines and a protected streams program; 4) declare a moratorium on development of significant streams; and 5) use findings in the preliminary report as interim guideline. *Id.*

According to staff, the preliminary report is not used as a policy document—it is only used as a reference and an inventory of Hawai'i's streams. Staff is still attempting to fill gaps in this information base since the quality of current information varies widely among streams. As new information becomes available, the report is amended. Telephone Interview with David Higa, Water Commission Planner (Apr. 21, 1993). For an update of efforts since May 1993, see discussion of The Stream Protection and Management Task Force, see *infra* notes 368-72 and accompanying text.

[176] *See* Citizen's Complaint filed by West Maui-Moloka'i Taro Farmers Association and an Oct. 29, 1991 support letter from NHAC to the Water Commission regarding Maui Land & Pineapple Co., Inc.'s ("Maui Land & Pine") continuing diversion of 100% of the Honokohau Valley streamflow (on file with Water Commission and at NHAC office).

As the most extensive system of lo'i along the west Maui coast, Honokohau once flourished with water from a large stream flowing from far up in the mountains. HANDY & HANDY, *supra* note 28, at 494. Now, a "taro gate" in the Honolua Ditch Tunnel releases only approximately one mgd to the stream from the average 28 mgd diverted through the tunnel by Maui Land & Pine. This release flows overland and returns to the stream approximately three miles downstream from the diversion point. Two miles of the streambed is totally dewatered below the diversion until a spring emerges in the streambed. Valley residents and taro farmers requested additional water be released at the dam. Thus far, the strongest action the Water Commission has taken was to request that Maui Land & Pine increase the taro gate flow to 2 mgd. This doubling of taro gate flow would amount to a mere 5% (approximate) reduction in Maui Land & Pine's ditch flows. Maui Land & Pine refused to comply with this request. Juxtaposed against the wishes and needs of the taro farmers and valley residents is a heavy reliance on this water by Maui Land & Pine, Kapalua Resort (2.0 mgd), Maui County Pioneer Mill (5.5 mgd), (remaining available flow). HWP Maui, *supra* note 58, at 1-31.

This skepticism has been further fueled by the establishment of the Agribusiness Development Corporation ("ADC").[177] Hawaiians, as well as many others, fear that ADC will commandeer water that is no longer needed for the cultivation of sugar.[178] The purpose of the ADC is to "create a vehicle and a process to make optimal use of agricultural assets," specifically plantation irrigation systems.[179] The ADC has been vested with the authority to acquire and manage these systems and can finance them by issuing and selling bonds as well as charging user fees.[180]

The ADC is a public corporation which may later incorporate as a non-profit corporation. It is governed by an eleven member board of directors. The director of business, economic development and tourism, the chairperson of the board of agriculture and the chairperson of the BLNR are ex-officio voting board members.[181] Although the bulk of the water in most of the irrigation systems originates on ceded lands upon which Hawaiians have specific rights and interests, there is no representation on the board by OHA, HHC or any independent Hawaiian individual or entity (such as a community development corporation). The legislature did not appear to consider how ADC's apparent authority to secure title to plantation irrigation systems would interface with DHHL's authority to do the same under HHCA.[182]

Water Commission decisions to designate Moloka'i and Windward O'ahu only for ground water management have significant implications

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[177] *See generally* ADC Act, *supra* note 15.

[178] *See supra* note 124. The discontinuation of sugarcane irrigation creates an expectation by many windward O'ahu residents that part or all of the now diverted windward ground and surface water directed through the Waiāhole Tunnel will be returned to windward O'ahu to restore stream flow to the Kaneohe Bay estuary system. This expectation is at odds with competing plans by major landowners and developers for development in the 'Ewa Plain and other parts of Leeward and Central O'ahu. Moreover, plans apparently were under consideration by the Office of State Planning (OSP) to lay claim to another 6-8 mgd from windward O'ahu for export to central O'ahu. Similar expectations and concerns are evident on Maui, Kaua'i and Hawai'i as well. *See* Water Commission Informational Meeting, *supra* note 154 (Testimony of then Director OSP Harold Matsumoto) (videotape on file at NHAC office).

[179] *See generally* ADC Act, *supra* note 15.

[180] This process has been exempted from Public Utility Commission oversight. *See* ADC Act, *supra* note 15.

[181] Of the other eight members, four are to be selected by the president of the senate and four by the speaker of the house of representatives. *See also supra* note 97 regarding DLNR's potentially conflicting roles as both a regulatory agency and one with substantial water use interests. *See infra* note 327.

[182] *See generally* ADC Act, *supra* note 15.; HAW. REV. STAT. ch. 174 (1993).

for management of both surface and ground water. This is particularly important to many windward O'ahu and north Moloka'i aquifers where direct relationships exist between ground and surface water (*i.e.*, extraction of ground water from an aquifer causes corresponding reductions in stream flow).[183]

In the absence of designation of the surface water basin as a water management area, the Water Code provides little, if any, direction to the Commission with respect to inter-basin water transport.[184] Hawai'i's common law prohibits inter-basin transport of riparian and appurtenant surface water.[185] In those areas where direct relationships exist between ground water and surface water, ground water developed by wells is indistinguishable from surface water and therefore should not be trans-

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[183] For discussion of the interrelationship between ground water and surface water, see Moloka'i and Windward Designation SUBMITTALS, *supra* note 124. The *Reppun* court acknowledged the unity of the hydrologic cycle:

> The common law in treating surface and groundwater as distinct failed to recognize that both categories represent no more than a single integrated source of water with each element dependent upon the other for its existence. Hawai'i is no exception; artesian waters have been subject to the doctrine of correlative rights, stream waters have been held subject to riparian and appurtenant rights, and no attempt has been made to reconcile the possible conflicts between the two systems.
>
> The trend in many states has been to recognize the interrelationship between surface and groundwater sources and to combine the control and management of both under a unified statutory scheme. . . . We agree that the law must recognize that "all waters are part of a natural water course, whether visible or not, constituting a part of the whole body of moving water." We therefore hold that where surface water and groundwater can be demonstrated to be physically interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights, whether the diversion involves surface water or groundwater.

Reppun v. Board of Water Supply, 65 Haw. 531, 555, 656 P.2d 57, 73 (1982) (citations omitted). *See also generally* Meyer, *supra* note 127; John D. Musick, Jr. and Gaël Beriro, *One River, The Integration of Ground and Surface Water in Hawai'i*, 5 Ke Kia'i 10-11 (Apr. 1, 1994).

[184] *Cf.* Water Code § 49(c) which provides:

> [C]ommon law of the State to the contrary notwithstanding, the commission shall allow the holder of a use permit to transport and use surface water or ground water beyond overlying land or outside the watershed from which it is taken if the commission determines that such transport and use are consistent with the public interest and the general plans and land use policies of the State and counties.

[185] *McBryde I*, 54 Haw. 174, 198, 504 P.2d 1330, 1341 (1973); *Reppun*, 65 Haw. at 550, 656 P.2d at 70.

portable. In this circumstance, enforcement of instream standards can arguably control development of ground water.[186]

The limitation on transporting surface water and its implication for related ground water resources is a critical concern to county boards of water supply and to developers as they seek to secure additional water sources to direct into integrated island-wide water systems. In addressing this concern the Honolulu Board of Water Supply and major developers appear to utilize a de facto water crediting process whereby a developer drills a well on land it owns or leases, dedicates the well to municipal use, and feeds the water into the Board of Water Supply's integrated system.[187] Apparently, that developer may concurrently be given a water commitment from Board of Water Supply

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[186] Water Commission, RESUBMITTAL: Petition to Designate Windward O'ahu as a Water Management Area for Surface Water, Commission on Water Resource Management 3-4 (Sept. 16, 1992). Ironically, in spite of such strong language from Hawai'i's highest court, consultants to the Honolulu Board of Water Supply (BWS) stated in 1988 that BWS is not required by law to "reduce or cease water production whenever the DLNR determines that ground water development has reduced stream flow below instream flow standards adopted by the DLNR." VTN PACIFIC, FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS) FOR WINDWARD OAHU REGIONAL WATER SYSTEM IMPROVEMENTS iii (1988). Later BWS consultants apparently interpreted the court's statement as implying that "instream flow standards do not regulate ground water development." ODGEN ENVIRONMENTAL AND ENERGY SERVICES, DRAFT ENVIRONMENTAL ASSESSMENT AND CONSERVATION DISTRICT USE APPLICATION, MAAKUA WELL PROJECT, at 4-2 (Feb. 1993). However, in 1993, BWS consultants iterated BWS intent to voluntarily comply with the interim standards and prohibit water removal whenever dry-weather stream flow is at or less than existing median flow. *Id.* It is noteworthy that this voluntary compliance with these standards during dry weather does not appear to extend to sub-median wet weather flow even though ground water extractions under such conditions could still violate instream flow standards.

Water Commission staff did not agree with the BWS's earlier assessment that interim instream flow standards do not regulate ground water development. The staff submittal reasoned that it was not necessary to designate the surface water of the five designated aquifers as the "the developable yield concept assumes a one to one relationship between ground and surface water." Water Commission, Minutes 3-4 (Sept. 16, 1992) (relating to Windward designation). See *supra* note 124 and accompanying text for further discussion on the decision to bifurcate designation of windward O'ahu's ground and surface waters.

[187] When Kazu Hayashida, former Board of Water Supply Chief Engineer (current Director of State Department of Transportation), was asked if Bishop Estate would be given a water credit for some of its lessees' developments if it dedicated the output of the Ko'olau Ag wells in Punalu'u Valley, O'ahu to the Board of Water Supply, Kazu Hayashida replied: "That's right, no different from any other developer." Kevin O'Leary, *Troubled Waters*, HONOLULU WEEKLY, Feb. 10, 1993, at 4, 7.

systems, often in other parts of the island. These arrangements seemed to operate with the tacit approval of the Water Commission and its staff, as there appears to have been a lack of scrutiny of permit applications in areas where there is no planned development in the vicinity of the water source. More recently the Commission has denied water use permit applications in some of these types of situations.[188]

Despite the Water Commission's past failures to make stream management issues a top priority, adoption of "status quo" instream flow standards has functioned effectively in some cases as an extension of riparian natural flow principles. New users of surface water typically must seek stream diversion works permits and stream channel alteration permits, and, if diversions would alter the "status quo" streamflow, petitions to amend instream flow standards.[189]

The Commission has been relatively responsive to extensive community-based efforts to resist permitting of two hydropower development projects. In both cases, the community perceived that these projects would adversely impact the availability of water for traditional and customary uses and came in large numbers to testify against the permit applications.[190] Unfortunately, such turnout cannot be regularly mobilized to deal with less visible yet equally important issues.

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[188] *See supra* note 129. This is a particularly critical issue as water use permits are now being sought by Ko'olau Ag. Ko'olau Ag is planning to dedicate these wells to the Honolulu Board of Water Supply. Some speculate that these proposed wells on leased Bishop Estate land in Punalu'u, on the windward side of O'ahu, would ultimately be used to offset water that Bishop Estate and/or Campbell Estate needs to develop lands in the Ewa Plain area, on the leeward side of O'ahu. Presumably Ko'olau Ag will be obliged to divulge more specifics on proposed use to allow Water Commissioners to apply the reasonable and beneficial use test required for water use permits. Farmers in the area have complained that drawing more water from the Punalu'u area will impact the streamflow levels that they depend on to water their crops. Neighbors have already noticed substantial reductions in stream and ditch flow due to existing surface water usage by Ko'olau Ag. Water Commission, Minutes (Apr. 28, 1993) (Item 2). At the September 1, 1993 meeting, the Water Commission, while granting a well construction permit, denied a water use permit to Bishop Estate for a new source in Waialua, O'ahu because the Estate did not plan to develop a use for the water within the next four years. This decision is not reflected in meeting minutes but has been confirmed by viewing NHAC videotapes of these proceedings.

[189] *See supra* note 168 regarding "status quo" interim instream flow standards.

[190] For example, the Hanalei community turned out in force at the Hanalei School Cafeteria on March 4, 1992 to protest two permit applications for a hydropower project in Wailua, Kaua'i. *See* Water Commission Special Meeting, Minutes (Mar. 4, 1992). This was partly because taro farmers feared a hydropower plant on the Wailua river would negatively impact the famous Hanalei taro fields. It was the force of their

Small water users and cultural practitioners will continue to be disadvantaged so long as surface water is managed as an inexpensive resource with potentially high economic return. Even the most recent Commission report on surface water reflects this bias. The draft staff recommendations on stream protection and management in Hawai'i, in its discussion of the SPAM vision statement "to protect beneficial uses," recognizes stream water only as "an important element of Hawai'i's economy."[191] However, economic value is not the sole surface water management criteria under the Water Code. Code mandates to protect Hawaiian rights and traditional and customary practices require that consumptive and non-consumptive water uses intrinsic to Hawaiian beliefs, values, and practices must be recognized and considered in the recognition of "beneficial uses." One battleground in the struggle for this recognition and consideration is the Commission's development of the statewide, code-mandated water use inventory.

D. Information Gathering and Distribution: Water Declarations & Certification

The Water Commission has jurisdiction over all water resource users in the State. One of the first tasks undertaken by the Water Commission

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testimony, as well as that of other community organizations, that persuaded the Commissioners to deny both permits. David Martin, *COWRM Rejects Wailua Hydropower*, 3 KE KIA'I 12 (Apr. 30, 1992). Mauna Kea Power Company's petition to amend the interim instream flow standard of Honoli'i Stream was defeated after intense debate and testimony at five Water Commission meetings. *See* Water Commission, Minutes (Nov. 15, 1989) (Item 1); Water Commission, Minutes (Sept. 1990) (Item 14); Water Commission, Minutes (Oct. 1990) (Item 7); Water Commission, Minutes (Nov. 1990) (Item 13); Water Commission, Minutes (Dec. 1990) (Item 2) [hereinafter collectively cited as Honoli'i Stream Minutes]. The public asked questions about threats to native Hawaiian species living in the stream, but also questioned how the surf would be impacted where Honoli'i Stream meets the ocean. Honoli'i Stream Minutes, *supra*. A group of surfers claimed the Water Commission had jurisdiction over the streamflow-related quality of the surf. After months of debate by all parties, the Commissioners voted unanimously to deny the permit applications. Honoli'i Stream Minutes, *supra*. Water Commissioner and Stream Protection and Management Task Force Chairperson Guy Fujimura has suggested that the Honoli'i decision is indicative of an evolving Water Commission policy that all streams cannot support all uses. Interview with Guy Fujimura, Water Commissioner (Oct. 24, 1993).

[191] HAW. COMM'N ON WATER RESOURCE MANAGEMENT, DRAFT STAFF RECOMMENDATIONS, STREAM PROTECTION AND MANAGEMENT IN HAWAII 3 (May 1994). *See generally* CONCON, COMM. WHOLE REP. NO. 18 at 60, *reprinted in* 1 CONCON PROCEEDINGS 1026 (Sept. 15, 1978)("When considering use and development of our natural resources, economic and social benefits are major concerns. However, the broad definition of economics that [sic] of 'careful and thrifty' use of the resources, rather than the narrow sense of immediate financial return, should be adopted.").

was to gather information about the physical nature (including the quantity and quality) of Hawai'i's water resources and how they are being used. All users were required to file a separate declaration for each use of water in any area of the state within one year of the adoption of the administrative rules, procedures, and forms.[192] Drafters of the Water Code intended that subsequent certificates of use would protect interests under article XII, section 7 of the Hawaii State Constitution.[193] They also intended that this process would lay the foundation to provide actual notice to certificate holders of subsequent regulatory activity which may affect them.[194] Upon determination that a use was reasonable and beneficial, the use would be "certified."[195] A "certified use" must be recognized by the Water Commission in resolving claims with respect to water rights and uses.[196]

The deadline for filing declarations was May 27, 1989.[197] Despite the important implications of filing declarations,[198] the Water Com-

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[192] WATER CODE § 26.

[193] The Water Code's certification process in section 27 provides for the preservation of traditional and customary rights of Native Hawaiians, as its legislative history states that "the section on certificates of use is intended to afford protection to constitutionally recognized interests under article XII, § 7 of the constitution that are not in designated areas." WATER CODE BILL, *supra* note 90, at 4-5.

This implies a special requirement of protection for certified water uses in non-designated areas which arise under art. XII, § 7 of the State Constitution relating to "traditional and customary" Hawaiian rights. Moreover, this particular section of the legislative history was said to have been a compromise for passage at the urging of Representative Calvin Say. Without it, his crucial vote would have been withheld. Charlene Hoe, delegate to 1978 Constitutional Convention, the Water Round Table and currently on the Water Code Review Commission, said: "We saw certification as a way to address our [community] concerns that were borne out of the push pull of (the State versus County) home rule struggle." Telephone Interview with Charlene Hoe (Apr. 13, 1994).

[194] WATER CODE BILL, *supra* note 90, at 4. "The Commission should adopt rules to provide adequate notice and procedural safeguards for all users including actual notice of applications to other users, that may be affected, hearing procedures, and conditions in a manner similar to that provided for permits in designated areas." *Id.*

[195] WATER CODE § 27(a).

[196] *Id.*

[197] The Water Code requires that "any person making a use of water in any area of the State" file a declaration of that use. *Id.* § 26(a). The statute clearly states that if no declaration is filed, however, "the commission in its discretion, may conclusively determine the extent of the uses required by declaration." *Id.* § 26(d).

If the information on the declaration is inaccurate then it will impact the Water Commission staff's ability to recommend certification of the declaration. This inac-

mission's primary effort to inform the public of the deadline was directed to large commercial and public utility water users. After considerable advocacy group pressure, the Water Commission held a series of public information hearings around the State.[199] In the first two meetings, Water Commission staff misinformed those in attendance, including Hawaiians, that filing of declarations was only for the purpose of developing an inventory.[200]

Due to the great numbers of declarations filed (7,300 separate declarations), the Commission was unable to meet its own deadline of November 27, 1989, for acting on the individual declarations. On February 28, 1990, the Commission, in the face of strong public opposition, accepted its staff recommendation to categorize the declar-

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curacy in the water use declaration may or may not be identified when the Commission's staff makes an on-site field visit to inspect the water use declaration. If the Commission determines that the use is a "reasonable, beneficial use, the commission shall issue a certificate describing the use." *Id.* § 27(a).

[198] *See* MacDougal, *supra* note 95, at 227-28. Those who have not filed a declaration may not have the benefit of a hearing before the Commission to contest a "conclusive" determination of use and those who failed to obtain certificates of existing uses may suffer consequences later, either when a dispute occurs or when a water management area is designated; however, it is unclear what those consequences may be. *Id.*

[199] NHAC initiated and directed a highly successful volunteer public education and filing assistance program which focused on predominantly Hawaiian communities throughout the State. This statewide project presented in-depth educational information and provided assistance in meeting state registration requirements with the support of the University of Hawai'i Native Hawaiian law school student organization 'Ahahui O Hawai'i, and the University Geography Department and Water Resources Research Center.

[200] *See* Water Code Review Commission Meeting (Feb. 5, 1993) (videotape on file at NHAC office). This misconception still prevails. In discussions (with the Water Code Review Commission) about the Water Code's history and original intent on February 5, 1993, Water Commission Deputy Director Rae M. Loui asked: "It [the declaration process] was intended to be an inventory, right, not an indication of rights?" Yukio Naito, formerly Project Coordinator of the Advisory Study Commission on Water Resources, responded, "I think the original thought . . . it was an inventory but at the same time it was a permitting system we were supposed to keep track of." *Id.* A handout drafted by Bill Rozeboom, Water Commission hydrologist on staff, that was used at a Molokai public information meeting describing the process as a survey was no longer used after NHAC met the Water Commission staff and informed them that the handout was misleading in that the process was more than just a mere survey and describing the process as such was likely to cause many of those who do not appreciate surveys not to participate in the declaration process. *See* Water Commission, Public Information Meeting (Apr. 20, 1989) (handout entitled "Deadline for Water Registration is May 28") (on file at NHAC office).

ants, allegedly to facilitate the review and processing of the declarations.[201] Four categories were established:[202]

- Category 1 — relatively complete declarations of actual, certifiable existing uses;
- Category 2 — declarations of instream or "non withdrawal" uses;
- Category 3 — declarations which supposedly do not reflect an existing or certifiable use, primarily declarations of appurtenant and riparian rights and claims for future uses; and
- Category 4 — declarations that are incomplete.[203]

In December 1990, the Water Commission determined Category 1 declarations would be subject to field verification before certification.[204] Declarations for instream uses (Category 2), and for water rights and

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[201] Members of the public argued that the categorization constituted an administrative rule-making without the legally required public participation (*e.g.*, public hearing and comment). The Commission's counsel and staff claimed that categorization was merely an administrative measure necessary to process declarations. *See, e.g.*, Water Commission Meeting (Feb. 28, 1990) (NHAC Testimony by David Martin).

[202] *See* Water Commission Special Meeting, Minutes (Feb. 29, 1990) (Submittal, Item 1); Water Commission Special Meeting (Feb. 29, 1990) (Public Testimony); *see also* Water Commission Special Meeting, Minutes (Nov. 28, 1989) (Submittal, Item 1); Water Commission Special Meeting (Nov. 28, 1989) (Public Testimony).

[203] Category 4 declarants either provided the required information to complete their filings or their original filings were set aside.

[204] Telephone Interview with Eric Hirano, Engineer, DLNR, (Mar. 12, 1993); Telephone Interview with Richard Jinnai, Engineering Technician, DLNR (Oct. 4, 1995). According to the staff, due to budget constraints its priorities have shifted to verifying declarations in designated areas on O'ahu and Moloka'i. Contracts have also been issued for field verifications on North Kaua'i and East Maui. The staff has verified about 60-70% of O'ahu declarations and 100% of Moloka'i declarations. *But see* Water Commission, Submittal: Stanhope Farms, Application for Water Use Permit to Stanhope Farms Well (Well No. 3308-02) Mokuleia Groundwater Management Area, Waialua, Oahu (Mar. 17, 1993) (Item 4) (indicating that 9% of declared well sites have been field inspected and noting that "[i]nformation from the registration program indicates there are possibly 152 existing wells in the North Aquifer Sector. Few of these wells (14) have been initially field checked but many of the declarants, including the larger users, have not been completely field verified. There are significant users who have not been fully verified to date.") As of May 18, 1994 a total of 380 field verifications had been completed on O'ahu, 134 on Maui, 28 on Kaua'i and 92 on Moloka'i. There was no count for the island of Hawai'i because they have been completed only sporadically. Telephone interview with Yoshi Shiroma, Water Commission Investigations Officer (May 18, 1994).

future uses (Category 3) would not be certified.[205] In so doing, the Water Commission created a subclass of declarants, restricting their access to Water Code proceedings and procedural safeguards, and interfering with the protection of their water uses as the Commission proceeds with allocation of water to others.[206] A substantial number of

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[205] After lengthy discussion with the testifying public and following an executive session in which the Commissioners consulted the Attorney General, the Commissioners approved the staff recommendations with the following amendments:

1) That the Commission staff continue to process declarations of instream use in the context of developing permanent instream flow standards, but that such declarations of instream use *are not certified.*

2) That the Commission staff continue to process declarations of unexercised appurtenant water rights in the context of the survey of appurtenant water rights, but that such appurtenant water rights which are not currently being exercised *are not certified.*

Water Commission, Minutes 12 (Dec. 19, 1990).

[206] Williamson B. C. Chang, *Silencing the Legal System and the Lost Hawaiian Voice*, 2 KE KIA'I 4,5 (Jan. 8, 1991). Loss of a water use declarant's procedural protections is illustrated in Water Commission handling of the declaration filed by Ho'okahe Wai Ho'oulu 'Aina (HWHA) for instream and consumptive use of natural springs (punawai) and for use of Mānoa Stream water feeding taro lo'i at the University of Hawai'i. When HWHA attorney Yuklin Aluli argued that the very act of HWHA filing a water use declaration vested a water entitlement sufficient to warrant granting of a request for a formal dispute resolution, the staff responded that "water declarations are not recognition of water rights." The staff further concluded that HWHA did not own any of the property where the punawai and stream diversion were used, and therefore did not have any water rights. The staff recommended that HWHA's request for dispute resolution should be denied and the issue taken up by the Commission for decision-making. Water Commission, Minutes 8-16 (Nov. 18, 1992).

NHAC testified that the Commission's failure to consider HWHA's dispute resolution request and failure to exercise authority over the punawai and its downstream watercourse was tantamount to a decision not to certify HWHA's declared water uses. By not considering certification of declared uses, the legislative intent of certification provisions to provide procedural protections were circumvented: "The section on certificates of use is intended to afford protection to constitutionally recognized interests under Article XII, Section 7 of Hawaii's Constitution that are not in designated areas. The Commission should adopt rules to provide . . . procedural safeguards for all users[.]" WATER CODE BILL, *supra* note 90, at 4.

The Attorney General's office rejected HWHA's repeated requests for a public hearing on the Water Commission's de facto decision not to certify its declared water uses, based on its ruling that the Wa'ahila tributary was an alluvial seep, not a stream channel with a spring water source requiring an alteration permit, and that therefore the Water Commission did not have jurisdiction. NHAC has asserted that the declarant has a right to a hearing under Hawaii Revised Statutes § 9. *See* Water Commission Minutes (Nov. 18, 1992); Water Commission Minutes (Nov. 18, 1992) (NHAC Testimony). *See also* Joyce M. Brown, *UH's Hawaiian Studies Building vs. Waikiki's Last Ancient Lo'i and 'Auwai*, 4 KE KIA'I 12 (Jan. 31, 1993).

these declarants are Hawaiian.[207] Some of the difficulties created in designated ground water management areas, such as Windward O'ahu are evident as existing ground water users' permit applications, filed predominantly in 1993, are being reviewed and customarily approved[208] before consideration or "certification" of water use declarations filed in 1989.[209]

An effective certification process should allow for registration of claimed and verified appurtenant, riparian and Hawaiian traditional and customary rights in a comprehensive database. Registrants would receive dependable advance notification of pending permit applications. Permit applicants could also more readily ascertain any water rights registered within a project area. Recent advances in on-line information transfer (*e.g.* the Internet) and geographical information systems (GIS) technology could support more economical and user-friendly access to this and other types of water resource information. DLNR has a home page on the Internet through which it could share important information more easily.

In early 1994, the Water Commission directed staff to complete the certification process for the island of Moloka'i and hired a consultant to assist in the certification process. The Water Commission did not commit to issuing certificates upon completion of the consultant's work, directing only that standard forms be established.[210] Incredibly, the first

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[207] Approximately 7300 declarations were filed by approximately 2500 individuals and entities. NHAC filed approximately 2500 declarations for about 844 people. NHAC assisted an additional 1000 people who filed their declarations directly with the Water Commission. Approximately 80% of the 1844 individuals NHAC assisted were Hawaiians. Search of WRTAS, Native Hawaiian Advisory Council, Inc., Honolulu, Hawai'i (Aug. 3, 1994) (electronic water tracking database).

[208] *See, e.g.,* Water Commission, Minutes (Jan. 26, 1994) (describing nine water use permit applications approved with amendments in the Ko'olauloa ground water management area).

[209] These permits are issued on an interim basis subject to review within five years. HAW. ADMIN. R. § 13-171-21(a) (1988); *see also* Water Commission, Standard Water Use Permit Conditions No. 17 (on file at NHAC office). This approach is not only unfair to declarants, whose water uses are not being considered, but more fundamentally is short-sighted management practice.

[210] Water Commission, Minutes 2 (Mar. 16, 1994). *See also* Water Commission, Statement of Water Use, (Oct. 2, 1992) (field verification of Shigenobu Inouye water use declaration); Water Commission, Certificate of Water Use of Shigenobu Inouye (CERT: MO 94-0001). Arguably, a water use permit acknowledges a standard of reasonable and beneficial use more rigorous than that implied by a certificate of reasonable and beneficial use.

certificate issued was to a user who had already obtained a water use permit for the same use. No plans have been announced to process certificates in the windward O'ahu water management areas despite the same compelling needs. This approach appears grossly inconsistent with the structure of the Water Code and the Legislature's intent that the certification process help to protect declared water users and water rights protected under the Hawaii State Constitution article XI, section 7 and article XII, section 7.

Inadequate technical data has created major problems for the Commission and the regulated community, particularly those with limited financial resources. Hydrological data gathering and data access capacities have not advanced significantly since Water Code enactment. The number of stream gaging stations statewide has increased about 3.6% with the number of ground water monitoring stations declining about 9.6%.[211] Uncertainties about "sustainable yield" estimates on the various islands reduce public confidence in permitting decisions.[212] Recent indications of more cooperative working relationships between the United States Geological Survey (U.S.G.S.) and the Water Commission allow some optimism that technical capabilities will improve; however, more financial support at both state and federal levels will be required.[213] U.S.G.S. hydrological modeling techniques are being applied to calculate sustainable yields in Kohala, Hawai'i, Waialua and Pu'uloa (Pearl Harbor), O'ahu, Kualapu'u, Moloka'i, and to study ground and surface water interrelationships in East Maui.

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[211] *See* 1 WATER RESOURCES DIV., U.S. GEOLOGICAL SURVEY, U.S. DEPT. OF THE INTERIOR, WATER RESOURCES DATA HAWAII AND OTHER PACIFIC AREAS WATER YEAR 187 vi (1988).

[212] After hearing four hydrologists make four different statements about the island's underground water supply, Maui Council Chairman Goro Hokama admitted his skepticism about estimations on ground water yield. The Council decided to delay action on Dole Food Co., Inc's proposal to use Lana'i's underground water source to irrigate a seaside resort golf course until after federal and state agencies determine how much water can be withdrawn from the aquifer without damaging the supply. Gary T. Kubota, *Council Delays Decision on Lanai Water Bid. The Maui Council Chairman Criticizes Dole Co.'s Actions*, HONOLULU STAR BULLETIN, Mar. 30, 1994, at A-3.

[213] In the 1993 legislative session the Water Commission was strictly held to a zero growth operating budget and received no capital improvements budget. NHAC testified in support of an increased Water Commission budget, pointing out many programmatic shortfalls related to inadequate staffing and funding levels. Haw. House Committee on Energy and Environmental Protection Information Hearing (Jan. 23, 1993) (NHAC Testimony regarding budget line item LNR 404).

Public access to data has been restricted by the Water Commission. The Deputy Attorney General to the Water Commission has assumed a particularly proprietary position regarding control over public access to information.[214] Claims of attorney-client privilege have become a frequent basis for restricting access.[215] Under claims of attorney-client privilege, the Water Commission often retires to executive session. Upon resumption of the public meeting, the Water Commission usually announces its decision with little, if any, comment about the relevant legal considerations or basis for decision-making. Thus, the Water Commission does not provide the public with the basis or rationale for its decisions. This leaves the public without clear understanding of key issues, gives the appearance of secrecy and impropriety, and provides an incomplete official record upon which to base future actions.[216] In addition to undermining public confidence, this "modus operandi" potentially restricts the rights of the regulated community to comment, testify and appeal adverse decisions of the Commission. Such restriction is inconsistent with the intent of the Water Code and also deprives the Commission of public information, views and perspectives.

Even routine information requests have been thwarted. By way of illustration, an NHAC request for electronic media copies of the Commission's water use declarant data base became a point of major controversy requiring resolution (ultimately in NHAC's favor) by the State Office of Information Practices.[217] Verbal requests for electronic media copies of Water Commission minutes and agenda item staff submittals have also been refused.

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[214] *See* HAW. REV. STAT. ch. 92 (1993) ("sunshine law").

[215] *See, e.g.*, Water Commission, Executive Session Minutes (Apr. 29, 1992, July 15, 1992).

[216] *See, e.g.*, Water Commission, Minutes (Dec. 12 1992). Executive sessions are often called during Commission meetings with no explanation to the public. *Id.*

[217] NHAC requested the Water Commission's computerized database of water use declarants so NHAC could more easily alert Hawaiian declarants of approaching deadlines. The staff refused to release the computerized database on the basis that it might be used for commercial purposes. The task of reinventing a database of 7,300 water use declarations would have been extremely time consuming, expensive, and needlessly duplicative. Moreover, the information was already public record. It took five months of correspondence with both the Office of Information Practices and the Water Commission before the database was finally released as required under the Uniform Information Practices Act, a new state law adopted under Freedom of Information provisions, commonly known as the Sunshine Law. HAW. REV. STAT. § 92-F (1993). Public Access to Declarations of Water Use and Electronic Mailing List of Declarants, 35 Op. Att'y Gen. (1990).

Where water is power, information about water is also power. Therefore, in promoting and protecting Hawaiian rights to and uses of water, access to information about water is nearly as important as access to water itself. Hawaiians under foreign rule have always suffered from a lack of information about (and thus understanding of) the legal and political processes that affect their lands, their waters, and their lives. If the Water Commission and other agencies are to fulfill their obligations to protect Hawaiian water rights and uses (and their broader public trust responsibilities), they must vastly improve information gathering, processing, and dissemination. Only when the information is openly available will Hawaiians be able to protect their interests and fully enjoy their constitutional right to participate in matters of such fundamental importance.

V. NATIVE HAWAIIAN WATER RIGHTS UNDER THE STATE WATER CODE

The Water Code contains a separate section on Native Hawaiian Water Rights;[218] however, Hawaiian water rights are affected by and protected under a number of sections of the Water Code and by many other state, federal and international laws. The provisions of the "Native Hawaiian Water Rights" section encompass a broad range of exclusively Hawaiian water rights in subsections A, B. and C; subsection D's inclusion of appurtenant rights as Hawaiian water rights is somewhat confusing as such rights are not commonly believed to be available exclusively to Hawaiians. Appurtenant water rights attach to lands irrespective of the present owner's or user's race, ethnicity or nationality.[219]

A. Hawaiian Home Lands Water Reservations

Subsection A of the Hawaiian Water Rights section of the Water Code recognizes the water rights provided for in the HHCA and

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[218] WATER CODE § 101(a-d). This section in large part codifies that bundle of rights determined by the prevailing political and legal system to be Hawaiian water rights. To the contrary, Hawaiians advocating for their water rights repeatedly stress that these rights are to be defined by Hawaiians. *See, e.g.*, Water Code Review Commission Meeting (July 20, 1994) (Testimony of Ilima Wood on Maui).

[219] *See McBryde I*, 54 Haw. 174, 191, 504 P.2d 1330, 1340 (1973), Reppun v. Board of Water Supply, 65 Haw. 531, 551, 556, 656 P.2d 57, 70, 74 (1982).

specifies that the Water Code shall not amend or modify rights or entitlements provided by the HHCA.[220] This supports the intent of the HHCA to rehabilitate native Hawaiians by getting them back on the land.[221] The Water Code and the legislative history of the HHCA, as well as a line of federal courts cases, support the notion that Hawaiian Home Lands must receive adequate water to support homesteading activities.[222] Quantification of those rights remain a major unresolved issue.

One of DHHL's unexercised section 221 powers is its authority to institute eminent domain proceedings in its own name.[223] Where water

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[220] WATER CODE § 101(a). *See infra* note 222.

[221] HHCA § 101(a). *See* H.R. REP. No. 839, 66th Cong., 2d Sess. 4 (1920). Senator John H. Wise, a member of the Legislative Commission of the Territory [of Hawaii] and one of the authors of the HHCA, described the law as a plan for the rehabilitation of the Hawaiian people:

> 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 homes. I believe it would be easy to rehabilitate them. . . . 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 and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.

H.R. REP. No. 839, 66th Cong., 2d Sess. 4 (1920). *See also Hawaii State Senate Bill 3236: Hearing Before the Select Comm. on Indian Affairs*, 101st Congress, 2d Sess. (1990)(relating to a purpose clause for the HHCA).

[222] See Act 325, adopted in 1991, which provides, in pertinent part, that:

> Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.

Act 325, 16th Leg., Reg. Sess., 1991 Haw. Session Laws 1013. *See also* H. R. REP. No. 839, 66th Cong., 2d Sess. 10 (1920); MACKENZIE, *supra* note 24, at 56-61. One aspect of Hawaiian rights is the obligation of the Water Commission and DHHL to reserve water for Hawaiian Home Lands. WATER CODE § 101(a).

[223] HHCA § 221(c) provides, in pertinent part:

> In order adequately to supply livestock, the aquaculture operations, or the domestic needs of individuals upon any tract, the department is authorized . . . (2) to contract with any person for the right to use or to acquire, under eminent domain proceedings similar, as near as may be, to the proceedings provided in respect to land by sections 101-10 to 101-34, Hawaii Revised Statutes, the right

from state lands is not sufficient to meet Hawaiian Home Lands water requirements, the Hawaiian Homes Commission (HHC) has authority to condemn "structures and improvements thereon"[224] for "the right to use any privately owner surplus water or government owned surplus water."[225] A combination of historic (and current) lack of funding and resultant lack of long-term planning may help to explain DHHL's non-use of this avenue to secure needed water infrastructure.[226]

Until 1990, the priority rights of Hawaiian beneficiaries under section 221 of the HHCA[227] to "governmental-owned" water[228] or "govern-

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to use any privately owned surplus water or any government-owned surplus water covered by a water license issued previous to the passage of this Act, but not containing a reservation of such water for the benefit of the public. Any such requirement shall be held to be for a public use and purpose. The department may institute the eminent domain proceedings in its own name.

Id.

[224] *See* HAW. REV. STAT., ch. 101 (1993). Specifically, section 101-6 provides that "property which may be taken by virtue of this part includes all real estate belonging to any person, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights, and easements of every nature." HAW. REV. STAT. § 101-6 (1993).

[225] HHCA § 221(c). *See* letter from William M. Tam, Deputy Attorney General, to Richard D. Wurdeman, Haw. County Corp. Counsel (Aug. 22, 1994) (on file at NHAC office).

[226] *See, e.g.*, Susan Faludi, *Broken Promises: Hawaiians Wait in Vain*, WALL ST. J., Sept. 9, 1991, at A1 (discussing failure of the Hawaiian Home Lands program to return Hawaiians to the land, partially due to failures by the State of Hawaii and the federal government to provide adequate funding for infrastructure); *Hawaiian Home Lands: Hearings Before the Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. (1990).

[227] HHCA § 221 (1956), as amended by Act 24, §1, HHCA § 221 (1990).

[228] There are two broadly divergent views of what constitutes "government-owned water." The first holds that the Hawaii Supreme Court's ruling that the State is the "owner" of the water, equating this ownership as that of trustee, thus, "government water" is all water. *McBryde I*, 54 Haw. at 187, 504 P.2d at 1339 (1973); Reppun v. Board of Water Supply, 65 Haw. at 548, 656 P.2d at 69 (1982).

The second view is that "government water" is only that water on government land. The state Deputy Attorney General to the Water Commission asserts that this narrow meaning is consistent with the legislative history:

> When the HHCA was adopted in 1921, Hawaii water law was still developing. In *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675 (1904), and *Carter v. Territory*, 24 Haw. 47 (1917), the Hawaii Supreme Court described the right to use water as though it were "owned" by the title holder of the land (usually the konohiki) "to do with as he pleases." *Hawaiian Commercial Sugar*, 15 Haw. at 680-82. Hence, water on government land was described as being "government owned" and water deriving from private lands was described

ment water" were limited to domestic uses, aquacultural operations, and livestock watering. In 1990, the legislature added "agricultural operations" to this list of purposes.[229] The state Deputy Attorney General to the Water Commission argued that this priority was limited and only gave the DHHL "first call" on government water, not a reserve right.[230] Also in 1990, the Legislature enacted Act 349, which adds a provision to the HHCA clarifying its purpose "to enable native Hawaiians to return to their lands in order to fully support self-sufficiency and self-determination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions and culture of native Hawaiians."[231] The first stated purpose of the act is "establishing a permanent land base for the benefit and use of native Hawaiians upon which they may live, farm and ranch and otherwise engage in commercial, industrial or any other activities as authorized by this act."[232] A principal purpose of the HHCA is "[p]roviding adequate amounts of water and supporting infrastructure, so that homestead lands will always be usable and accessible."[233]

The original Water Code did not explicitly address Hawaiian water reservations for Home Lands. In 1991, the Hawai'i Legislature recognized that long delays in developing infrastructure for Hawaiian

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as being privately owned. *Id.*; *Carter v. Territory*, 24 Haw. at 53; *Territory v. Gay*, 31 Haw. 376, 382 (1930). Consequently, the phrase "government owned water" as used in 1921 means water deriving from government lands.

Letter, *supra* note 225, at 2. *See also* BENJAMIN A. KUDO, CHRISTINE A. LOW, TECHNICAL PAPER ON THE IMPLEMENTATION OF HAWAIIAN WATER RIGHTS (Dec. 31, 1993) (to the Review Commission on the State Water Code) (stating that "government owned" water should be interpreted as it was used in 1921, pre-*McBryde*, and waters appurtenant to or beneath government lands constitute "government owned" water).

Some Hawaiians, such as Kaua'i taro farmer Joe Manini, strongly object to any reference to government-owned water as being State-owned and assert a third definitional term "na kanaka maoli water." Such strongly conflicting interpretations illustrate the sharply divergent positions of state officials and many Hawaiians, and underscores the need for independent, non-governmental representation of Hawaiian trust beneficiaries. A "sister agency" mentality operating between state agencies works to the detriment of trust beneficiaries.

[229] *See* HHCA § 22.1

[230] This interpretation was one impetus for Act 325 which was intended to further protect the rights of HHCA beneficiaries.

[231] HHCA §101(a). This provision is subject to the consent of the U.S. Congress. Most Acts of this nature include a provision describing its purpose; it is unusual, and suspicious to some, that no purpose provision was included when the bill was enacted.

[232] HHCA §101(b)(4).

[233] HHCA § 101.

Home Lands disadvantage homesteaders because competing water uses threaten the future availability of water resources.[234] Act 325 amended four separate sections of Hawaii Revised Statutes to specifically require that water reserves be established for current and foreseeable development and use of Hawaiian Home Lands.[235] Three of these sections are in the Water Code.

Section 101(a) of the Water Code provides, in pertinent part:

> Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of

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[234] *See* WATER CODE § 101 (1993) (as amended by Act 325, 16th Leg., 1991 Reg. Sess., 1991 Haw. Sess. Laws 1013). The legislative history states:

> Since the passage of the Hawaiian Homes Commission Act of 1921, the shortage of available water has been one of the primary reasons for the failure of administrators to settle Native Hawaiians on Hawaiian homesteads . . . [This] inability to access water resources in an economic and efficient manner has been a major obstacle to the settlement of large tracts of homestead land. In many cases, competing water users have been able to assert claims to water long before the Department has been able to. In some instances, the failure of different state agencies to coordinate their activities has led to the commitment of government sources of water to private interests without regard for the water needs of current and future homesteaders.
>
> This problem has been exacerbated by the potentially long delays in providing supporting infrastructure to Hawaiian homestead areas. During these periods of delay, other water users are seeking to commit water resources for other competing uses.
>
> This threat still exists today. . . . The attorney general has interpreted that amendment (Sec. 221(c) of the HHCA) to provide the department with only a "first call" to existing water resources, and not a reservation of water for current and future homestead development.
>
> Accordingly, the legislature finds that further amendments to laws affecting the allocation of water must be enacted to assure that adequate amounts of water are reserved for the future use of Hawaiian homesteaders.

H. R. REP. No. 839, 66TH CONG., 2ND SESS. 10 (1920). *See also supra* note 222.

[235] *See* HAW. REV. STAT. § 171-58 (1993) (relating to water licenses administered by the Board of Land and Natural Resources); HHCA, § 220(d) (relating to development of Hawaiian Home Lands and requiring reservation of sufficient water for the homelands); HAW. REV. STAT. §§ 174-16, 174-17 (relating to water development on public lands administered by the Division of Water and Land Development); WATER CODE §§ 31(h), 49(a)(7), 49(e) (conditions for water use permit in designated water management areas), 101(a) (Hawaiian Water Rights).

> Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.[236]

This language applies statewide. Similarly, sub-section 31(n), relating to the Hawaii Water Plan requires consideration of DHHL water reservations through the statewide water planning process - including the county water use and development plans. Subsection 49, paragraphs (a) (7) and (e) require that water use permits (applicable in water management areas) will not interfere with, but will be subject to, rights provided in section 221 of the HHCA. Apparently based upon its position that its authority to allocate water is limited to designated water management areas, the Water Commission has indicated that it will consider requests for water reservations only for water management areas) will not interfere with, but will be subject to, rights provided in section 221 of the HHCA. Apparently based upon the position of the Water Commission that its only authority to allocate water is limited to designated water management areas, it has indicated that it will consider only requests for water reservations in water management areas.[237] While there are some indications the Water Commission may see the error of this position, neither the Water Commission nor DHHL has initiated water reservations for non-designated areas.[238]

Although Act 325 became effective in July 1991, it was not until June 1993 that procedures for establishing reserves were implemented. In the interim, and to this day, the Water Commission continued its usual practice of allocating water and issuing water use permits in the Pearl Harbor, 'Ewa Caprock and Waialua groundwater management areas without addressing the water needs of Hawaiian Home Lands. The February 1992 draft of the Hawaii Water Plan contained no reference to reservations of water for Hawaiian Home Lands.[239] County Departments of Water Supply continued working on water-related

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[236] WATER CODE § 101(a).

[237] *Id.* § 49(d):

> The commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary. Such reservations shall be subject to periodic review and revision in the light of changed conditions; provided that all presently existing legal uses of water shall be protected.

Id.

[238] Institutional racism has been cited as the cause for delay by some Hawaiian rights advocates. *See* Trask, *supra* notes 83, at 16.

[239] *See* water plans cited *supra* note 58. *See also infra* note 320 and accompanying text.

development projects with little or no regard for statutorily mandated Hawaiian Home Lands water reservations.[240]

The passive approach to establishing water reservations taken by the Water Commission and DHHL raises substantial concerns for the Hawaiian community. During this period Hawaiian rights advocacy organizations, such as the Hawai'i La'ieikawai Association, Hui Pā kele 'Āina, Ho'olehua and Kalama'ula Hawaiian Homestead Associations, Ka Lāhui Hawai'i, Native Hawaiian Advisory Council, and Native Hawaiian Legal Corporation, and many private individuals, increased efforts to promote and respond to heightened Hawaiian awareness about Hawaiian Home Lands water reservation issues and their important implications for future homestead development.[241]

Ultimately, these pressures had an effect on the Water Commission and DHHL. As noted in the previous discussion of ground water management,[242] in June of 1993 the Water Commission reserved 1.409 mgd of water from the Waipahu-Waiawa System within the Pearl Harbor Water Management area to DHHL for its current and foreseeable needs. While this action set very important precedent, establishing the first reservation of water for Hawaiian Home Lands, there are significant shortcomings in both the processes used to make these water reservations and in the amounts of water reserved.

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[240] For example, in Anahola, Kaua'i, the Kaua'i Department of Water connected a developer's pipeline from wells on Hawaiian Home Lands to a private, upscale residential development (Aliomanu Estates). Kaua'i County has stated it will allow other developers to tap into the line as long as water is available. Unfortunately, the County has also refused to commit to any protective measures assuring future water availability for Hawaiian Home Lands. In these situations, even if adequate water remains for Hawaiian Home Lands, it likely would be less accessible and much more expensive to develop as compared with the cost of developing and delivering water that is now being diverted. Joyce M. Brown, *Is it Water Under the Bridge*, 3 KE KIA'I 2 (Sept. 30, 1992).

[241] For example, many Hawaiians and Hawaiian organizations, such as Hawaii Laiekawai Association, Ka Lahui Hawai'i, Hui Na'auao, Ohana Council, Native Hawaiian Legal Corporation and NHAC, gathered to support kuleana landowners' water rights in Laie, O'ahu at a public hearing of the Public Utilities Commission on Jan. 27, 1994 concerning a permit for the Zion Securities, a subsidiary of the Mormon Church. For evidence of non-Hawaiian support for Hawaiian water rights, *see, e.g.*, Water Commission, Minutes 5-10 (Jun. 2, 1993) (Testimony of Sierra Club, Hawaii Green Party, Life of the Land, and Hawaii's 1000 Friends advocating for DHHL water reservations for future homestead development).

[242] *See supra* note 142-49 and accompanying text (regarding ground water issues and designation).

The Water Commission has treated DHHL water reservations more as a simple accounting problem than the complex water management and allocation problem that it is. For example, the Water Commission deducted the total 1.409 mgd water reserve for DHHL's leeward O'ahu homesteads from available allocations in the Waipahu-Waiawa system of the Pearl Harbor Water Management Area instead of from the 'Ewa-Kunia aquifer system, adjacent to homesteads. This decision appears to have been based solely upon a rough estimate of the amount of water available for allocation within the respective aquifer systems. Only 0.300 mgd was unallocated in the 'Ewa-Kunia system with 2.390 mgd unallocated in the Waipahu-Waiawa system. The Water Commission avoided the issue of DHHL's priority right and did not clearly address why at least the remaining 0.300 mgd in the 'Ewa-Kunia system was not reserved to DHHL. At the same time, Water Commission staff recommended approval of Grace Pacific Inc.'s water use permit application for 0.122 mgd of potable water from the 'Ewa-Kunia system for dust control at the Makakilo Quarry.[243]

DHHL's May 7, 1993 letter to the Water Commission (requesting and supporting the 3.265 mgd reserve) raises serious questions about the adequacy of both the residential and agricultural water reserves requested. DHHL's use of the O'ahu residential "county standard" of 160 gallons per capita per day (gcd) does not adequately consider water requirements for 'ohana, subsistence lifestyles and homestead locations. While DHHL's initial planning approach recognized factors such as higher-than-average numbers of residents per household and higher-than-average lot size, DHHL apparently discounted those factors based upon its expectations that many homestead awards would not be developed due to lack of funding and upon its plans to implement water conservation. DHHL's reservation request also does not compensate for the dry leeward location of the affected homelands.

Moreover, DHHL projections are considerably lower than those reflected in Table D-9 of the O'ahu Water Management Plan, which differentiates O'ahu per capita water demand by geographic area. For example, Wai'anae per capita demand is 239 gcd and Ewa demand is 338 gcd. Using these figures as indicators, DHHL's projections could be from 50 to over 110 per cent underestimated. Furthermore, DHHL estimates and proposed allocations do not appear to include contingency volumes, unlike allocations to the Honolulu Board of Water Supply

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[243] Water Commission, Minutes 4-5 (July 28, 1994).

which include cushions for fire protection, maximum day capacity (heavy usage), and other contingencies.

The Oahu Water Management Plan[244] represents general public water needs to which DHHL's proposed 2000 gallons per acre per day (gad) agricultural needs may be compared:

Feed/Forage	7700 gad
Horticulture/Nursery	7400 gad
Banana	3019 gad
Guava	4400 gad
Macadamia Nut	4400 gad
Papaya	5000 gad
Sweet Potato	7400 gad
Taro (Dry Land)	6000 gad
Aquaculture	36000 gad

DHHL, in submitting its initial request for a 3.265 mgd reserve allocation, did not directly consult with affected HHC beneficiaries about current and foreseeable homestead and other water needs.[245] Although the Water Code does not explicitly require direct consultation with HHCA beneficiaries in developing water reservations, there is nothing in the Code that would prelude such participation.[246] Moreover, public participation would have provided DHHL with insights from

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[244] WATER COMMISSION, OAHU WATER MANAGEMENT PLAN (May 1992) (Table 4-4; Oahu Water Requirements Forecast for Selected Crops).

[245] No meetings were held to consult with beneficiaries regarding the reservation, and in particular with respect to the methodology for developing the quantity of the reservation. The decision to not consult was made by Hoaliku Drake, Hawaiian Homes Commission Chair. Telephone interview with Charlie Ice, DHHL Planner (July 26, 1994). *Cf.* Mahealani Kamauu and Alan Murakami, *DHHL Families Persevered Through Beauracratic Mire*, HONOLULU STAR BULLETIN, July 20, 1995, at A-17 (describing difficulty working with DHHL).

[246] However, House Bill 3012 introduced during the 1994 Seventeenth Legislature by Representative Annelle C. Amaral, would have amended the Native Hawaiian water rights section of the Water Code to require DHHL to consult with beneficiaries who may be "affected" and Hawaiian Home Lands applicants on the waiting list who may potentially be "affected" by current and future water reserves. The bill died in the House Judiciary Committee. Another Hawaiian legislator, Senator Eloise Tungpalan, introduced Senate Bill 2758, a similar measure. The Senate version crossed over but did not survive the House Finance Committee apparently because of administration opposition.

those who will be most affected and resulted in a higher level of beneficiary and public confidence.

In amending the water leasing statutes, the Legislature required both DLNR and DHHL to consult with beneficiaries to "develop a reservation of water rights sufficient to support both current and future homestead needs."[247] Direct input from beneficiaries as a critical first step to determine reserves of water for Hawaiian Home Lands under the water leasing statutes should be standard practice. The lack of an explicit statutory requirement does not reduce the responsibility of the Water Commission and/or DHHL to consult with beneficiaries or their representatives. At the very least, beneficiaries are entitled to clear and comprehensive explanations of reserved quantities and the methods used to calculate them.[248]

A contributing factor to DHHL's failure to fully protect beneficiaries water rights is inadequate planning.[249] The DHHL's outdated general plan of 1976[250] does not appear to be guiding current DHHL decisions affecting the development of the Hawaiian Home Lands. Failure to prepare and update its long term development plans severely limits DHHL's capacity to produce accurate assessments of beneficiaries' future water needs and water infrastructure requirements. The long overdue update of this basic planning document and other more specific management plans could afford an opportunity to engage affected Hawaiians in comprehensive community planning initiatives. Existing homesteaders, accelerated lot awardees, and waiting list applicants should be encouraged to participate in this planning process. The effectiveness of these procedures would depend upon accurate inven-

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[247] Act 325 provided, in pertinent part:

> The department of land and natural resources shall notify the department of Hawaiian home lands of its intent to execute any new lease, or to renew any existing lease of water rights. *After consultation with affected beneficiaries*, these departments shall jointly develop a reservation of water rights sufficient to support current and future homestead needs. Any lease of water rights or renewal shall be subject to the rights of the department of Hawaiian home lands as provided by section 221 of the Hawaiian Homes Commission Act.

Act 325 § 3, 16th Leg., 1991 Reg. Sess., 1991 Haw. Sess. Laws, 1013 (amending HAW. REV. STAT. § 171- 58(g)) (emphasis added).

[248] *See supra* note 161 and accompanying text regarding certain conflicts of interests between DHHL, the Hawaiian Homes Commission, and its beneficiaries.

[249] For example, DHHL's general plan was drafted in 1976 and has not been updated for the last 18 years.

[250] DHHL, Hawaiian Home Lands General Plan (1976).

tories of previous, existing, approved, planned, and proposed water and land uses. In addition, the Water Commission's completion of water use certifications and analysis of the legality and priority of existing uses are required to ensure an accurate and comprehensive reservation process. In any case, unless allocation of water is suspended or significantly slowed until appropriate reservation procedures are developed and implemented, the Water Commission will not meet its statutory obligations to HHCA beneficiaries.

In designated water management areas, the Water Commission has done little for the protection of Hawaiian water rights except the inclusion of a limited condition in water use permits.[251] As a practical matter, it is not clear how much protection such permit conditions will afford if protracted and expensive legal battles are required for trust beneficiaries seeking to reduce these allocations in order to obtain water that should have been reserved before any water use permit was issued.

DHHL, apparently relying upon the advice of the Deputy Attorney General to the Water Commission, appears convinced that these conditions are sufficient to allow for actual recall of previously allocated water when needed by Hawaiian Home Lands.[252] Many Hawaiians are doubtful as to whether the State Attorney General's office would vigorously pursue legal defense of Hawaiians if permittees challenged such recall and reductions in their water allocations.[253] Hawaiian claims against DHHL trustees for failure to protect trust assets have generally been met with a vigorous defense, with the Attorney General's Office

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[251] As an example, in the standard water use permit conditions contained in Stanhope Farms Application for a Water Use Permit for Stanhope Farms Well (Well No. 3308-02) in the Mokuleia Ground Water Management Area, Waialua, Oahu. Water Commission, Minutes (Mar. 3, 1993) (Item 4 relating to conditions), Condition 3 states that the "water use must at all times meet the requirements set forth in the Water Code's administrative rules § 13-171-13 which means that it . . . [w]ill not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act." Condition 5 states that the "water use permit is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable" and condition 8 states that the "water use permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to . . . meet legal obligations to the Department of Hawaiian Homes, if applicable."

[252] Telephone interview with Charlie Ice, formerly DHHL planner and presently working with Water Commission (Mar. 30, 1994).

[253] For discussion of certain conflicts of interests between the DHHL, the HHC and its beneficiaries, see A BROKEN TRUST, *supra* note 145; Ka'ai'ai v. Drake, Civ. No. 92-3642-10 (1st Cir. Haw. filed Oct. 27, 1992).

raising multiple procedural defenses such as sovereign immunity, statutes of limitations, res judicata, estoppel, and laches before the merits of the issues were ever reached.[254] To ensure that the interests of HHCA beneficiaries are fully represented, the Legislature should take prompt action to require independent representation, paid for by the state.[255] The water reservation process is a vivid example of such need for independent representation. A vivid example of such need for independent representation.

B. Water Leasing

Subsection B of the Native Hawaiian Water Rights section of the Water Code deals in a very limited way with water leases, providing that no action under the Water Code may "diminish or extinguish" water lease revenues. The Water Code does not provide the Water Commission any authority over water leases; the program is presently administered by the BLNR. BLNR's handling of water lease issues has not benefitted Hawaiians, neither from the standpoint of revenues related to ceded lands nor with respect to availability of water for homesteads or Hawaiian communities.

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[254] *See* Yamamoto, Haia, and Kalama, *supra* note 12. Pele Defense Fund v. Paty and *Ka'ai'ai* are classic examples of this practice. Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) (breach of trust claim over 27,800 acres of public "ceded" lands being exchanged for 25,800 acres of privately owned lands labored with procedural issues such as standing, plaintiff's right to sue, statute of limitations, collateral estoppel, res judicata, and sovereign immunity); *Ka'ai'ai*, Civ. No. 92-3642-10 (requesting injunctive relief to prevent a state agency from signing comprehensive releases for the single claim of back rent for illegally transferred trust lands met with procedural arguments of sovereign immunity, no justiciable question, and political question arguments). *See also* Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990) (challenging transfer of certain trust lands by the Board of Land and Natural Resources encountered arguments such as no substitution of parties, sovereign immunity, and retrospective relief issues); Keaukaha-Panaewa Community Association v. Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984) (plaintiffs claiming loss of 25 acres of trust lands to a County of Hawai'i flood control project had to prove the Hawaiian Home Lands Act merited an enforceable section 1983 action by proving congressional intent to create a private cause of action); Napeahi v. Paty, 912 F. 2d 897 (9th Cir. 1990) (challenge to State's determination that 1.75 acres on the Kona coast underlying the Hyatt Regency Waikoloa Hotel were not trust lands revolved around procedural questions of standing, eleventh amendment issues, and sovereign immunity).

[255] In response to *Ka'ai'ai*, the Legislature created a state funded independent representative. *See infra* note 344 and accompanying text for further information regarding this case.

1. Kekaha and Waimea, Kaua'i

In 1969, BLNR granted Kekaha Sugar Company a general lease covering (1) 14,558 acres of Hawaiian Home Lands and another 13,000 acres of public land, and (2) rights to take, store and use all surface water flowing from the Waimea River and its irrigation ditch systems and all ground water from existing wells and shafts.[256] Since that lease term began, Hawaiian homesteaders have not been able to obtain sufficient water for their lands and DHHL has not assisted their efforts to do so.[257] The lease expired at the end of 1993, and the state has not yet announced its long-term plans for subsequent management of the ceded lands and government water involved; however, BLNR recently extended the lease for one year (without significant change in its terms) in part because the Hawaiian Homes Commission is not prepared to exercise its claims to the water or to manage the water systems.[258]

2. East Maui Water Leases

Renewal of long-expired East Maui water leases has been delayed for several reasons, in part as the result of efforts by several taro farmers asserting infringements upon appurtenant and riparian water rights. Rather than terminate or renew expired leases, the BLNR has instead issued successive one year revocable permits, alternating them between the irrigation company and its parent corporation even though

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[256] MACKENZIE, *supra* note 24, at 58.

[257] *See* Kekaha Sugar v. Manini, Civ. No. 2129 (5th Cir. Haw. complaint filed May 23, 1979) (Preliminary Injunction granted Sept. 26, 1979); Kekaha Sugar Ltd. v. Joseph Manini, Civ. No. 88-0156 (5th Cir. Haw. 1990) (Order Granting Motion for Preliminary Injunction, Feb. 27, 1990).

[258] Discussion between Harold Masumoto, former Office of State Planning Director and Elizabeth Pa Martin and David C. Penn (Oct. 28, 1993). *See also* BLNR, Minutes (Aug. 27, 1993) (Item F-6) (concerning General Lease No. 42-22).

In other BLNR action regarding ceded lands resources at Kekaha, Kaua'i, BLNR recently disposed of land licenses without recourse to public auction for mining sand. This appears to limit opportunities for obtaining full value for this resource. Further, depletion of sand resources may result, making the sand unavailable to the Hawaiian community. *See* Public Notice, HONOLULU STAR BULLETIN (Feb. 12, 1993); H.R. 1822, 16th Leg., Reg. Sess. (1993); H.R. 1356, 16th Leg., Reg. Sess. (1993) (Moratorium Bills), Hearing on H.B. 1356 Before the House Committee on Hawaiian Affairs (Feb. 15, 1993) (testimony of NHAC) (on file at NHAC office).

these permits are limited to a maximum term of one year.[259] Moreover, these permittees are selling water back to the county of Maui at a profit with none of these proceeds reaching Native Hawaiian beneficiaries.[260]

3. Other Water Leases

In addition to leases for areas described above, many other Kaua'i leases expired at the end of 1994. BLNR has not yet presented any plans for continuing allocation of these waters. Although required by statute to do so,[261] BLNR and DHHL have not yet consulted with HHL beneficiaries with respect to renewing these leases.

The Kōhala Ditch water lease on the Big Island expired in 1991. As yet, there is no BLNR report on the future use of this water, nor

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[259] BLNR Meeting, Issuance of Revocable Permits to East Maui Irrigation Co., Ltd. (June 11-12, 1992) (testimony of Carl C. Christensen, NHLC staff attorney, on Items F-1(a) through F-1(d) exposing permit arrangement details which deny fair revenues to native Hawaiian beneficiaries) (on file at NHAC office). NHLC attorney Carl Christensen protested rotating the issuance of revocable permits between East Maui Irrigation Co., Ltd. ("EMI") and Alexander & Baldwin, Inc., ("A & B") alleging a violation of Hawaii Revised Statutes section 171-58(c) which restricts issuance of a temporary permit to a maximum term of one year. *Id.* Christensen asserted that issuance of a permit for a term longer than one year requires offering the lease at a public auction. *Id.* at 2.

The staff submittal stated that issuing a one-year revocable permit to parent company A & B followed by a one-year revocable permit to subsidiary EMI satisfies the requirement of a maximum term of one year. Christensen countered that EMI was a mere instrumentality and alter ego of A & B as A&B was EMI's parent company. According to Christensen "any purported separation between the two entities is illusory and without effect as to [Hawaii Revised Statutes] section 171-58." *Id.*

In addition, Christensen argued that by issuing revocable permits rather than leases to A & B and EMI requirements under section 171-58(g) to consult with Department of Hawaiian Home Lands and its beneficiaries were being circumvented. *Id.* Due to the need for water to permit future homestead use in Kula, Waiohuli-Keokea and Kahikinui, the failure to consult beneficiaries deprived the beneficiaries of a forum for their concerns. *Id. See also* Letter from Carl Christensen to Keith W. Ahue, Chairperson of the BLNR and Members (May 27, 1993) (on file at NHAC office) [hereinafter Christensen letter].

[260] Christensen letter, *supra* note 259. Carl Christensen has stated that NHLC did not request a contested case hearing because he was told that the BLNR was moving to remedy some of the NHLC's concerns. *Id.* at 1-2. Christensen letter, *supra* note 259, at 1-2.

[261] HAW. REV. STAT. § 171-58 (1993).

is the issue addressed in the latest version of the Hawaii Water Plan prepared by the Water Commission. Again, DHHL and BLNR have not consulted with HHL beneficiaries regarding water lease renewals. This is especially disturbing in an area with many acres of Hawaiian Home Lands, high water requirements, and tremendous competition for water resources.

Thirty percent of the revenues from these revocable permits are transferred to the Hawaiian Home Lands Trust; an additional 20% of the revocable permit revenues go to the OHA. Recent BLNR audits show that prior rents for revocable permits in general were grossly undervalued. At the last BLNR meeting to renew the East Maui revocable permits, staff recommended increases in permit fees and an appraisal; however, both recommendations were rejected.[262]

C. Subsection C - Traditional and Customary Rights to Water

Hawaiian traditional and customary rights include rights of indigenous people and rights under the laws of the State of Hawai'i and the United States.[263] The Water Code's declaration of policy states that "adequate provision shall be made for the protection of traditional and customary Hawaiian rights."[264] The Code also requires that:

> Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.[265]

Traditional and customary beliefs, values and practices are the essence of the Hawaiian culture. To fully understand the nature and scope of the rights protected by this statute, knowledge of these beliefs, values,

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[262] BLNR, Minutes (May 1, 1993) (Item F-1-d).

[263] *See, e.g.*, *supra* note 5; U. S. Apology Bill, *supra* note 18; HHCA Hearing, *supra* note 19 (stating that the federal trust responsibility continues as a result of the Joint Resolution of Annexation, July 7, 1898, Pub. Res. No. 51, 55th Cong., 2nd Sess., 30 Stat. 750 (1898)).

[264] WATER CODE § 2(c).

[265] *Id.* § 101(c).

and practices is required.[266] Knowledge, and thus the expertise to define traditional and customary Hawaiian rights, lies within the Hawaiian community, not judicial decisions of the state and federal courts.[267]

Hawai'i courts have stated that Hawaiian traditional and customary rights are recognized in three primary sources: 1) Article XII, section 7 of the Hawaii Constitution, 2) Hawaii Revised Statutes section 1-1, and 3) Hawaii Revised Statutes Section 7-1.[268]

Article XII, Section 7 provides that:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

A mandate for government protection of access to water, food, material and spiritual resources necessary to perpetuate tradition and custom can be inferred from this provision. This constitutional provision, therefore, affords government protection to these Hawaiian rights in a manner and degree which preserves the opportunity for full exercise and perpetuation of tradition and custom.

Hawaii Revised Statutes § 1-1 provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by

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[266] *See, e.g.*, NHAC, KANAWAI ORAL HISTORIES (1993) (oral histories regarding traditions and customs related to water funded by the Native Hawaiian Culture and Arts Program) (transcripts on file at the Bishop Museum).

[267] Hawaiian traditional and customary rights are often mistakenly described as synonymous with gathering rights. However, as this Water Code provision indicates, gathering rights are only a subset of traditional and customary rights. One source of misunderstanding the full extent of traditional and customary rights is that most of the cases before the courts have involved gathering rights issues. Thus, decisions in these cases have been mistakenly read to imply that gathering rights are the only traditional and customary rights. There have been earlier cases involving traditional and customary rights dealing with "access." *See, e.g.*, Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968); *In re* Kelley, 50 Haw. 567, 445 P. 2d 538 (1968).

[268] Of course, many Hawaiians would not concede that these laws are the source of such rights, but rather that these laws partially recognize the already existing inherent rights of Native Hawaiians as indigenous people.

Hawaiian judicial precedent, or established by Hawaiian usage.[269]

This statute essentially codifies Hawaiian customs and usage doctrines.[270]

In addition, Hawaii Revised Statutes § 7-1 provides:

> Building materials, water etc.; landlord's titles subject to tenant's use. When the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. *The people shall also have a right to drinking water, and running water, and the right of way.* The springs of water, running water, and road shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.[271]

This statute assures the right to gather specific items, the right to "drinking" and "running" water, and the "right of way" to access "springs" and "running" water.

The Hawaii Supreme Court has held that these provisions protect the right of a Hawaiian, defined as those whose ancestors can be traced

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[269] HAW. REV. STAT. § 1-1. The first Hawaiian supreme court justice for the State of Hawai'i, William S. Richardson, believed that "haole" or Western law had deprived Hawaiians of much of their civilization, making crimes out of traditional practices. Thus it was 'fair,' legally to restore some property rights to the rightful owners." Jerry Burris, *Whose Beaches? Look to the Law: Richardson High Court Drew on Hawaiian Tradition*, HONOLULU ADVERTISER, Feb. 20, 1994, at B1.

[270] The Hawaii Supreme Court confirmed that Hawai'i adopted English common law as the common law of the State of Hawai'i only to the extent it is not inconsistent with Hawaiian usage. This Hawaiian usage exception insures that Hawaiian traditional practices supersede the common law except in very limited circumstances. In determining whether to acknowledge specific traditional and customary practices, a case by case analysis balancing respective interests and harm is required. Kalipi v. Hawaiian Trust Co., 66 Haw. 3, 656 P.2d 745 (1982) (citing O'Brien v. Walker, 35 Haw. 104 (1939), *aff'd*, 115 F.2d 956 (9th Cir. 1940).

[271] HAW. REV. STAT. § 7-1 (emphasis added). This statute was originally enacted in 1851 and continued as Hawai'i law without substantial modification. The original Hawaiian language version of the Kuleana Act (from which the statute evolved) indicates that it (1) created these rights only for Hawaiians, and (2) also created rights to irrigation water (not just "running" water). *See* Nahekeaopono Ka'iuwailani, The Erosion and Resurgence of Native Hawaiian Rights: A Re-examination of the Rights Reserved to Natives under section 7-1 and its Predecessor, Section 7 of the Kuleana Act of 1850 (as amended) (1994) (unpublished manuscript on file NHAC office).

to the inhabitants of the Hawaiian Islands prior to 1778,[272] to go on to undeveloped land to engage in traditional and customary practices for subsistence, cultural, and religious purposes.[273] In further recognition of the rights of the indigenous people of Hawai'i, the state constitution also protects these practices.[274]

In each of the three leading Hawai'i decisions dealing with traditional and customary gathering rights, the court has reaffirmed the obligation of state authorities to preserve and protect the rights of Hawaiians. The Hawaii Supreme Court first dealt with traditional and customary rights in *Kalipi v. Hawaiian Trust Co.* where the Court held that in order to engage in traditional and customary practices pursuant to Hawaii Revised Statutes section 7-1 (1) a person must reside in the ahupua'a where gathering is exercised; (2) the lands eligible for gathering must be in an undeveloped state; and (3) collectable items are only those specifically enumerated in section 7-1.[275]

However, the court held that under section 1-1, gathering is not restricted to those substances specifically enumerated in section 7-1. The court opined that "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it established that the application of the custom has continued in a particular area." Therefore, "where these practices have, without harm to anyone, been continued, we are of the opinion that

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[272] HAW. CONST. art. XII, § 7.

[273] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 3, 656 P.2d 745 (1982); Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1994), *cert. denied.*, 113 S. Ct. 1277 (1993); Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, No. 15460, 1995 WL 515898 (Hawai'i, Aug. 31, 1995) [hereinafter *PASH*].

[274] A more expansive argument has been advanced that although the practices which fall within the meaning of traditional and customary rights are defined based on practices of the inhabitants of the Hawaiian islands prior to 1778, those early Hawaiians would not have limited access to these practices only to natives of the islands. Rather, the early Hawaiians would have taken a more inclusive approach in determining who could participate. These rights should be interpreted in light of practices within the Hawaiian community, not by strict reading of the provision's language. The focus of protection must be on both practice and practitioner. Consistent with the fact that although the constitution recognizes these rights, the constitution did not create these rights, definition as to the scope and nature of tradition and custom must reside in Hawaiian community, not the courts.

[275] *Kalipi*, 66 Haw. at 7-11, 656 P. 2d at 752-55. For Kalipi, this meant that since he did not reside in the ahupua'a of 'Ohi'a or Manawai, he was not entitled to engage in any gathering practices there. *Kalipi* did not directly address water rights, but the Court noted that *McBryde I* would control.

the references to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done thereby."[276] However, the court concluded, there was "insufficient basis to find that such rights would, or should, accrue to persons who did not actually reside within the ahupua'a in which such rights are claimed."[277]

Ten years later, in *Pele Defense Fund v. Paty*,[278] the Hawaii Supreme Court was asked to determine the validity of a land exchange between the State and Campbell Estate. The court took the opportunity to expand *Kalipi* and held that gathering rights are not limited to those who reside in the ahupua'a. The court reasoned that the framers of article XII, section 7 of the state constitution did not intend for this constitutional provision to be narrowly construed. Rather, the court interpreted the Hawaiian traditional and customary rights reflected in Hawaii Revised Statutes section 1-1 and article XII, section 7 consistent with the manner in which those rights were traditionally exercised. Thus, an analysis of previous patterns of these practices, not of the location of one's residence, was the relevant consideration.

Moreover, building on the recognition of Hawaiian usage doctrines as a source of law recognized in section 1-1, the court accepted that the gathering of items specifically enumerated in section 7-1 are illustrative of the types of rights protected, but are not exclusive. However, as in *Kalipi*, the court in *Pele* held that only access to undeveloped land was protected for the exercise of traditional and customary rights.

In the most recent decision concerning traditional and customary rights, *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*,[279] the Hawaii Supreme Court has made a strong statement on the obligation of a state agency to protect and preserve Hawaiian rights under the Hawaii Constitution article XII, section 7 and section 1-1. The court held that the Hawaii County Planning Commission (HPC) "may not issue a [shoreline management area] use permit unless it finds that the proposed project will not have any significant adverse effects." Among the factors that must be considered is the "loss or destruction of any natural or cultural resource, including but not limited to, historic sites."[280] The court reminded HPC that it must act consistent with the policies and objectives of the Coastal Zone Management

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[276] *Id.* at 9-10, 656 P.2d at 750-751.
[277] *Id.* at 12, 656 P.2d at 753.
[278] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied.*, 113 S. Ct. 1277 (1993).
[279] 1995 WL 515898.
[280] *Id.* at *6.

Act (CZMA), one of which is to protect and preserve "those natural and manmade historic and prehistoric resources in the coastal management zone that are *significant in Hawaiian . . . history and culture.*"[281]

The court also reminded the HPC that it is "obligated to protect customary and traditional rights to the extent feasible under the Hawaii Constitution and relevant statutes." The court clarified the discussion of customary rights in *Kalipi* as "merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices in exercising otherwise valid customary rights in an *unreasonable* manner. . . . On the other hand, the *reasonable* exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7" of the Hawaii Constitution. In considering the balance between the rights of private landowners and the rights of persons exercising traditional Hawaiian culture, the *PASH* court declared that "the western concept of exclusivity is not universally applicable in Hawai'i."[282]

The *PASH* court reaffirmed its holding in *Pele* that the State's obligation to "protect customary and traditional rights normally associated with residency in an ahupua'a, may also apply to the exercise of the rights beyond the physical boundaries of that particular ahupua'a." The court clarified that those "who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1, are entitled to protection regardless of their blood quantum."[283]

In past decisions, the court has made some distinctions between the exercise of customary rights on developed and undeveloped lands. In the context of permits for the development of lands, the *PASH* court determined it was not appropriate "to place undue emphasis on non-Hawaiian principles of land ownership. . . . Such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i . . . which can also be successfully incorporated in the context of our current culture."[284] The court held that although the state could impose appropriate restrictions on the exercise of Hawaiian rights on developed land, "the

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[281] *Id.* (quoting HAW. REV. STAT. § 205A-2(b)(2) (1993)) (emphasis in original).

[282] *Id.* at *14 (emphasis in original).

[283] *Id.* at *16. The court expressly reserved the question of the extent to which non-Hawaiian members of an Ohana "may legitimately claim rights protected by article XII, section 7 of the state constitution and HRS § 1-1." *Id.* n.41.

[284] *Id.* at *17.

State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence."[285]

One of the problems encountered by Hawaiians who wish to assert their traditional and customary gathering rights in a particular area is the question of whether they must prove that those rights have been continuously practiced. The court noted the confusion over this question caused by dicta in earlier decisions. The court acknowledged dicta in *State v. Zimring*, that "the establishment of traditional usage 'would be of little weight' because the practice 'would not have carried over into a private property regime within the framework of a private enterprise economic system,'" and in *Kalipi* that the practices set forth in section 7-1 "remain 'available to those who wish to continue those ways.'"[286] The *PASH* court held that the ancient Hawaiian usage of land did "carry over into the new system of property rights established through the Land Commission" and "the right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site."[287]

The obligation imposed on the Water Commission by the Water Code is even stronger than that imposed upon the HPC under the CZMA. For example, section 2 of the Water Code requires that in providing for the beneficial use of the state's water for domestic, aquacultural, agricultural, power development, and commercial and industrial uses, "adequate provision shall be made for the protection of traditional and customary Hawaiian rights."[288] Under the *PASH* decision, the state constitution, and statutes, including the Water Code, the Water Commission has an affirmative duty to protect Hawaiian traditional and customary practices. In the past, the Commission has treated Hawaiian rights as an afterthought and acted, if at all, as a reaction to challenges to proposed Commission actions. In order to fulfill its constitutional and statutory responsibilities, the Water Com-

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[285] *Id.*

[286] *Id.* at *16 (quoting State v. Zimring, 58 Haw. 106, 116-18, 566 P.2d 725, 732-33 (1977) and Kalipi v. Hawaiian Trust Co., 66 Haw. 3, 9, 656 P.2d 745, 750 (1982)).

[287] *Id.*

[288] WATER CODE § 2. Similarly, § 3 defines "instream uses as beneficial uses of stream water" including "[t]he protection of traditional and customary Hawaiian rights." *Id.* § 3. Section 101(c) specifically protects the cultivation of taro and the gathering of traditional products, such as hihiwai, opae, o'opu, and limu which are found in streams and estuaries— and require an adequate water flow and quality to thrive. *Id.* § 101(c).

mission must assure that every allocation decision includes a careful and comprehensive analysis of potential impact on Hawaiian rights. In establishing procedures and priorities for water management in Hawai'i, including the development of a state water plan, the Commission has a duty to establish instream flows that preserve and restore stream products traditionally gathered by Hawaiians, ensure viable ecosystems for the plants and animals related to traditional and customary cultural, spiritual and religious practices, and support traditional aquacultural and agricultural activities.

D. Appurtenant Water Rights

Appurtenant water rights "are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land."[289] Appurtenant water rights are "incidents of land ownership"[290] defined by the quantity, quality, and other characteristics of uses of water use in place at the time of their attachment (typically during the Māhele).[291] Appurtenant water rights may only be used in connection with the particular parcel of land to which the right appertains and therefore cannot be used as a basis for diversion and transport to other parcels of land or to other watersheds, even if the other land is owned by the same person.[292]

The greatest volumes of water under these rights were typically used for cultivating wetland taro. Quantification of those volumes has been

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[289] Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982). The most recent Hawaii Supreme Court decision to define appurtenant water rights is unequivocal in limiting the right to water actively used at the time of ownership conversion. *Id.*

[290] *Reppun,* 65 Haw. 531, 656 P.2d 57.

[291] See *infra* notes 366-67 and accompanying text for further discussion on implementation of the enforcement of appurtenant rights.

[292] *McBryde I,* 54 Haw. at 191, 504 P.2d at 1341. The court wrote:

> As the use of the word 'appurtenant' indicates, it is water rights which pertain to or annexed to that particular parcel of land conveyed by the original grant from the King or Hawaiian government. We hold that the right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled. Thus, neither McBryde nor Gay & Robinson may transport water to another watershed, which they may have the right to use under their respective appurtenant water rights."

Id. (citations omitted). *See also Reppun,* 65 Haw. 53, 656 P.2d 57 ("[A]ppurtenant easements attach to the land to be benefitted and cannot exist or be utilized apart from the dominant estate.")

subject to great debate.[293] Courts have calculated them by multiplying the acreage of land in cultivation by an average volume of water used (typically expressed per acre per day) for growing taro.[294] In *Reppun v. Board of Water Supply*,[295] the Hawaii Supreme Court stated, "[f]or while the proper measure of those rights is indeed the quantum of water utilized at the time of the Māhele, requiring too great a degree of precision in proof would make it all but impossible to even establish such rights." The court held that where the parcel of land was "being utilized to cultivate traditional products by means approximating those utilized at the time of the Māhele" there was a presumption that the amount of water being used sufficiently approximated the quantity of the appurtenant water rights to which that land was entitled.[296]

Although the Water Code's primary provisions relating to appurtenant rights are in the Native Hawaiian Water Rights section, the right has been defined as one that attaches to land, not individuals, and thus whether the landowner is "Native Hawaiian" is not considered relevant. The legal history shows that the root of this inconsistency may be that appurtenant water rights, by virtue of their linkage to "native tenants," "immemorial usage," and "ancient custom," were thought to have been derived from the rights granted to Hawaiians by the Kuleana Act and its successors.[297] In fact, the appurtenant water right is an Anglo-American legal concept with no foundation in ancient Hawai'i.

Since their establishment in *Peck v. Bailey*,[298] appurtenant water rights have been a fundamental principle of Hawai'i water law. This doctrine has been consistently reaffirmed by the Hawaii Supreme Court, including its decisions in *McBryde*[299] and *Reppun*.[300] The protections af-

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[293] A 1990 draft of the Taro Industry Analysis No. 4 prepared by the University of Hawai'i College of Tropical Agriculture and Human Resources for the Governor's Agricultural Coordinating Committee, suggests that:

> On the average, taro requires approximately 0.2 inches (5400 GAD) for growth. To this amount, additional water is required to compensate for seepage and evaporation from the paddy. Additional water is also needed to adequately cool the paddy. Water requirements are higher in the summer, and water requirements vary with location and farm.

[294] *See McBryde I*, 54 Haw. at 176-77, 504 P.2d at 1333.

[295] 65 Haw. 53, 656 P.2d 57.

[296] *Id.*

[297] *See* Nahekeaopono Ka'iuwailani, *supra* note 68.

[298] 8 Haw. 658 (1867).

[299] 54 Haw. 174, 504 P.2d 1330.

[300] 65 Haw. 531, 656 P.2d 57.

forded appurtenant water rights by the Water Code are very strong. The Advisory Study Commission on Water Resources' report to the State Legislature (leading to the Water Code's enactment) concluded that appurtenant water rights are deeply rooted in Hawaiian culture[301] and acknowleged that appurtenant rights enjoy special protections under the State Constitution. The legislative intent was that "appurtenant rights may not be lost"; thus both exercised and unexercised (inchoate) appurtenant rights are protected in a number of Water Code provisions.[302] However the Water Commission's December 1990 decision not to certify declarations of inchoate appurtenant water rights jeopardized effective administrative protection of these rights.[303]

In response to threatened legal challenges to Water Commission's decision not to certify declarations of instream uses and inchoate appurtenant rights, the "Nakata Subcommittee" was appointed to re-examine the issues and to address the concerns of holders of appurtenant rights was established.[304] In April 1991, the subcommittee issued a report recommending more comprehensive public notice programs, acceleration of an appurtenant rights survey ordered by the Water Commission in February 1990, and amendment of Water Code administrative rules to create a registry of eligible appurtenant water rights holders.[305] On April 17, 1991, the Commission accepted the

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[301] "The constitutional use of the word 'rights' with respect to appurtenant rights is a recognition by the framers of the State Constitution that appurtenant rights are deeply rooted in the culture of native Hawaiians." ADVISORY REPORT, *supra* note 90, at 36.

[302] WATER CODE BILL, *supra* note 90, at 5. Protections of appurtenant water rights are found in four different sections of the Water Code. *See* WATER CODE §§ 27(a) (reports of water use), 50(c) (regulations of water use), 63 (regulation of water use), and 101(d) (Hawaiian water rights).

[303] *See supra* note 192-209 and accompanying text.

[304] Water Commission, Minutes (Dec. 19, 1990).

[305] Report of the Subcommittee to the Water Commission on Declarations of Instream Use and Appurtenant Water Rights. (Apr. 17, 1991). The Water Commission accepted the report and instructed their staff to develop a plan of action for commission approval. The recommendations of the sub-committee were as follows:

1) That the Commission begin to publish a monthly bulletin of all the applications and activities of the Commission.

2) That the Commission change the administrative rues to include the bulletin requested. This type of bulletin is already required in the administrative rules for designated areas.

3) In regards to the declaration of instream uses, the sub-committee supported the action of the Commission in saying that the instream uses are not to be

subcommittee's report and instructed their staff to develop a plan of action for Commission approval.[306]

The implementation of these recommendations has been slow and of minimal effect. The recommendation for improved public notice resulted in a monthly bulletin which tracks permitting and other actions pending before the Water Commission. The monthly bulletin is a valuable tool for following Water Commission activity; however it does not provide adequate notice to those potentially impacted by Commission actions, particularly those who have filed declarations of uses upon which the Commission has deferred action. For example, the Water Commission is not providing appurtenant rights and other Hawaiian rights declarants (all of whom were not granted certification) with direct notice of water use permit applications that may affect them in the newly designated Windward and Moloka'i Water Management Areas.[307] Registrations of water sources, declarations of water use for wetland taro cultivation, appurtenant rights claims and other readily available information could provide the Commission with a comprehensive computerized data base that could be used to identify those potentially affected by Commission actions. Source-specific registries of potential holders of appurtenant water rights and other interests could be created from the data base and be used to provide direct notice of pending actions to registrants. The Commission staff has taken the position that such a process would be too burdensome.[308] This is especially troublesome given the lack of affirmative action by the Water Commission to protect Hawaiian rights and appurtenant rights. The history of land and water management has been essentially a history

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certified providing that there would be adequate notice of action.

4) On the declaration of appurtenant water rights, it was recommended that a registry of candidate appurtenant rights to be created and urged the work on the survey of appurtenant water rights proceed as quickly as possible.

5) That the administrative rules be changed to include the registry of candidate appurtenant water rights.

6) In all of the permits that the Commission approves that there be a clause conditioning the permit on appurtenant water rights, other uses, and use rights in the Code, the administrative rules, and the State Constitution.

Water Commission, Minutes (Apr. 17, 1991).

[306] *Id.*

[307] *See* Water Commission Meeting (July 28, 1993) (videotape on file at NHAC office).

[308] *See* Water Commission Meeting (Mar. 16, 1994) (Videotape on file at NHAC office).

where those without the financial resources to closely monitor proposed actions by governmental agencies such as the Water Commission have been disenfranchised. Without adequate information and notice of such actions, the general public, and Hawaiians in particular, have been marginalized from processes that have generally been dominated by large economic interests.

In order to gather additional information to identify appurtenant rights holders, the Water Commission commissioned a study of the fourth recommendation of the Nakata Subcommittee.[309] The study got off to a slow start when the contractor originally selected for the appurtenant water rights survey was replaced by a subcontractor who assumed most survey responsibilities. On March 8, 1993, the Commission established the Appurtenant Water Rights Advisory Group to guide the survey effort. The draft Phase I report on the appurtenant rights survey requested by the Water Commission in February 1990 was circulated to this group on February 14, 1994.

Potential conflicts exist as the Water Commission attempts to accommodate appurtenant rights and Hawaiian water rights; Hawaiians themselves may have a difficult time in balancing various types of water rights. To illustrate, the formerly extensive lo'i'ai (taro pondfields) in Waimea Valley, Kaua'i and adjacent Kekaha Hawaiian Home Lands are both serviced by Waimea river water. Similarly, on Moloka'i extraction of water needed to develop the agricultural lands of Ho'olehua and Kalamaula already affects Waikolu stream. Additional withdrawals would affect appurtenant and traditional and customary rights.

Some Hawaiian water uses are protected as appurtenant rights, they yet may be better protected as Hawaiian custom.[310] Seeking enforcement of appurtenant rights to benefit Hawaiians has proven to be expensive, exhausting, and unsatisfactory. Thus Hawaiians ultimately may be more successful in meeting their water needs by advocating the strict limitation and regulation of appurtenant rights, while pursuing broader claims of traditional and customary rights to irrigation water based upon state constitutional, statutory and common law and emerging international human rights norms relating to indigenous peoples. Regulatory initiatives have not typically expanded appurtenant rights to benefit Hawaiians, in part because the cost-benefit analyses of the regulators has taken a very narrow view of what constitutes a cost or a benefit.

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[309] *See supra* note 305.

[310] *See supra* note 302.

E. Hawaii Water Plan

The interrelationship between water use and land use was clearly recognized in the Water Code.[311] The Legislature intended that water planning and development would be comprehensive, consistent with land use planning, and in accordance with an overall water plan.[312] The Water Code requires development of a state water use and protection plan to be used as "the guide for developing and implementing this [Water Code] policy."[313] The critical importance of this planning process continues to be recognized by both policy makers and interested citizens. Deputy Attorney General William Tam stated: "I like to think of the Water Plan as the truth serum between land use planning and water use."[314] Water use planning would be more effective if the degree to which land use planning leads water use planning were minimized; however, counties continue to boldly implement water-insensitive land use directives without adequately addressing water issues.[315]

The Water Code mandates that the Water Commission prepare and implement a four part Hawaii Water Plan comprised of : 1) a statewide water resource protection plan to be prepared by the Water Commission; 2) county water use and development plans to be prepared by each separate county and adopted by ordinance; 3) a state water projects plan which is to be prepared by the agency which has jurisdiction over such projects; and 4) a water quality plan which is to be prepared by the Department of Health.[316] Except for the Water Quality

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[311] *See* Advisory Report, *supra* note 90, at 12 ("[W]ater use and land use planning should be linked together. Throughout the recommended code, the need for linkage between water use and land use planning is emphasized.").

[312] WATER CODE § 2(b); HAW. ADMIN. R. § 13-170-60(e).

[313] WATER CODE § 2(b) This is the second statement of policy in the Water Code immediately following the statement that water is held by the State in a trust relationship for the benefit of citizen beneficiaries.

[314] William Tam, State Deputy Attorney General, Remarks at the 9th Annual People's Water Conference (Feb. 13, 1993).

[315] For example, in Anahola, Kaua'i, the Kaua'i Department of Water connected a developer's pipeline from wells on Hawaiian Home Lands to private, upscale residential development (Aliomanu Estates). Kaua'i County has stated it will allow other developers to tap into the line as long as water is available. The County has also refused to commit to any protective measures assuring future water availability for Hawaiian Home Lands.

[316] WATER CODE § 31. The Review Commission on the State Water Code recommends that the Office of Hawaiian Affairs prepare a Native Hawaiian Water Plan. *See* REVIEW COMM'N FINAL REPORT, *supra* note 99, at 49.

Plan, the component parts of the Hawaii Water Plan were to be adopted by the Commission no later than July 1, 1990.[317] County water use and development plans which are approved at both the county level by ordinance and at the state level (by the Water Commission) should be influential policy documents.

There was very little public participation in the first attempts to draft and adopt the Water Plan. The first public meeting on the proposed Plan occurred only four months before the July 1, 1990 statutory deadline, nearly three years after the enactment of the Water Code. As a result of concerns over deficiencies in the draft Plan, the Commission granted only conditional approval. A one year "intensive review" period to rehabilitate the Water Plan was initiated. Because the review was not near completion within that year, the "intensive review" period was extended for fourteen more months. During this extended review period, the public was not included in "plan development" meetings held between Water Commission staff, county officials, major water users, and their consultants. No public information about agendas or outcomes was released.[318] Public input was limited to participation by development interests, with limited reactive responses in subsequent public information meetings by the general public and Hawaiians.

The February 1992 draft revised Water Plans (still under review) retain many of the deficiencies of earlier versions. County water plans are still inconsistent and non-standardized, water quality plans and policies are not comprehensive and action-oriented, and water conservation planning is not adequately considered. Despite Act 325's requirement that Hawaiian Home Lands water reservations be included in the Hawaii Water Plan,[319] such water reservations are not mentioned.[320] References to Hawaiian water rights are also conspicuously

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[317] WATER CODE § 32(c).

[318] Public notice of meetings including agendas are usually required under the state's "Sunshine Law":

> The board shall give written notice of any regular, special, or rescheduled meeting or any executive meeting when anticipated in advance. The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, the time, and place of the meeting, and in the case of an executive meeting, the purpose shall be stated.

HAW. REV. STAT. § 92-7(a) (1993).

[319] *See* discussion, *supra* note 234.

[320] *See supra* note 58.

absent.[321] In August 1992, the Water Commission again extended completion of the Water Plan review process to December 1993.[322] This deadline passed without comment by the Water Commission.[323]

The failure of the Hawaii Water Plan to acknowledge and integrate meaningful protection of Hawaiian water rights is a fatal flaw. By failing to provide procedures through which Hawaiian water rights concerns can be constructively addressed and protections implemented, the draft plan does not meet its statutory requirements for a comprehensive planning document. Protecting and preserving traditional cultural beliefs, values and practices of Hawaiians is required under the state constitution, statutory and common law, and the Water Plan must set forth guidelines and procedures for water use and planning that fulfill those requirements.

The current draft Water Plan perpetuates a "first come, first serve" mentality that encourages development of access to water first, reserving the determination of how to resolve conflicts until later. The engineering bias which permeates the Water Plan devises a prescription for maximizing water usage, not for managing, conserving or controlling it.[324] By stating in effect that abundant water supplies will be made available, the Water Plan sidesteps the need to establish a community-based set of priorities for water use and ignores the very real limitations on water resources in the State.

It is currently unclear how the Water Commission intends to finalize an effective and responsible water plan. In order to develop such a plan, the Water Commission must take more of a community-based approach and focus on formulating and implementing concrete strategies for achieving community water management objectives. Such a plan could be a valuable guide to water management, water resource protection, and water source development.[325]

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[321] *See supra* note 58.

[322] *See* Water Commission, Minutes (Aug. 19, 1992).

[323] The process of adopting a water plan appears to be at a standstill. Nonetheless, the report of the Water Code Review Commission contains findings and concerns about the Water Plan which may help to revive the process.

[324] Patricia Tummons, Editor of Environment Hawai'i, has stated that the fundamental approach of the Hawaii Water Plan is that water is an abundant resource and "may be available in virtually unlimited quantities, given enough 'augmentation' projects." Tummons concludes, however, that water, especially inexpensive water, is not available in infinite quantities, and is "being spoken for in increasing quantities virtually every day." Patricia Tummons, *A State Water Plan, But No Water Policy*, ENV'T HAW. 8 (Aug. 1990).

[325] *See generally* Catherine Vandemoer, Native Hawaiian Reserved Water Rights:

In addition to specific Water Plan proceedings before the Water Commission, county councils and county water departments offer potentially fruitful opportunities for greater public involvement and influence in water resource planning. County land use plans (Development Plans) are adopted as county ordinances that until now always led water use planning and development, and have established the policy orientations and fiscal priorities of county water departments.

County water use and development plans, like county land use plans (but unlike other components of the Hawaii Water Plan) obtain the force of law as county ordinances, as well as becoming state policy after Water Commission approval. Thus, with focused public involvement, the well-established process of amending county ordinances holds great potential for community-based water management.

This is not to imply that all functions under the Water Code should be delegated to the counties (a concept often endorsed by counties and commercial business concerns). It seems unlikely that counties will engage in bottom-up water resources management and planning unless forced by public opinion.

A state Water Commission planning process that relies upon state county water plans developed with broad-based community participation may be a productive approach.

F. Enforcing Hawaiian Water Rights

The Statehood Admissions Act restates the State's trust obligations to Hawaiians concerning management of Hawaiian Home Lands and ceded lands.[326] Constitutional provisions also protect Hawaiians' traditional and customary rights and appurtenant water rights. All state and county agencies have duties to meet the State's fiduciary and constitutional responsibility to protect Hawaiian rights. In such an environment, Hawaiian interests should be a primary component of decision-making processes, explicitly recognized and integrated into the procedures of all responsible agencies. Nevertheless, Hawaiian water rights continue to exist primarily as unenforced "paper" rights.

Quantification, Perfection, and Management of The Native Trust Asset (1993) (unpublished manuscript prepared for 9th Annual People's Water Conference, Honolulu, Hawai'i) (on file at NHAC office).

[326] Admission Act of March 18, 1959, Pub L. No. 86-3, §§ 4, 5-6. *See also* HHCA Hearings, *supra* note 19.

To date, the State of Hawai'i and its agencies have not protected Hawaiians' water rights adequately and are, in some cases, actually competing with Hawaiians for water.[327] DHHL's efficiency is hindered by its apparent inability to exercise a strong independent commitment to the interests of HHCA beneficiaries with respect to water needs. The Department's advocacy efforts on behalf of Hawaiian beneficiaries has been largely ineffective in negotiations and working relationships with larger and more powerful state agencies such as the Office of State Planning (OSP), DLNR, and the Department of Transportation (DOT).

DHHL has begun to take a more active role with respect to beneficiary water rights concerns; however, DHHL presently has neither personnel dedicated exclusively to working on water management issues nor independent legal representation concerning water entitlements and other beneficiary rights. However, the primary initiative by DHHL, seriously underfunded for several decades, is attempting to develop the massive infrastructure necessary to supply adequate water to homesteaders.[328]

OHA[329] was established by the State of Hawai'i to manage a publicly-funded trust for bettering conditions of native Hawaiians (any descendant of not less than one-half part of the blood those peoples inhabiting the Hawaiian Islands previous to 1778) and Hawaiians.[330] OHA is funded in part by revenues the State of Hawai'i receives from "ceded lands" and their natural resources. OHA's purpose clause provides that OHA shall serve "as the principal public agency in the State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians."[331] OHA has not yet been invited to participate in negotiations for water lease revenues;

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[327] For example, DLNR is a co-applicant for a water use permit with Waiahole Irrigation Company and is an ex-officio voting member of the Agricultural Development Corporation. *See supra* notes 19 and 97.

[328] According to DHHL, infrastructure requirements are estimated at $186 million for the 4,000 homestead residential lots scheduled for development by the end of 1994. Infrastructure for another 10,000 homestead lots is projected at an additional $1.4 billion. STATE OF HAWAII, REPORT ON THE HAWAIIAN HOME LANDS PROGRAM III-7 (Jan. 1992) (submitted to the Committee on Energy and Natural Resources of the U.S. Senate). In both 1993 and 1994, no capital improvement project funds in DHHL's budget requests for this infrastructure were requested from the Legislature.

[329] HAW. REV. STAT. §§ 10-1 to 10-16 (1993).

[330] *Id.* §§ 10-3(1), 10-3(2).

[331] *Id.* § 10-1(a).

but, OHA is actively involved in many issues before the Water Commission.[332]

As Hawaiians move toward sovereignty, DHHL and OHA are burdened by their lack of autonomy. They have fiduciary duties to advocate for their trust beneficiaries, but they are dependent on the state for continued funding,[333] and are castigated by a significant portion of the Hawaiian community for their lack of independence. As the State proceeds with efforts to resolve state and federal breach of trust claims with minimal Hawaiian beneficiary input, this lack of autonomy has undermined Hawaiian acceptance of these initiatives.

In at least one instance, the Attorney General's office provided concurrent representation to both the DHHL and the State, despite a conflict in the interests of the State and the beneficiaries. In 1991, Governor John Waihe'e created a task force to resolve Hawaiian home lands trust controversies. In 1992, this body recommended a partial settlement to release the state from any other claims against it associated with the illegal use of certain Hawaiian Home lands from 1959 to 1984. Throughout the negotiations that led to the settlement offer, no effort to consult with Hawaiian beneficiaries was made. The Office of the State Attorney General purported to represent both Hawaiian interests and the conflicting interests of numerous other state agencies throughout the negotiations. In *Ka'ai'ai v. Drake*, Hawaiian beneficiaries opposed the settlement agreement negotiated between the state and DHHL and sought to require independent Hawaiian beneficiary involvement in the negotiations.[334] In the 1993 Legislative session, as part of the settlement in the *Ka'ai'ai v. Drake* case, Act 352 created the position of independent representative for beneficiaries in resolving

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[332] Co-authors represention of OHA in the Waiāhole Water Case. On October 22, 1993, OHA objected to water use permit applications submitted to the Water Commission by Campbell Estate for the Ko'olauloa aquifer system, arguing that if all Campbell's estate water permits were granted "water withdrawals would (i) exceed the sustainable yield of the Ko'olauloa aquifer by 14 mgd, (ii) be 49% of the sustainable yield for all windward aquifers, (iii) be 11% of the sustainable yield for all aquifers in Oahu, and (iv) be 27 times greater than the much publicized water reserves for the Department of Hawaiian Home Lands." Letter from Clayton Hee, OHA Chairperson, to Keith Ahue, Former BLNR and Water Commission Chairperson (Oct. 22, 1993) (on file at NHAC office). OHA has also been actively involved in a contested case regarding the 'Ewa Caprock aquifer and development of the 'Ewa Marina.

[333] *See supra* note 19.

[334] Co-author Elizabeth Pa Martin served as co-counsel to Plaintiffs Charles Ka'ai'ai and the late Alice Kaleimanula Pa Kema Aiwohi in the *Ka'ai'ai* case.

claims relating to the State's breaches of its Hawaiian Home Lands trust obligations prior to 1988.

The independent representative began to work with the Governor's task force to achieve an equitable settlement. However, following the 1994 legislative session, Senate Bill 2262 to fund the independent representative office and "provide access to the courts for prompt resolution of legal disputes" was vetoed by the Governor. This demonstrates both the legal dilemma such conflicts of interests create and the resistance of the Waihe'e administration to establish open and fair processes to equitably resolve these claims. These concerns have not gone unnoticed. The Hawaii Advisory Committee to the United States Commission on Civil Rights, after extensive analysis of the history of DHHL activities, expressed concern about this lack of autonomy or independent counsel for DHHL. It recommended that "[t]he department should not rely on other State offices for legal and technical representation, as these entities are not acting exclusively on behalf of the native beneficiaries."[335] At this writing, there is little evidence that independent representation will be provided to protect beneficiaries' water interests.[336] However, the critical nature of unresolved Hawaiian rights issues and the broad scope of Hawaiian concerns regarding state water resource management graphically illustrate the need for autonomy and independent counsel.

Another potential impediment for Hawaiians is the view of various governing bodies in the international community as well as within the United States and the State of Hawai'i that rights for Hawaiians and other indigenous peoples are "preferential" or "special." Many Hawaiians, and other indigenous peoples, consider this view to be racist. As the Report of the Ministerial Advisory Committee on a Maori Perspective for the New Zealand Department of Social Welfare discusses, one of the most pervasive forms of cultural racism is the assumption that Euro-American values, beliefs and systems are "normal." This places native values, beliefs and systems in the category of "special" or "exotic." A so-called "cultural preference" for native peoples therefore becomes an "extra."[337]

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[335] A BROKEN TRUST, *supra* note 145, at 43, 46.

[336] *See, e.g.,* Memorandum on the Basis for Inclusion of Hawaiians within the Trust Counsel Bill from Williamson B.C. Chang to the U.S. Senate Select Comm. on Indian Affairs (June 21, 1990)(on file at NHAC office).

[337] THE REPORT OF THE MINISTERIAL ADVISORY COMMITTEE ON A MAORI PERSPECTIVE

VI. Balancing Acts

Historic approaches to water management policies and planning will not restore appropriate balance. Adjusting this balance may be achieved through commitment to developing appropriate management systems and by acknowledging that applying small band-aids to Hawai'i's multi-faceted water resource management problems will not work. To meet today's challenges, advocates and policy makers must apply imagination and innovation and build consensus among both Hawaiian and non-Hawaiian communities through participatory and value-based processes. The Water Commission has demonstrated more openness and receptivity to public participation than boards and commissions such as the BLNR and the Land Use Commission, and a broad range of committees, advisory groups, and task forces have been established to address many of the relevant policy issues, implementation procedures, and shortcomings of the Hawaii Water Code and its administration. As these bodies move forward, a unique window of opportunity exists within the next few years to establish laws, policies, and practices which better protect Hawaiian water rights and uses.

A. Water Code Review Commission

Section 5(a) of Act 45 established within the Legislative Reference Bureau a seven member review commission to comprehensively review the Water Code and develop recommendations for its improvement.[338] The Water Code and the Water Commission's policies and practices are subject to an initial review by this Commission based upon five years of implementation. The Water Code Review Commission ("Review Commission") is required to review:

> (1) all water issues addressed in the state Water Code; (2) other water matters of fundamental importance which should be dealt with in a state Water Code but which have not yet been incorporated, such as the definition of public and private rights to water, the institution of a comprehensive statewide permit system to regulate all types and uses of water, the integration of water quality and water quantity matters for a

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for the Department of Social Welfare, Puao-teata-tu (Daybreak) 25-27 (1986) (Wellington, New Zealand). *See also* John H. Bodley, Victims of Progress 59 (3d ed. 1990).

[338] Water Code Act, supra note 14, § 5(a); *see also* H.R. Stand. Comm. Rep. No. 348, 14th Leg., 1987 Reg. Sess., 1987 Haw. House J. 1262.

> unified management of the resource by a single lead agency; and (3) the appropriate agencies of the state and county levels responsible for protecting, developing, and controlling water, their aims and objectives, the necessary powers to be conferred upon them, and their organizational support.[339]

Act 45 required the Review Commission to be selected and start its work by July 1, 1992. Selection of the Review Commissioners was delayed until October 6, 1992.[340] Five of the seven Review Commissioners selected by the Senate President and the House Speaker represented the interests of either private developers or county Boards of Water Supply in other public forums.[341] In 1994, legislation expanded

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[339] WATER CODE ACT, supra note 14, § 5(a).

[340] *See* letters from Senate President Richard S. H. Wong and House Speaker Daniel J. Kihano notifying Review Commissioners of their selection to the Review Commission on the State Water Code (October 6, 1992) (on file at NHAC office). Review Commissioners are Chairman Fred Trotter (independent businessman), Vice Chair Ray Sato (formerly Kaua'i County's chief engineer, and chief engineer for the Honolulu Board of Water Supply while on the Commission, now managing engineer of the Honolulu Board of Water Supply), Secretary Charlene Hoe (Kamehameha Schools teacher), Kazu Hayashida (managing engineer of the Honolulu Board of Water Supply during Commission work, now director of the Department of Transportation), Bina Chun (Vice President of Bedford properties, developers in Hawaii Kai), Douglas MacDougal (attorney with Ashford and Wriston, which represents Campbell Estate), Alan Murakami (Native Hawaiian Legal Corporation litigation director).

[341] See letter from NHAC to Fred Trotter, Review Commission chairperson (Dec. 14, 1992) (expressing serious concerns about the "makeup of the Review Commission and its stated leadership" and further pointing out an extreme imbalance toward what NHAC perceived to be "pro-development bias."), *reprinted in* 3 KE KIA'I 14-15 (Dec. 31, 1992). *See also* David L. Martin, *Water Code Review Commission Convenes First Meeting, Nov. 19*, 3 KE KIA'I 12-13 (Dec. 31, 1992). *See also supra* note 126 for other community concerns that have arisen out of litigation between Ko'olau Ag and the Water Commission. The close association between Ko'olau Ag's founder and now Review Commission chairman Fred Trotter and Ms. Valerie Mendez to whom Mr. Trotter has transferred ownership of Ko'olau Ag has generated public concern about the appearance of conflicts of interest on Mr. Trotter's part. *See, e.g.,* Deldrene Herron, Testimony Before the State Water Code Review Commission on the Implementation of Native Hawaiian Water Rights (Feb. 23, 1994) (on file at NHAC office) (noting that chairman of the Water Code Review Commission Trotter is required to improve the Water Code; potential conflicts when a company with which he has very close ties sued the Water Commission about the Water Code's administrative procedures for designating water management areas); Letter from Fred Trotter, to Honolulu Advertiser, Waiahole Ditch Water: No Change in Use (July, 1995), (Chairman Trotter suggests that the Waiahole controversy be handled in a manner contrary to the recommendations of the report of the Water Code Review Commission which he chaired) (edited and published as Waiahole Tough Decisions Ahead, *infra* note 354).

the Review Commission to include two neighbor island members.[342]

The Review Commission first met on November 13, 1992. As the appointed Commissioners began discussing their mandate, they focused on three primary issues — designation of water management areas (including the associated issue of state management and allocation authority versus county home rule),[343] transporting water out of watersheds,[344] and Hawaiian water rights.

By February 1993 the Review Commission had initiated a series of information-gathering meetings with various individuals and groups familiar with origins of the Water Code and its subsequent implementation. At the first meeting, Yukio Naito, the project Coordinator for the Advisory Study Commission on Water Resources which drafted the original Water Code reviewed the Code's historical context. Heads of the county Boards of Water Supply, the OSP, OHA, Department of Agriculture, DHHL, USGS, United States Army Corps of Engineers, DLNR's Division of Water and Land Development, and the Water Commission and its staff, including the Deputy Attorney General to the Water Commission, participated in these meetings.

In July, August and September 1993, the Review Commission conducted twelve public informational meetings around the State. It sought public input and comment on a broad range of Water Code related issues.[345] An interim report was presented to the 1994 Legis-

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[342] H.R. 2965, 17th Leg., Reg. Sess. (1994) (requiring that at least two Commissioners be resident of Hawai'i, Kaua'i or Maui). A resolution to urge appointment of OHA and DHHL representatives to the Water Code Review Commission was also considered by the 1994 Legislature, but was not passed. H.R. Con. Res. 431, 17th Leg., Reg. Sess. (1994) (introduced by Representative Ululani Beirne, a Hawaiian).

[343] *See supra* notes 89 & 109 and accompanying text.

[344] *See supra* notes 109 & 184 and accompanying text.

[345] Issues of concern highlighted by the Water Code Review Commission staff included: 1) the identification and definition of public and private rights to water; 2) the institution of a comprehensive statewide permit system; 3) the integration of water quality and water quantity matters for a unified management of the resource by a single lead agency; 4) the appropriate agencies of the state and county responsible for protecting, developing and controlling water, their aims and objectives, the necessary powers to be conferred upon them, and their organizational support; 5) designation of water management areas; 6) water allocation; 7) appurtenant rights, and riparian and correlative rights and uses; 8) native Hawaiian water rights; 9) Hawaii Water Plan; 10) protection and conservation of water resources; 11) agricultural water needs; 12) stream management and the setting of instream flow standards; 13) data Collection and analysis regarding the quantity and quality of available resources; 14) desalination; and 15) reuse of waste water. *Review Commission on the State Water Code Chapter 174C -*

lature for review.[346] Hawaiian water rights received a high level of public comment and discussion within the Review Commission and was the only major issue specifically mentioned in the Executive Summary of their interim report.[347] In discussing the statewide information meetings, the report noted:

> Public participation reflected strong interest in a broad range of issues, including the make up of the Commission on Water Resource Management, stream protection and management, water quality, protection of Native Hawaiian water rights, water for lands administered by the Department of Hawaiian Home Lands, and increased community participation in the preparation of plans.[348]

The Review Commission continued to meet with the Water Commission and its staff on specific topics, such as the Hawaii Water Plan, designation of water management areas, and water reservations. At these meetings, the tensions between the Water Commission's state-level management and allocation authority and county home rule concerns become more evident as did the tensions between the existing land use driven planning processes, which are essentially formulated by county prerogatives, and water resource-based planning which is the Water Commission's primary responsibility.[349]

The Review Commission and the Water Commission disagreed on the need for a statutory "hierarchy" of prioritized water uses. Early in the review process, Commissioner Douglas MacDougal developed and circulated proposed hierarchies of water uses, which included a hierarchy of reserved uses of stream water and ground water that would have to be addressed before water would be allocated to any other uses.[350] The Review Commission supported his position that the

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State Water Code and Proposed Changes, HONOLULU STAR BULLETIN, June 13, 1994, tabloid insert.

[346] WATER CODE REVIEW COMMISSION, INTERIM REPORT TO THE STATE LEGISLATURE, 6-18 (Dec. 15, 1993). The report provides information about the background and purpose of the Review Commission, major issues, progress to date, and outlines future plans. The interim report discusses the twenty major issues identified by the Review Commission during its first year. The report does not prioritize the major issues.

[347] *Id.* at 5.

[348] *Id.*

[349] Evidence of this tension surfaced regularly in both the testimony of County water departments and others, such as agribusiness interests opposed to statewide permitting.

[350] *See Water Code Review Commission Would Establish Hierarchy of Uses*, 5 KE KIA'I Oct./Nov. 1994 at 1. *See also Review Commission on the State Water Code State of Hawaii,*

Water Code should include a hierarchy of water uses. Former Water Commission Chairman Keith Ahue responded that there was insufficient data to support the stream hierarchy, to quantify appurtenant rights and, further, that implementation of the proposed hierarchy could "impact existing uses" and "bring all developments of stream water to a halt" until the Water Commission was able to develop the necessary data.[351] The Review Commission addressed Ahue's concerns by recommending amendments related to "non-conforming uses" and a procedural approach to deal with out-of-priority existing uses. The Water Commission thereafter raised objections regarding its budgetary and administrative capacity to handle additional workloads.

One other area in which the Review Commission and the Water Commission initially disagreed relates to jurisdiction over water in irrigation ditches, including 'auwai. The Water Commission staff had consistently taken the position that they did not have authority to make decisions concerning these 'auwai. The Review Commission consensus was that it was well within the Water Commission's realm of responsibility to manage water that flows within 'auwai and ditches. Subsequently, and following the similar recommendations of the Native Hawaiian Water Rights Task Force, Water Commission staff apparently concurred. These differences and others were apparently a factor in the Water Commission's decision to establish a special commission to review the recommendations of the Review Commission.[352]

The Review Commission reached consensus and recommended amendments to the Water Code for a hierarchy of uses, providing in

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Notice of Public Hearings, HONOLULU STAR BULLETIN, June 13, 1994, at 3-4 (tabloid insert). This tabloid insert provides a well organized and comprehensive analysis of major issues and proposed Water Code changes and is available upon request from the Review Commission. *See also NHAC, Update on the Review Commission on the State Water Code: The difficult task of establishing water use priorities*, 5 KE KIA'I, June 1, 1994, at 24.

[351] Letter from Keith Ahue, Water Commission Chairman, to Fred Trotter, Water Code Review Commission Chairperson (Apr. 5, 1994) (on file at NHAC office). Rather than a position of the Water Commission as a body, this appeared to be the view of Water Commission staff and its Deputy Attorney General. *See* Water Commission, Minutes 1 (May 18, 1994); KE KIA'I, *supra* note 350, at 23. *See also* Letter from Douglas W. MacDougal, Water Code Review Commissioner, to Fred Trotter (April 29, 1993) (on file at NHAC office and with Review Commission); Water Code Review Commission Meeting, Proposal 58 (Sept. 23. 1994) (NHAC's Position Paper on the Hierarchy and Non-Conforming Uses) (recommending a phase-out schedule for non-conforming uses) (on file at NHAC office).

[352] *See* Water Commission, Minutes 1 (May 18, 1994).

part that "water use permits . . . shall be deemed contingent upon sufficient water being available for higher priority reserved uses." An important shortcoming in the recommended language is its failure to articulate a category which clearly encompasses Hawaiians' constitutionally protected traditional and customary right to cultivate taro and other traditional crops.[353]

The Review Commission arrived at two primary conclusions regarding Hawaiian water rights: "more important than expanding Hawaiian water rights is establishing the means to implement Hawaiians' water rights," and "the adoption of administrative rules for Hawaiian water rights to section (Part IX) will provide needed clarification of existing rights." The recommendations would require DHHL to prepare a water plan quantifying its foreseeable future water needs and requests OHA to prepare a water plan quantifying all other Hawaiian water rights. Further, Hawaiian water rights is listed as one of the top priorities within the Review Commission's hierarchy.[354]

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[353] The report stated that:

> Consensus was reached on all of the proposed amendments, even though individual commissioners initially expressed reservations in varying degrees about several proposals. Very much on the minds of individual commissioners was the proper balance to be achieved by a Water Code that would: (1) establish priorities, (2) require the CWRM to adopt rules, and (3) provide the CWRM with discretionary authority in certain areas of decisionmaking. In the end, the commission decided that the CWRM could serve the public interest best by making decisions less on a case-by-case basis and more through rule-governed procedures supplemented by more comprehensive and better focused planning.

REVIEW COMM'N FINAL REPORT, *supra* note 99, at 2. These proposed amendments are at issue in the contested case hearing involving allocation of Waiāhole Ditch system and have been delayed by legislators seeking to assure those waters remain in central O'ahu for of Leeward land owners.

[354] *Id. See also* Water Code Review Commission Meeting (Nov. 29, 1993) (NHAC testimony). NHAC supported the Review Commission's effort to clearly prioritize water uses: "[T]he Legislature should adopt a system of priorities for fair and efficient use of water resources or mandate the Water Commission to adopt such priorities. We would support a system similar to that proposed by Doug MacDougal." NHAC submitted the following four primary recommendations:

> 1) The Legislature should develop an action plan to consult closely with members of the Native Hawaiian community in the development of all legislation relevant to the management of water resources. The Legislature should ensure that the free and informed consent of Native Hawaiians is obtained prior to the passage of legislative or administrative measures which may affect Hawaiian water rights and entitlements.
>
> 2) The Legislature should direct the Water Commission to implement a com-

The Review Commission worked diligently and made a good faith effort to receive and address a broad spectrum of public comment. Despite public concerns about a development-oriented bias of the Review Commission and its leadership, they have handled many issues in a relatively balanced and forthright manner. They appeared committed to providing meaningful recommendations and not just "token changes."[355]

The Review Commission reached consensus on a proposal to address statewide permitting and home rule concerns.[356] In recommending statewide permitting, and recognizing the likelihood of political opposition to this proposal, the Review Commission agreed that counties should be given some level of responsibility for water resource allocation, provided they have the necessary staff and technical support. If adopted, this recommendation could require each county to create an agency with jurisdiction over water allocation decisions now made by

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munity-based system of water resource management through application of a traditional ahupua'a-based system. Ahupua'a—based planning priorities should be integrated into the Hawaii Water Plan at both State and County levels.

3) The Legislature should revise the State Water Code to manage water resources through a statewide permitting system.

4) Guiding principles should be developed with respect to out-of-watershed transfers that are community-specific and reflective of tradition and customary Hawaiian values.

Id.; but see Fred Trotter, *Waiahole: Tough Decisions Ahead*, HONOLULU ADVERTISER, July 9, 1995, at B3 (advocating for Water Commission action inconsistent with recommendations of the Water Code Review Commission and potentially adverse to protection of Hawaiian rights).

[355] On July 21, 1993, Review Commission Chairman Fred Trotter answered a representative of the Hawaiian Sugar Planter's Association who testified consistent with other sugar interests (such as the Land Use Research Foundation, HC&S) basically that the Water Code need not be comprehensively overhauled and the status quo was desirable:

> How long does it take to get intelligent? [We] have been working on this for two years. What you're saying is let's take a little longer to get the answers to these problems. Some people are not going to make it before these problems are solved . . . . So if you find me rising a little bit in my chair over the fact that we should go through this whole exercise but just do a little bit, we're not going to do that.

Water Code Review Commission Meeting (July 12, 1993) (videotape on file at NHAC office). Commissioner Kazu Hayashida commented that if constitutional rights are to mean anything, where possible, water should be returned to taro farmers. *Id.*

[356] Water Code Review Commission Meeting (Apr. 29-30, 1994) (videotape on file at NHAC office).

the Water Commission. The Water Commission would maintain oversight authority and retain authority should a county be unwilling or unable to assume these responsibilities.

The final report to the 1995 legislature was submitted in December 1994. The proposed Review Commission changes to the Water Code were introduced in the House of Representatives as House Bill 139. However, the House Committee on Water and Land Use Planning was unwilling to hold public hearings. Senate leadership refused to introduce a comparable bill. Despite the widespread public participation the Review Commission elicited during its twenty-four public hearings held statewide with at least 500 citizens in attendance, the House and Senate committee held separate public hearings on neighbor islands in September through November 1995. This final report and its less than warm reception by the Legislature highlights the tensions between old established political players and Hawaiian rights, public trust and environmental activists. The Review Commission's recommendations are subject to adoption, revision or rejection by the Legislature in 1996.

B. Native Hawaiian Water Rights Task Force

When the Water Code administrative rules originally were promulgated in 1988, Chapter 6 was reserved for a future Native Hawaiian water rights section.[357] Hawaiian organizations were persistent in their

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[357] The Water Commission adopted administrative rules for the first five chapters of the Water Code on April 10, 1988, within one year of the code's adoption by the legislature. Water Commission, Minutes 1 (Apr. 20, 1988).

The decision to postpone drafting the administrative rules for the Native Hawaiian water rights chapter has been controversial. Mililani Trask, Esq., Kia'āina (Governor) of Ka Lāhui Hawai'i, argues that the state's failure to draft the rules for Native Hawaiian water rights is simply "institutionalized racism." Trask maintains that the State of Hawai'i has been able to circumvent the clear requirements of the Hawaii Revised Statutes, the State Water Code and the Hawaiian Home Lands Act of 1920 by "simply ignoring the law and refusing to address administratively the issue of Hawaiian water entitlements." Trask stated that since 1988, hundreds of approved well permits and licenses have allocated water to non-natives. In spite of the vast quantities of water that have been allocated, no protection or reservation of water rights for Hawaiians has been adopted by the Water Commission. *See* Mililani B. Trask, *Hawaiian Reserved Water Rights, The Politics of Water in Hawaii* 2-3 (Feb. 13, 1993) (arguing that the state's failure to draft rules for all but the Native Hawaiian rights section of the Water Code amounts to "institutionalized racism") (unpublished

criticism of the Water Commission for not proceeding with promulgation of the Hawaiian rights section. On February 19, 1992, the Water Commission deferred public hearings on new administrative rules on Native Hawaiian water rights, but it indicated that a draft would be ready for the Commission's review within two months.[358] The Commission appointed Dr. Michael Chun, President of the Kamehameha Schools (former Water Commissioner and member of Alexander and Baldwin's Board of Directors) as chair of a newly-established Native Hawaiian Water Rights Task Force ("Task Force") to develop the rules.

Task Force members were selected in February 1993[359] and the Task Force held its first meeting on March 30, 1993. Members of the Task Force varied widely in experience and perspectives on water management and regulatory issues. Considerable effort and time was required for members to become conversant with both broad policy issues and specific technical issues. The Task Force discussed interpretations of and solutions to issues that would give the greatest possible protection and priority to Hawaiian water uses of all kinds. They recognized competition between general public and Hawaiian public interests, as well as potentially divergent Hawaiian interests on issues such as water requirements for DHHL development and potential impact on instream flows and water required for traditional practices.[360] The Task Force considered more locally-based water management and dispute resolution mechanisms, and adoption of traditional concepts of water management and dispute resolution within the ahupua'a.[361]

The purpose clause of the draft rule states that decisions of the Water Commission shall incorporate values inherent in Hawai'i's an-

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paper presented at the 9th Annual Peoples Water Conference in Hawaii) (on file at NHAC office); MICHAEL HAAS, INSTITUTIONAL RACISM, THE CASE OF HAWAI'I (1992). There are others who argue that institutionalized racism is not the cause for delay, rather it resulted from concern that administrative rules for the Hawaiian rights section of the code must deal with very complex issues and that hastily drafted rules would somehow limit existing protections for Hawaiian water rights.

[358] Water Commission, Minutes 9 (Feb. 19, 1992).

[359] Co-author David Martin is a member of this Task Force, along with Walter Ragsdale (Moloka'i), David Sproat (Kaua'i, taro farmer), Jackie Mahi Erickson (O'ahu, attorney for Hawaiian Telephone), William Makaimoku (Hawai'i, businessman), Ray Soon (O'ahu, DHHL), and Chairman Michael Chun (president of Kamehameha Schools and former Water Commissioner).

[360] *See supra* note 310 and accompanying text.

[361] *See supra* note 23.

cient water management system, emphasizing that no one person owned water and all shared in its use and protection. The Task Force's proposed definition of appurtenant rights addressed the quantity and quality of water used for traditional crops, without reference to the time of the Māhele or the time the use began. Registries of appurtenant water rights and of streams known to have supported traditional gathering practices were proposed. These rules, if adopted and implemented, would provide a significant tool for protecting Hawaiian water rights; however, they fall short in some respects.

The Deputy Attorney General to the Water Commission encouraged the Task Force to either narrow or conclusively define the issues. The Task Force, primarily through the strong leadership of Chairman Chun, resisted this effort. However, in deliberations preceding the submission of draft rules to the Water Commission, the Task Force made some accommodations. Based upon concerns of the deputy attorney general and the Water Commission staff that some of the changes being considered went beyond the authority of the Water Code, the Task Force modified its approach and produced both proposed administrative rules and recommendations for changes to the Water Code.[362]

The Task Force did not fully achieve its objective of drafting rules to support the Hawaiian Home Lands water reservation process. While the work of the Task Force was underway, Water Commission staff initiated rule-making procedures to implement the Water Commission's decision granting the DHHL request for a reservation of water in the Waipahu-Waiawa system within the Pearl Harbor water management area[363] with minimal consultation with the Task Force.

The Task Force completed a draft of the administrative rules in October 1993 and presented it to the Water Commission at an informational briefing on December 21, 1993. In response to comments at the briefing, portions of the Task Force's draft rules were modified by the Water Commission's staff. On February 16, 1994, the Water Commission adopted staff's revised draft and approved a recommendation to begin the rulemaking process.[364] Five public hearings were

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[362] Letter from Michael Chun, Chairman of the Native Hawaiian Water Rights Task Force of the Water Commission, to Keith Ahue, Chairperson of the Commission on Water Resource Management, Department of Land and Natural Resources (Dec. 20, 1993).

[363] HAW. ADMIN. R. § 13-167, subchapter 3. *See also supra* note 146.

[364] *See* Water Commission, Minutes (Feb. 16, 1994) and Draft of HAW. ADMIN. R., Title 13, DLNR (Sub-Title 7, Water Resources, Chapter 172, Hawaiian Water Rights (Mar. 30, 1994) that resulted from that meeting.

held between December 1994 and February 1995. After a review of oral and written testimony, Water Commission staff recommended changes they characterized as not being substantial. Staff recommended approval of the proposed rules at the July 19, 1995 Water Commission meeting; however, because there was no quorum, no action was taken.[365]

The Task Force was not funded to hold public information meetings or accept testimony. This, in part, may account for the relatively limited public response (151 total sign-ins) in the Water Commission public hearings on the proposed rule. The proposed rules define various aspects of Hawaiian traditional and customary rights but in a number of important respects fail to capture the essence of Hawaiian holistic approach to water resources management. The rules acknowledge the Water Commission's duty to protect native Hawaiian water rights but provide very little guidance as to the actual implementation and enforcement of the rights described. Upon adoption of the Hawaiian rights administrative rules, the Task Force will be dissolved.

C. Appurtenant Rights Advisory Group

In February 1994, the Water Commission established an Appurtenant Water Rights Advisory Group to oversee a statewide survey of appurtenant water rights that it originally ordered in February 1990.[366] The survey is to create an inventory of all lands which have or are believed to have appurtenant rights to water. The survey was divided into two phases. Phase I of the survey was originally intended to be a

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[365] *See* Water Commission, Minutes (July 19, 1995); (Submittal Item 10); Water Commission Meeting, (July 19, 1995) (Testimony of NHAC and OHA). These rules are subject to the Hawaii Administrative Procedures Act requiring a public hearing process. HAW. REV. STAT. ch. 91 (1993).

[366] *See* Water Commission, Minutes (Dec. 19, 1990) (regarding appointment of the Nakata Sub-Committee). The Appurtenant Rights Advisory Group met for the first time on March 8, 1993. *See* Water Commission, Minutes of the Advisory Group Appurtenant Water Rights Survey, Phase I (Mar. 8, 1993). Members were Water Commissioner Robert Nakata, Water Commissioner Richard Cox, University of Hawai'i Appurtenant Water Rights Researcher and NHAC Hydrotechnical Advisor David C. Penn, Taro Farmer Charles Reppun, East Maui Irrigation superintendent Garrett Hew, Maui Land & Pine plantation manager Doug V. MacCluer, and DLNR Administrator Mason Young. WATER COMM'N, PRELIMINARY REPORT TO THE SUBCOMM. ON DECLARATIONS OF INSTREAM USE AND APPURTENANT WATER RIGHTS (1991)(on file at NHAC office).

pre-inventory study to identify sources of pertinent information, appropriate methodologies, and the total scope and approximate cost of work required to develop the comprehensive inventory. The prime focus of the phase I study has shifted to investigating and informing people how to conduct research about appurtenant water rights. The Phase I report will take the form of a manual and includes a pilot study of Honokohau, Maui to illustrate the methods recommended. A draft of this phase I report was circulated to the Advisory Group on February 14, 1994; however, it has not been released for public review and comment.

Phase II is intended to utilize the information and methodologies identified in Phase I to provide a comprehensive inventory of lands which may hold appurtenant rights. The scope and timetable for Phase II work will not be completed in Phase I as originally planned. Development of the Phase II scope of work and procedures for utilizing the final inventory to assure appurtenant water rights could be of great importance in the coming years. A registry could allow claimants of appurtenant water rights to file evidence in support of their claims on an ongoing basis. The work of the Advisory Group may lay important groundwork for assessing the use of appurtenant water rights in protecting Hawaiian water uses.

Protection of appurtenant water rights could be improved if registered rights claimants received direct notice from the Water Commission of pending actions which could affect their rights.[367] The registry could also be used by land owners to formally dedicate appurtenant water rights to instream flows, thereby affording more opportunity for using their appurtenant rights and promoting watershed vitality.

In identifying and quantifying the scope of water uses protected by appurtenant rights, the Water Commission must act cautiously to assure that adequate water resources will be available to support customary Hawaiian activities for which appurtenant waters are essential. At the same time, appurtenant use should not be permitted to cause detrimental effects upon instream flows, Hawaiian traditions and customs, and new water use opportunities for Hawaiians.

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[367] Water Commission staff states that providing direct notice to all affected parties would be unmanageable. *See* Water Commission Meeting (July 28, 1993) (videotape on file at NHAC office) (note particularly statement of Rae M. Loui, Deputy for the Water Commission regarding information item on public notice).

D. Stream Protection and Management Task Force (SPAM)

Since the passage of the Water Code there has been persistent public pressure for the Water Commission to develop a statewide stream protection and management program. This pressure contributed to the passage of Senate Concurrent Resolution 130 during the 1992 legislative session, requesting the Water Commission to "finalize, adopt and put into place" a stream protection system before the 1994 legislative session. The public's urging heightened when the Water Commission decided not to designate water management areas for surface water use permitting. In response to these pressures, the Water Commission initiated action to develop a stream protection management process. In initial discussions about the formation of a stream management task force, community groups sought statewide community representation and outreach. However, a broadly representative seven member O'ahu-based task force was selected and held its first meeting on May 13, 1993[368] to categorize streams on the basis of their need for protection and to suggest protocols for various levels of protective stream management. Other objectives include developing policies and guidelines to increase stream management predictability and developing mechanisms to allow for community-based planning and management.[369]

Members of SPAM agreed that stream protection was critical, but there was divergence of opinion concerning the values a stream program would protect and how they would be protected. One common theme was that "all streams cannot be all things to all people." After a good deal of lively discussion, SPAM agreed to incorporate the protection of Hawaiian traditional values into its vision statement. However, as the work of SPAM proceeds, concern with maintaining existing surface water uses and defining potentially available water resources often takes

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[368] The Task Force chaired by Water Commissioner Guy Fujimura, Secretary Treasurer International Longshoremen's and Warehousemen's Union (ILWU) consists of members Meredith Ching, Alexander and Baldwin, Bill Devick, Department of Land and Natural Resources' Division of Aquatic Resources; Ron Kouchi, Kauai County Council; Alan Murakami, Native Hawaiian Legal Corporation; Oswald Stender/Sydney Keli'ipule'ole, Kamehameha Schools/Bishop Estate; Andy Yuen, U.S. Fish and Wildlife Service; and Marjorie Ziegler, Sierra Club Legal Defense Fund. Sallie Edmunds, a planner on loan from the Office of State Planning and co-author of the 1990 Hawaii Stream Assessment Report, serves as project manager.

[369] STREAM PROTECTION AND MANAGEMENT TASK FORCE FOR THE COMMISSION ON WATER RESOURCE MANAGEMENT, STREAM PROTECTION AND MANAGEMENT IN HAWAII: RECOMMENDATIONS AND SUGGESTIONS 2 (Apr. 1994).

precedence. SPAM's final report included both consensus recommendations and individual member recommendations.[370] The Water Commission staff compiled a more comprehensive set of draft recommendations based on SPAM's report.[371] The recommendations included SPAM consensus recommendations, individual SPAM member recommendations and numerous additional recommendations by Water Commission staff.

SPAM's primary objective, the development of protective stream categories and management protocols, was addressed in two steps. The Task Force achieved consensus on establishing a single protected "Heritage" class of streams, described as "undiverted, perennial streams which support viable populations of native species." Five additional categories were added in the Water Commission recommendations - Candidate Heritage Streams, Heritage Segments, Subsistence Streams and Segments, or Dry Gulches. "Candidate Heritage" streams include streams believed to be of "Heritage" stream quality but not yet elected to the Heritage category. "Heritage Segments" include stream reaches above the highest diversion which support viable populations of native species (rather than any reaches where these populations occur). "Subsistence Streams or Segments" criteria include streams or segments of streams in an as yet undeveloped registry of streams "important for traditional and customary gathering by Native Hawaiians." Management rules were developed for all categories except the "Subsistence Streams or Segments" category. The "Dry Gulch" category essentially eliminates permit requirements in gulches with no natural sources of fresh water. It is unclear how flow channels dewatered by diversions of surface and ground water or naturally dry gulches which are artificially made to flow will be categorized.

SPAM's report provided that the Water Commission or any interested party may nominate streams for categorization. The draft management rules provide that appurtenant rights and constitutional rights "are preserved" and that "Native Hawaiian traditions and customary gathering rights shall be honored in accordance with prevailing law." They do not specifically provide for Hawaiians traditional and customary right to grow taro and other traditional crops or address other cultural uses of water. Rules for Heritage streams would prohibit new

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[370] *Id.*

[371] Draft Staff Recommendations based on the work by the Stream Protection and Management ("SPAM") Task Force, Prepared for the Commission on Water Resource Management (May 1994) [hereinafter SPAM Report].

or expanded surface and ground water withdrawals and development within 100 feet of the boundaries of the regulated stream. The Water Commission would have authority to review activities within the Heritage stream watershed.

For uncategorized streams, the Task Force recommended restrictions on channelization and allowed for streambank stabilization when necessary. This limited recommendation raised concern because a significant number of water management problems arise with respect to diverted streams. Water Commission staff inserted seven additional management rules in this category. The more noteworthy rules provide the Water Commission shall consider if a use of water is reasonable and beneficial[372] in reviewing diversion works permits, that there should be "no net loss of habitat that supports native biota," that estuaries are important habitats worthy of protection and should be identified, and that "traditional and customary gathering rights shall have priority over recreational fishing." As with categorized streams, there is no specific provision for Hawaiians traditional and customary right to grow taro and other traditional crops.

The draft rule regarding priority of "traditional and customary gathering rights" raises concerns for Hawaiians because it is incomplete and does not specify the significant other uses or categories of uses, over which other traditional and customary Hawaiian rights in addition gathering, have priority. This once again reveals the Water Commission's problems in coming to terms with the need to give priority Hawaiians' to constitutionally protected water rights.

The draft staff recommendations also addressed Hawaiian rights issues by combining the consensus recommendation that a registry of streams important to traditional and customary rights be created with an individual Task Force member's recommendations that "a position is needed to advocate for Native Hawaiian water interests." The Water Commission staff supported this recommendation but preferred that such an advocate reside outside of the Water Commission. This recommendation warrants further development as it may provide a meaningful opportunity for Hawaiians to advocate for the enforcement of their water rights.

SPAM approached the issue of stream restoration very cautiously, ultimately recommending that it required more study. Strongly opposing views on reallocating currently diverted water led to agreement

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[372] *See* Water Code definition of "reasonable and beneficial use," *supra* note 116.

only that any reduction in use of diverted stream water may represent an opportunity to restore streamflows, and that the benefits of restoration should be weighed with the benefits of continued diversion. The staff recommendations did, however, support one stream restoration demonstration project and one stream restoration study.

The difficulty of SPAM in reaching consensus on issues such as streamflow restoration, Hawaiian water rights, and establishing hands-on approaches to managing stream use disputes illustrates how difficult these issues really are. The May 1994 recommendations for stream management were to be presented to the Water Commission along with draft rules and an implementation plan no later that September 1994; however, to date, there has been no evidence of Water Commission action to adopt the proposed recommendations. This also suggests that these issues could remain unresolved at policy levels for some time to come. However if, as provided in the recommendations, "All rules, programs and policies adopted by the Water Commission as a result of the SPAM process shall be included and integrated into the Hawaii Water Plan," the impact of those recommendations that are adopted will be heightened by the required dual level (Commission action/County ordinance) public approval process.

The debates before the Water Commission, its Task Forces, the Water Code Review Commission and before the Legislature have been beneficial in airing many of the issues important to the protection and exercise of Hawaiian water rights. However, little concrete progress has resulted. In the years to come, Hawaiians and their supporters will continue to seek opportunities to work with the Water Commission, review commissions, legislators, and the general public in order to have a voice in the management of water resources.

VI. Forging A New Balance

At this critical juncture in the development of Hawai'i water law and related administrative processes, the Hawaiian sovereignty and self-determination movements are growing in strength[373] and Hawaiian

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[373] The centennial of the illegal overthrow of Hawai'i's monarchy on January 17, 1993 presented a major rallying point for the sovereignty movement, support for which has been coalescing within virtually all parts of the Hawaiian community and steadily growing in the non-Hawaiian community. *See, e.g.*, Shannon Tangonan, *10,000 March to Sounds of Sovereignty*, Honolulu Advertiser, Jan. 18, 1993, at A-3.

The signing of an apology for the illegal overthrow of the Hawaiian sovereign nation

interests are converging with issues before the Water Commission and other key policy makers as they proceed with the development and refinement of the rules of procedure that will control allocation of and access to water. However, issues that relate to sovereignty (either directly or indirectly) can also be a source of tension and disagreement.[374] Expanding public recognition that Hawaiian cultural values and indigenous rights are beneficial not only for Hawaiians, but for the physical environment and the State's general population as well,

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by the President of the United States reflects this growing support as it acknowledges wrongdoing by those acts which are now recognized by both houses of Congress and the executive branch of the United States. *See supra* note 18. In addition, Hawai'i was the only state mentioned by name in the 1992 national Democratic platform stating "it is the position of the [national] Democratic Party that the U. S. Government should 'recognize its trustee obligations to the inhabitants of Hawai'i in general, and to native Hawaiians in particular'." Juxtaposed against the Democratic Party's platform acknowledging responsibility for the overthrow was President Bush's position denying the existence of any obligations to Hawai'i and its people for the United States' role in the overthrow of the Hawaiian Kingdom. *See* Memorandum from Solicitor Thomas L. Sansonneti, Office of the Solicitor, U.S. Dept. of the Interior (Jan. 19, 1993) (on file with NHAC). *Contra* Memorandum from Solicitor John D. Leshy, Office of the Solicitor, U.S. Dept. of the Interior (Nov. 15, 1993) (on file with NHAC). *See also* Han v. Department of Justice, 824 F. Supp. 1480 (D. Haw. 1993).

Outside the political arena, various organizations took affirmative action to acknowledge their role in the illegal overthrow of the Hawaiian Kingdom. The Eighteenth General Synod of the United Church of Christ voted to make a public statement recognizing the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893. On January 17, 1993, the Office of the President of the United Church of Christ offered a public apology to the Native Hawaiian people in a widely publicized speech at the historic Kaumakapili church. One of the stated purposes of the public apology was to initiate the process of reconciliation between the United States and the Native Hawaiian people. The Japanese American Citizens League (JACL) passed a national resolution supporting the Hawaiians in their struggle to address the federal government's illegal and immoral wrongdoing committed against them. JACL is the oldest and largest Asian American civil rights organization in the United States.

Finally, in December of 1991, the Hawaii Advisory Committee to the United States Committee on Civil Rights issued its report endorsing sovereignty and self-determination for Native Hawaiians. This report was forwarded to the national Committee on Civil Rights for review and advisement to the United States President. A BROKEN TRUST, *supra* note 145.

[374] The editorial sections of the local newspapers reflect a sometimes rancorous debate which sometimes characterizes the sovereignty movement as "a step in the wrong direction." *See, e.g.*, Richard Sybert, *Viewpoint: Sovereignty is a Step in the Wrong Direction*, HONOLULU STAR BULLETIN, Oct. 1, 1992, at A-19; Haunani Kay Trask, KA LEO, Sept. 19, 1990, at 1 (explaining "*Haole Go Home*").

has been helpful in easing some of these tensions.[375] Thus, Hawaiian water issues and other environmental issues present unique opportunities to build community consensus and develop sound water management practices in the State.

Increased representation of Hawaiian values in administrative decision-making and comprehensive value-driven, community-based planning will contribute to development of such practices. A perspective reflecting Hawaiians' cultural values and international indigenous human rights norms will assist the total community to achieve consensus in prioritizing planned water uses.[376] Such processes may also resolve many of the fears and uncertainties related to Hawaiian sovereignty and self-determination.[377]

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[375] *See, e.g.*, Robert M. Rees, *Commentary — Sovereignty and the Visitor Industry*, PAC. BUS. NEWS, July 19, 1993, at 17; Ian Hodges, *Cashing in on Sovereignty*, 5 HONOLULU WEEKLY, Sept. 27, 1995, at 5.

[376] *See* DAVID L. MARTIN, COMMUNITY BASED PLANNING FOR IMPLEMENTATION OF HAWAIIAN WATER RIGHTS (1993) (unpublished manuscript on file at NHAC and the Water Code Review Commission). This paper presents a framework for community-based planning in Hawaiian communities and how this approach could be beneficial to State water management programs. NHAC proposes a structure and design to implement Hawaiian water rights and assure proper water management through a participatory community-based approach. *See also* CATHERINE VANDEMOER, IMPLEMENTING NATIVE HAWAIIAN WATER RIGHTS (1993) (prepared for the Review Commission on the State Water Code.

Also, in the area of forestry the Hawaii Tropical Forest Recovery Task Force (with DLNR chairman as its chair) was established within the U.S. Forest Service to "develop strategies for the long-term management, protection and utilization of the existing and potential forest resources of the State of Hawaii." The Task Force developed a community based planning model that emphasizes traditional Hawaiian uses and public participation. HAWAII TROPICAL FOREST RECOVERY TASK FORCE, HAWAII TROPICAL FOREST RECOVERY ACTION PLAN (July 1994).

[377] *See, e.g.*, A. A. Smyser, *Hawaiian Land Claims May Comprise a 'Taking,'* HONOLULU STAR BULLETIN, Apr. 1, 1993, at A-12:

> Where native Hawaiian rights are concerned, the U.S. and Hawai'i supreme courts seem to be on a collision course. Because things move glacially in the legal stratosphere, the actual collision may be a few years off. . . . Hawaiians, however defined, may practice traditional activities even on developed land and may even be able to halt development. . . . Land always has been a central issue in Hawai'i's history, [David] Callies [a University of Hawai'i law professor specializing in land use law] notes, but rarely have we been faced with a confrontation with such far-reaching consequences for land owners and land policy.

Id.

Emerging international human rights norms relating to indigenous peoples' rights support efforts to integrate Hawaiian people's values into the State's water management processes.[378] The United Nations Draft Declaration of Rights of Indigenous Peoples acknowledges rights to full recognition of indigenous laws and customs and to rehabilitation of the environment and productive capacity of indigenous lands.[379] It provides that indigenous people may not be deprived of their traditional means of subsistence and asserts their rights to plan and implement programs to achieve these ends.[380]

The United States apology for its complicity in the illegal overthrow of the Hawaiian Nation declared that the Hawaiian people have "never directly relinquished their inherent sovereignty as a people or over their national lands."[381] Hawaiians will continue their efforts to assert direct and sovereign control over lands and resources. One of the critical questions is whether Hawaiians can achieve a fair level of representation on the Water Commission and on all of the many bodies now addressing the Water Code and Water Commission policy. Given Hawai'i's present political structure, this will not be easily achieved. Nevertheless, increased participation by Hawaiians in these bodies will increase the likelihood of due recognition of Hawaiian values and practices and Hawaiian self-determination in Hawai'i's water management process. Participation should be extended to all bodies that are or will be potentially affecting ceded lands or water resources, such as the Water Code Review Commission, the Board of Land and Natural Resources, county councils, and newly established entities, such as the ADC. Only then will Hawaiians be in a position "to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests."[382]

The political status of the Hawaiian sovereignty movement is dynamic. Hawai'i's water management processes must develop in a manner flexible enough to meaningfully accommodate changes in that

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[378] Anaya, *supra* note 7. *See, e.g.,* U.N. Draft Declaration of Indigenous Peoples Rights, *supra* note 5; ILO 169, *supra* note 5 (describing emerging indigenous rights norms).

[379] U. N. Draft Declaration of Indigenous Peoples Rights, *supra* note 5, at 382.

[380] *Id.* at 383.

[381] *See* U.S. Apology Bill, *supra* notes 18, 374.

[382] Daes, *supra* note 7, at 3 (quoting U. N. Draft Declaration of Indigenous Peoples Rights).

status. Effective participation by Hawaiians in water management issues depends in part upon achieving some workable degree of political consensus, both within the Hawaiian community and the community at large, with respect to sovereignty and management of natural resources.

As Hawaiians achieve more widespread acceptance of their self-determination efforts and as their decision-making authority over Hawai'i's natural resources grows, more holistic and culturally-based planning will result. The Hawaiian community has much to offer in the creation of a new and more meaningful environmental, social, and economic balance. This will increase as Hawaiians and their supporters successfully promote these values and expectations into the Water Code and its administrative rules (and their implementation).

Water's special importance as a primary resource in the revitatlization of cultural systems and the development of and sustainable economic systems propels issues of representation and enforcement into the forefront of political and legal debate. The fair resolution of Hawaiian water rights claims is a critical litmus test for renewed Hawaiian self-determination and for community planning and environmental values. Absolute prioritization of the traditional and customary beliefs, values, and practices of Hawai'i's native people through amendment of the State Water Code and the processes by which it is administered will contribute to perpetuating Hawaiian culture, asserting increased Hawaiian self-determination and sovereignty and to the promotion of a synergistic process of change. Achieving results requires a clear vision of these goals and onipa'a (steadfast persistence).

> I could not turn back the time for the political change, but there is still time to save our heritage. You must remember never to cease to act because you fear you may fail. The way to lose any earthly kingdom is to be inflexible, intolerant, and prejudicial. Another way is to be too flexible, tolerant of too many wrongs and without judgment at all. It is a razor's edge. It is the width of a blade of pili grass.
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> — Lili'uokalani, 1917.[383]

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[383] HELENA G. ALLEN, THE BETRAYAL OF LILI'UOKALANI, LAST QUEEN OF HAWAI'I 1838-1917, at epilogue (1982).

Son of *Simon & Schuster*: A "True Crime" Story of Motive, Opportunity and the First Amendment

Gilbert O'Keefe Greenman*

"There are eight million stories in the naked city, and this is one of them."[1]

First came David Berkowitz, the "Son of Sam." He killed for fun and attention: "Sang songs on [his] way home after killing [his first victim]."[2] The story of the statutes that now bear his moniker began even before police caught the "Son of Sam." His 1977 shooting rampage created a media feeding frenzy.[3] Reports speculated that he might make a fortune from his story.[4] This was too much for the New York legislature. It passed the ill-fated Son of Sam law,[5] beginning an

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[1] THE NAKED CITY (ABC television serial, 1958-1963).

[2] DAVID ABRAHAMSEN, CONFESSIONS OF SON OF SAM 100 (1985) (quoting David Berkowitz).

[3] *See* David M. Alpern et al., *How They Covered Sam*, NEWSWEEK, Aug. 22, 1977, at 77.

[4] *See id.*

[5] N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1991) (*amended by* N.Y. EXEC. LAW § 632-1(b) (McKinney Supp. 1993)).

avalanche of similar laws in other jurisdictions.[6] The hastily drafted statute[7] sought to grab the profits from criminals' accounts of their crimes and to give the money to the crime victims.[8] Finally, Berkowitz got caught, but New York never directly applied the law to him.[9] New

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[6] ALA. CODE §§ 41-9-80 to -84 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. CODE ANN. § 16-90-308 (Michie 1987); CAL. CIV. CODE § 2225 (West Supp. 1994); COLO. REV. STAT. §§ 24-4.1-201 to -207 (1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985), amended 1995 Conn. Leg. Serv. P.A. 95-175 (June 27, 1995); DEL. CODE ANN. tit. 11, §§ 9101-9106 (1987 & Supp. 1992); FLA. STAT. ANN. § 944.512 (West Supp. 1993); GA. CODE ANN. §§ 17-14-30 to -32 (Michie 1990); HAW. REV. STAT. §§ 351-81 to -88 (Supp. 1992); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 725, para. 145 (Smith-Hurd 1992); IND. CODE ANN. §§ 12-18-7-1 to -6 (Burns 1992 & Supp. 1993); IOWA CODE ANN. § 910.15 (West 1994); KAN. STAT. ANN. §§ 74-7319 to -7321 (1992); KY. REV. STAT. ANN. § 346.165 (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. §§ 46:1831 to :1839 (West 1982 & Supp. 1993); MD. ANN. CODE art. 27, § 764 (Supp. 1993); MASS. ANN. LAWS ch. 258A, §§ 1-8 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1993); MINN. STAT. ANN. § 611A.68 (West Supp. 1994); MISS. CODE ANN. §§ 99-38-1 to -11 (Supp. 1993); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1993); MONT. CODE ANN. §§ 53-9-103 to -104 (1993); NEB. REV. STAT. §§ 81-1835 to -1841 (1987 & Supp. 1992); NEV. REV. STAT. ANN. § 217.007 (Michie 1986 & Supp. 1993); N.J. STAT. ANN. §§ 52:4B-26 to -30 (West 1986); N.M. STAT. ANN. § 31-22-22 (Michie 1990); OHIO REV. CODE ANN. §§ 2969.01-.06 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 17 (West 1992); OR. REV. STAT. § 147.275 (Supp. 1992); PA. STAT. ANN. tit. 71, § 180-7.18 (1990); R.I. GEN. LAWS §§ 12-25.1-1 to -12 (Supp. 1993); S.C. CODE ANN. §§ 15-59-40 to -80 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (1988); TENN. CODE ANN. §§ 29-13-201 to -208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309, §§ 1-18 (West Supp. 1993); UTAH CODE ANN. § 78-11-12.5 (1992); VA. CODE ANN. § 19.2-368.20 (Michie Supp. 1993); WASH. REV. CODE ANN. §§ 7.68.200.280 (West 1992); WIS. STAT. ANN. § 949.165 (West Supp. 1992); WYO. STAT. §§ 1-40-101 to -119 (1988). The following states have not enacted crime victimization statutes: Maine, North Carolina, North Dakota, Vermont, and West Virginia.

[7] Even at the time of its passage, at least one state official saw its flaws. *See* Memorandum of Franklin E. White, Division of Budget, *reprinted in* Legislative Bill Jacket, Act of Aug. 11, 1977, Ch. 823, 1977 N.Y. Laws.

[8] The Son of Sam law required any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to the New York Crime Victims Board and to turn over any income under that contract to the Board. N.Y. EXEC. LAW § 632-a. The Board was then required to deposit the payment in an escrow account for the benefit of any victim who, within five years of the establishment of the account, brought a civil action and recovered a money judgment against the criminal or his representatives. *Id.* After five years, if no actions were pending, the Board was to pay over any remaining moneys to the criminal. *Id.*

[9] Berkowitz received prison terms totaling more than 300 years after pleading

York directed it at other criminals,[10] however, and appellate courts upheld it.[11]

Then came Henry Hill. He committed crimes for fun and profit:

> But if you knew wiseguys you would know right away that the best part of the night for Paulie came from the fact that he was getting over on somebody. It wasn't the music or the floor show or the food . . . . The real thrill of the night for Paulie, his biggest pleasure, was that he was robbing someone and getting away with it.[12]

The New York Crime Victims Board tried to apply the Son of Sam law to Hill and his publisher, Simon & Schuster. Reviewing the case

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guilty in 1978 to killing six people. *See* Herbert Mitgang, *Publishing: Books Due on "Sam" and Tarnower*, N.Y. TIMES, Dec. 5, 1980, at C-29. Because it found him to be "acting under a legal disability," a New York court appointed a conservator for Berkowitz. *See* In the Matter of Doris Johnsen, as Conservator of David A. Berkowitz, 430 N.Y.S. 2d 904 (N.Y. Sup. Ct. 1979). The court in *Johnsen* upheld New York's "Son of Sam" law and found it to allow the conservator as an officer of the court to hold Berkowitz' profits from literary sales for the compensation of crime victims. 430 N.Y.S. 2d at 906.

According to the New York Crime Victims Board, Berkowitz voluntarily paid his profits from the book, *Son of Sam*, to his victims or their estates. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 111 (1991) (citing Respondent's Brief).

[10] Of the ten cases handled under the law before the Supreme Court struck it down, seven involved well-known crimes. Aside from its application to Henry Hill, whose case brought down the statute, the law was applied to Jean Harris, who was convicted of murdering the "Scarsdale Diet" doctor, Herman Tarnower. The New York Crime Victims Board has also placed in escrow moneys received by: Mark David Chapman, the man who killed John Lennon; Jack Henry Abbot, who stabbed a young actor and wrote the books *In the Belly of the Beast* and *My Return* about his life; Michele Sindona, the Sicilian banker involved in the collapse of several banks and later found poisoned in prison; and R. Foster Winans, the former Wall Street Journal columnist who was convicted of insider trading. Money was paid to victims out of the funds received by John Wojtowicz, the bank robber portrayed in the movie "Dog Day Afternoon." *See* Dennis Hevesi, *Cases Under "Sam" Law: Notorious But Few*, N.Y. TIMES, Feb. 20, 1991, at B8.

[11] *See In re Johnsen*, 430 N.Y.S.2d at 906 (noting that witnessing a criminal's recitation of his crime "becomes an acceptable substitute for live performances in the Roman arena . . ."); Barrett v. Wojtowicz, 414 N.Y.S.2d 350 (App. Div. 1979); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989), *aff'd*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 502 U.S. 105 (1991); Children of Bedford v. Petromelis, 573 N.E. 2d 541 (N.Y. 1991); Fasching v. Kallinger, 510 A.2d 694 (N.J. Super. Ct. App. Div. 1979), *rev'd on other grounds*, 546 A.2d 1094 (N.J. 1988).

[12] Henry Hill, as quoted in NICHOLAS PILEGGI, WISE GUY, LIFE IN A MAFIA FAMILY 20 (1985).

involving Hill, the Supreme Court struck down the law as unconstitutional.[13]

The Court concluded that the law fell under First Amendment scrutiny because it "impose[d] a financial disincentive only on speech of a particular content."[14] Because it termed the Son of Sam statute "content based," the court subjected it to "strict scrutiny," requiring the State to demonstrate that (1) the regulation was necessary to serve a compelling state interest and (2) it was narrowly drawn to achieve that end.[15] While the Court ultimately found that the statute was not narrowly tailored, the Court did acknowledge that the state had "an undisputed compelling interest in ensuring that criminals do not profit from their crimes" and in "ensuring that victims of crime are compensated by those who harm them."[16]

The lawmakers have not given up, however, and the tension between free speech and the goals of Son of Sam laws will not go away, notwithstanding the Supreme Court's decision and extensive commentary on the issue.[17] Legislatures have passed new statutes[18], and courts

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[13] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991).

[14] *Id.* at 116.

[15] *Id.* at 118.

[16] *Id.* at 118-19.

[17] *See* Garret Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493 (1992); Mark A. Conrad, *New York's New "Son of Sam" Law-Does It Effectively Protect the Rights of Crime Victims to Seek Redress from Their Perpetrators?*, 3 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 27 (1992); Mark Conrad, *The Demise of New York's "Son of Sam" Law-The Supreme Court Upholds Convicts' Rights To Sell Their Stories*, N.Y. ST. B.J., Mar.-Apr. 1992, at 28; Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas-What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483 (1992); Elliot M. Mincberg, *The Supreme Court and the First Amendment: The 1991-1992 Term*, 10 N.Y.L. SCH. J. HUM. RTS. 1 (1992); Shaun B. Spencer, Note, *Does Crime Pay — Can Probation Stop Katherine Ann Power from Selling Her Story?*, 35 B.C. L. REV. 1203 (1994); Robert Mazow, Comment, *Simon & Schuster v. New York State Crime Victim's Board: Should the Supreme Court have Invalidated New York's Son of Sam Statute?*, 28 NEW ENG. L. REV. 813 (1994); Lori F. Zavack, Note, *Can States Enact Constitutional "Son of Sam" Laws After Simon & Schuster, Inc. v. New York State Crime Victims Board?*, 37 ST. LOUIS U. L.J. 701, 728 (1993); Benedict J. Caiola & Esther Oz, Note, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board—"Crime Goes Hollywood"—The Striking Down of the "Son of Sam" Statute*, 14 WHITTIER L. REV. 859, 891 (1993); Karen J. Folb, Comment, *Constitutional Law-First Amendment Challenge to New York's "Son of Sam" Law-Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501 (1991)*, 26 SUFFOLK U. L. REV. 697 (1992); Kelly Franks, Note, *"Son of Sam" Laws After Simon & Schuster,*

will continue to apply existing laws, heating the same difficult conflict.[19]

Inc. v. Members of the New York State Crime Victims Board: Free Speech Versus Victims' Rights, 14 HASTINGS COMM. & ENT. L.J. 595 (1992); Douglas J. Fryer, Note, *Bearing the Burden of Strict Scrutiny in the Wake of Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: A Constitutional Analysis of Michigan's "Son of Sam" Law*, 70 U. DET. MERCY L. REV. 191 (1992); Ralph W. Johnson, III, Comment, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: The Demise of New York's Son of Sam Law and the Decision That Could Have Been*, 2 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 193 (1992); Connie Koshiol, Comment, *Strict Scrutiny Sounds the Death Knell for New York's Son of Sam Law*, 17 S. ILL. U. L.J. 599 (1993); Andrew Michael Lauri & Patricia M. Schaubeck, Note, *Like Father Like Son? The Constitutionality of New York's Son of Sam Law*, 8 ST. JOHN'S J. LEGAL COMMENT. 279 (1992); William E. Lawrence, Note, *Constitutional Law-Freedom of Speech-Crime May Pay: New York's Son of Sam Law Found Unconstitutional*, 14 U. ARK. LITTLE ROCK L.J. 673 (1992); Michele C. Meske, Note, *Between the Devil and the Deep Blue Sea: Crime Victims' Dilemma After Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 67 WASH. L. REV. 1001 (1992); Lisa Ann Morelli, Note, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: How Characterization of a Speech Regulation Can Effectively Destroy a Legitimate Law*, 42 CATH. U. L. REV. 651 (1993); Jon Allyn Soderberg, Note, *Son of Sam Laws: A Victim of the First Amendment?*, 49 WASH. & LEE L. REV. 629 (1992); Adam Robert Tschorn, *Beyond Son of Sam: Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, and a Constitutionally Valid Alternative to New York Executive Law Section 632-a*, 17 VT. L. REV. 321 (1992); Lori K. Zavack, Note, *Can States Enact Constitutional "Son of Sam" Laws After Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 37 ST. LOUIS U. L.J. 701 (1993); Elizabeth Buroker Coffin, Case Note, *Constitutional Law: Content-Based Regulations on Speech: A Comparison of the Categorization and Balancing Approaches to Judicial Scrutiny-Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 18 U. DAYTON L. REV. 593 (1993); Melissa M. Erlemeier, Case Note, *The First Amendment Prevails Over Crime Victim Compensation: Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 26 CREIGHTON L. REV. 1301 (1993); Carol M. Grebb, *Recent Decisions*, 31 DUQ. L. REV. 401 (1993); Tanya Herrera, *Recent Development*, 28 HARV. C.R.-C.L. L. REV. 567 (1993); Kevin S. Reed, *Recent Developments*, 15 HARV. J.L. & PUB. POL'Y 1060 (1992); Michele C. Meske, Note, *Between the Devil and the Deep Blue Sea: Crime Victims' Dilemma After Simon & Schuster, Inc. v. Members of the New York Crime Victims Board, 112 S. Ct. 501 (1991)*, 67 WASH. L. REV. 1001 (1992); Karen M. Ecker & Margot J. O'Brien, Note, *Simon & Schuster, Inc. v. Fischetti: Can New York's Son of Sam Law Survive First Amendment Challenge*, 66 NOTRE DAME L. REV. 1075 (1991); Thomas F. Doherty & Sharon A. Lepping, Note, *Crossfire: "Son of Sam" Law v. A Wiseguy's Freedom of Speech*, 2 SETON HALL CONST. L.J. 211 (1991); Jason S. Pomerantz, Note, *Have Courts Intruded on First Amendment Guarantees in their Zeal to Ensure that Crime Does Not Pay?*, 11 LOY. ENT. L.J. 505 (1991); Timothy Loss, Note, *Criminals Selling their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331 (1987).

[19] *See, e.g.*, CAL. CIVIL CODE § 2225 (*amended by* 1994 Stat. Ch. 556) (West Supp. 1994) (effective Sept. 12, 1994); N.Y. EXEC. LAW. S632-1(B) (McKinney Supp. 1993). *See also* Ronald S. Rauchberg, *Son of Sam Laws: Past, Present and Future*, 5 ENTERTAIN-

In light of this persistent tension and the continuing popularity of stories on crime,[20] this article presents an examination of the Son of Sam laws that takes its cue from "true crime" stories and their offspring, "true criminal" stories, the speech penalized by the statutes.[21] The article treats the collision between the Son of Sam law and the First Amendment as a murder, and takes the reader to the scene of the "crime," several years later, in an effort to reconstruct what happened, to determine why it happened, and to anticipate other crimes.

On December 10, 1991, the Supreme Court decided *Simon & Schuster*.[22] That same day, detectives entered a murky room, discovering the body of New York's original Son of Sam statute and the signs of a struggle. The dead statute clung to its stated purposes, the compelling interests in victim compensation and profit prevention. The detectives noticed a trail of blood leading away from the scene, and soon they saw the outraged relations of the statute spring up across the country. Despite intensive investigation, exactly what happened that day has remained unclear. Who was the victim? Was it the Son of Sam statute, or did the statute die the aggressor, having wounded the First Amendment? Would the statute's relatives finish the job? Was the First Amendment justified in self defense or was it a cold, calculating killer?

Previous detectives have sifted carefully through the crime scene, examining the legal equivalent of the physical evidence: the doctrines, cases, and statutes.[23] Any inquiry must make sense of these chalk

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MENT, PUBLISHING AND THE ARTS HANDBOOK 3, 9-10 (1992-1993) (discussing efforts by the Illinois and Indiana legislatures to fix the statutes).

[19] *See supra* note 17.

[20] *See* Elizabeth Jenson and Ellen Graham, *Stamping Out TV Violence: A Losing Fight*, WALL ST. J., Oct. 26, 1993, at B1, B8 (noting the large percentage of prime time hours devoted by networks to news magazine shows covering crime and to made-for-television movies about crime).

[21] This article uses the term "true criminal" to describe speech on crime produced with the participation of the criminal who committed the crime and the traditional "true crime" term for the larger set of nonfiction works on individual crimes. A criminal, perhaps with the help of a professional writer, composes a "true criminal" story, which becomes part of the "true crime" genre.

[22] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991).

[23] *See supra* note 17, listing commentary. These previous detectives have been prone to taking sides. Many have placed the blame squarely on the First Amendment or upon the Son of Sam statute. No one has figured out why the crime occurred in exactly the way it did.

outlines and bloodstains. However, to catch a killer the detectives must ask why. They cannot discern motive by the obligatory glance at legislative history or First Amendment doctrine. The agents must dig deeper:

> Human behavior is famous for its failure to comply with our theories about it. Except in the case of hired killers, the majority of murder cases have fundamental conflicts and emotional forces that instigate the homicide. . . . A murderer may kill for a particular reason, such as jealousy, fear, frustration, depression, some of which go back to his past, but the causes may not suffice to explain *why* the murderer has killed.[24]

This inquiry seeks these "fundamental conflicts and emotional forces."[25]

The analogy to a homicide investigation serves two goals. First, it provides a warrant to look for motives, even though the New York Crime Victims Board denied their existence,[26] and the Supreme Court denied their importance.[27] The homicide detectives must pass quickly beyond the two express purposes of the statute — victim compensation and profit prevention.[28] They then move beyond speculation by commentators regarding impermissible content-based discrimination.[29] For a homicide investigation, these factors lie close to the surface.

Motive runs deeper. Lonely and alienated people, driven by demons, sometimes become killers.[30] Certain demons also drive the Son of Sam statutes and the First Amendment. They play upon the personality of the jurisprudence, the motives of those who enact the laws, and the reasons judges sometimes strike them down. In chasing the demons,

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[24] ABRAHAMSEN, *supra* note 2, at 200.

[25] *Id.*

[26] "The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers." *Simon & Schuster*, 502 U.S. at 118 (citing Respondent's Brief).

[27] "[O]ur cases have consistently held that '[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.'" *Simon & Schuster*, 502 U.S. at 509 (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983)); "Simon & Schuster need adduce 'no evidence of an improper censorial motive.'" *Id.* (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987)).

[28] *See Simon & Schuster*, 502 U.S. at 118-19.

[29] *See, e.g.*, Epps, *supra* note 17, at 513.

[30] See *infra* notes 126-135 and accompanying text for the story of David Berkowitz, the "Son of Sam."

the detectives illuminate the personalities of the suspects. They view the surviving Son of Sam statutes and those newly enacted as avenging relatives out for their crack at the First Amendment. Meanwhile, the First Amendment's demons pop up in a variety of areas besides true criminal speech, from pornography to obscenity to violent speech in general.

Because the streets have remained tense since the original murder, this investigation attempts to explain the particular reason for the murder by providing insight into the personality of the suspects and their motivations. The motivational inquiry justifies a look at the speech itself and the emotions evoked by the speech and the speaker, subjects generally implied but not explored in commentary about free speech issues. Traditional commentators may neglect these subjects because they do not stand up in court,[31] but the detectives ask whether they play a submerged role exposing hidden aspects of the personalities of the two suspects: the Son of Sam statutes and the First Amendment jurisprudence.

The homicide analogy serves an additional purpose. It inspires the use of the true criminal stories themselves as departure points for the motivational inquiry. Beyond the stylistic license this provides, it also grounds this unorthodox investigation of a legal issue in the concrete factual context from which it came. The inquiry illuminates the facts surrounding the Son of Sam statutes by examining the demons driving the suspects. To maintain the focus on facts, it holds tightly to the stories of the Son of Sam, who inspired the statute, and Henry Hill, who, along with the Supreme Court, dealt the statute its fatal blow.[32]

In the first section of the article, the detectives receive a police artist's sketch of the two prime suspects, the First Amendment and the

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[31] "The emotive impact of speech on its audience is not a [potentially regulatable] 'secondary effect' [of speech.]" Boos v. Barry, 485 U.S. 312, 321 (1988). *See also* Texas v. Johnson, 491 U.S. 397, 399 (1989) (invalidating statute banning flag burning).

[32] Henry Hill told his story with the help of Nicholas Pileggi in the much-acclaimed WISE GUY (1985). Two authors have told David Berkowitz' story with his cooperation: Laurence D. Klausner in *Son of Sam* (1981) and David Abrahamsen in *Confessions of Son of Sam* (1985). Abrahamsen, an author of New York's insanity law, examined Berkowitz in 1977 and found him fit to stand trial. Judges agreed, and Berkowitz pleaded guilty. *See* Sam Roberts, *In the Mind of a Murder*, N.Y. TIMES, April 28, 1985, at 7-34. Critics faulted Abrahamsen's book for raising more questions that it answered. *See id.*; Mark Schorr, *Title Page*, L.A. TIMES, Oct. 13, 1985, at 16. Still, for the purposes of this article, the stories carry critical weight because of both their strengths and faults. They stand as examples of the genre and as departure points for analysis.

Son of Sam laws. In the second section, they find in recent applications of the laws and of *Simon & Schuster* that the conflict is alive and well. The path of the search then leads in the third section through the demons or motives that might have caused lawmakers and citizens alike to protest the profiting by criminals from their stories. Chasing demons into other quarters, the fourth section describes how these motives appear in other areas of First Amendment jurisprudence, such as obscenity and pornography.

The exploration then winds in the fifth section through motives or traditional purposes of First Amendment protections. These purposes affect the "value" of speech as perceived by courts. Finally, in the sixth section the investigation concludes by taking one last walk through the crime scene of *Simon & Schuster* and asking how the demons and motives discovered play upon the conflict, its partial resolution by the Court, its future incarnations, and conceptions of the First Amendment.

In the end, the detectives will find that at the original crime scene a bitter struggle ensued in which both participants suffered serious wounds. While the Supreme Court struck down the Son of Sam statute, the reincarnated New York statute and its siblings remain bloodied but unbowed, replete with new attempts at achieving their aims. Meanwhile, the First Amendment endures, but with a subtle internal injury. The investigation concludes that the pressures placed upon the Court's analysis by the strong motives discussed here have created a marginal dip in the Court's application of strict scrutiny. This injury has already invited new statutes and the side-stepping of *Simon & Schuster* by courts. It also may encourage a balancing approach to free speech, even in the context of the most protected, "core" speech. As for the criminal speakers, crime victims, and lovers of true criminal stories, the result of this affair only leaves their role in the plot to thicken.

I. The Suspects: A Police Artist's Sketch

The investigation fleshes out the pictures of the players and the crime. At the inception of the inquiry, the detectives receive this police artist's rendition of the suspects.

A. The First Amendment

The First Amendment has many faces. Among the rights listed in the Constitution, "Freedom of press, freedom of speech, [and] freedom

of religion are in a preferred position.''[33] The government cannot discriminate on the basis of the content of speech.[34] When a law singles out speech of a certain content and burdens that speech, the First Amendment almost always strikes the law down.[35] While some feel that a finding of content-based discrimination ends the inquiry,[36] the Supreme Court has applied the "strict scrutiny" test imported from Equal Protection jurisprudence: in order to support a content-based burden on speech, the government must show a compelling government interest and a statute narrowly drawn to achieve that purpose.[37] In addition, courts test statutes of general application for overbreadth: courts may strike down a statute as overbroad because it would result in the infringement of the free speech rights of persons not before the court.[38]

When government regulation only incidentally burdens speech, however, the government need only show that (1) the regulation is content neutral, (2) the government has the constitutional power and an important or substantial interest unrelated to the suppression of free expression, and (3) the regulation imposes no more restriction on First Amendment freedoms than is essential to further the interest.[39] The government may also impose "reasonable time, place, and manner regulations as long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.''[40]

Where the speech falls within one of several historically unprotected categories, courts can uphold content-based restrictions without any

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[33] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[34] "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984).

[35] Leathers v. Medlock, 499 U.S. 439, 443-45 (1991) (differential taxation of speakers, which threatens suppression of particular viewpoints, held to strict scrutiny).

[36] *See infra* note 265.

[37] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[38] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 432 (1960) ("For in appraising a statute's inhibitory effect upon [free speech] rights, this Court has not hesitated to take into account possible applications of the statute to other factual contexts besides that at bar.").

[39] United States v. O'Brien, 391 U.S. 367 (1968) (upholding regulation prohibiting draft card desecration). The First Circuit applied the O'Brien test in upholding New York's Son of Sam law, but the Supreme Court disagreed and applied strict scrutiny. *See* Simon & Schuster, Inc. v. New York Crime Victims Board, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 502 U.S. 105 (1991).

[40] United States v. Grace, 461 U.S. 171, 177 (1983).

further scrutiny, except for an inquiry into discrimination based upon viewpoint.[41] These "low value" categories of speech include obscenity,[42] defamation,[43] and incitement to violence.[44] Finally, in exceptionally rare situations, the government may act to prevent grave and imminent danger.[45] After looking at the First Amendment's many faces, the detectives step over the corpse of the original Son of Sam statute to look at sketches of its vengeful relations, the current players.

B. Son of Sam Statutes[46]

Following New York's lead, other states have enacted statutes similar to the original Son of Sam statute.[47] The majority of Son of Sam statutes currently in effect require that the crime victim make a civil claim to recover any money judgment against the convicted individual.[48] In addition, most states require that criminal defendants remit the proceeds earned from activities related to their crimes to the state for the benefit of crime victims.[49] A majority of crime victimization statutes also contain a provision requiring the appropriate state agency to notify

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[41] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In *R.A.V.*, the Court invalidated a statute prohibiting "the display of a symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* The Court stated that, while a few limited categories of speech, such as obscenity, defamation, and fighting words, may be regulated because of their constitutionally proscribable content, government may not regulate them based on hostility, or favoritism, towards a nonproscribable message they contain.

[42] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

[43] *See, e.g.*, Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[44] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

[45] *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971).

[46] For a comprehensive review of the current Son of Sam statutes, see Debra Shields, *The Constitutionality of Current Crime Victimization Statutes: A Survey*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929 (1994).

[47] *See* statutes cited *supra* note 6. Hawaii enacted its fairly typical Son of Sam statute without any fanfare in 1986. Haw. Pub. L. No. 155, § 1 (1986).

[48] *See, e.g.*, HAW. REV. STAT. § 351-84 (Michie 1994). For other statutes with similar provisions, see Shields, *supra* note 46, at n.81.

[49] *See* Shields, *supra* note 46, at n.82. Hawaii, however, gives only half of the proceeds to the crime victims when the defendant appeals, putting the other half in a collection account for the payment of legal fees incurred in the appeal. HAW. REV. STAT. §§ 351-82, 351-83 (Michie 1994). The criminal defendant may seek to have more than 50 percent attributed to legal costs. HAW. REV. STAT. § 351-83.

crime victims as to the existence of the escrowed funds.[50] Most states, including those that amended their statutes after *Simon & Schuster* held New York's definition of "criminal" overly broad,[51] require that the speaker in question be convicted.[52]

Similar to New York's original statute, the unamended statutes of twenty-five other states[53] still unconstitutionally single out the speech of a criminal defendant and place a financial burden on it.[54] These statutes require the forfeiture of proceeds earned by a criminal defendant from the expression of thoughts, feelings, opinions or emotions regarding their crime. After *Simon & Schuster*, it is doubtful that such statutes will survive First Amendment challenge. The Court held that, while the government has a compelling interest in preventing profit and compensating victims, it does not have a more compelling interest in profit from speech than in any other kind of profit.[55]

Since *Simon & Schuster*, New York and California have amended their Son of Sam statutes, diffusing the exclusive focus on speech profits.[56] In New York, the legislature beefed up the general restitutionary scheme and broadened the definition of "profit from crime" to "assets obtained through the use of unique knowledge obtained [through

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[50] *See* Shields, *supra* note 46, at n.83. Hawaii has no notice provision. HAW. REV. STAT. § 351. However, Hawaii holds the moneys in escrow a lengthy ten years from the date of the last judgment obtained by a victim or the victim's representative. HAW. REV. STAT. § 351-88(2).

[51] 502 U.S. at 118. Three states altered their statutes in response to this holding. *See* DEL. CODE ANN. tit. 11, § 9102(3) (Supp. 1992); MD. ANN. CODE art. 27, § 764(a)(2) (Supp. 1993); N.Y. EXEC. LAW. § 632-a (McKinney Supp. 1994).

[52] *See, e.g.*, HAW. REV. STAT. § 351-82 (Michie 1994). For other statutes requiring convictions, see Shields, *supra* note 46, at nn.105 & 106.

[53] *See* Shields, *supra* note 46, at n.122.

[54] *See, e.g.*, HAW. REV. STAT. § 351-81 (Michie 1994). Contracts must be submitted to the commission if:

> The subject matter of the contract is the reenactment of the crime, or the expression of the thoughts, feelings, opinions, or emotions of the person about the criminal offense for which the person is indicted or charged which is to be reflected in a movie, book, article, radio or television program, or other form of communication.

HAW. REV. STAT. § 351-81(2).

[55] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 119-20 (1991).

[56] *See* N.Y. EXEC. LAW § 632-1(b) (McKinney Supp. 1993); CAL. CIVIL CODE § 2225 (*amended by* 1994 Stat. Ch. 556 (effective Sept. 12, 1994)).

criminal activity]."[57] In California, profits falling under the statute now include all income from anything sold or transferred, including any right, the value of which is enhanced by the notoriety gained from the commission of a crime for which a felony conviction was obtained.[58]

The detectives disagree over whether these new statutes are potential copy-cat killers or vengeful relatives. If detectives believe the First Amendment acted in self-defense, they stare in the faces of new and improved killers. If, however, detectives feel that the First Amendment murdered New York's original statute, they addresses a pack of relatives ready to take the matter into their own hands. Regardless of the point of view, new cases illustrate the continuing struggle between Son of Sam goals and the First Amendment.

II. ALIVE AND WELL

After the Son of Sam and Henry Hill come a long line of potential candidates for the criminal speech hall of fame. From Katherine Ann Power,[59] to Tonya Harding[60] to, yes, O.J. Simpson,[61] famous crimes and famous people create unprecedented public interest. Infamous crimes committed by unknown criminals also attract attention.[62] These

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[57] N.Y. EXEC. LAW § 632-1(b) (McKinney Supp. 1993). As under the old statute, any legal entity which agrees to pay such profits to a person charged with or convicted of that crime must notify the crime victims board. *See id.* § 632-2(a).

[58] CAL. CIVIL CODE § 2225(a)(10) (1995). See *infra* text accompanying notes 97-101, for further discussion of these new statutes. *See also* Marnie I. Smith, *Criminal Procedure; Restitution Funds*, 26 PAC. L.J. 488 (1994) (discussing California's amendments to its Son of Sam statute). California filed its first ever Son of Sam cases in April, 1995 against Joe Hunt, a member of the infamous "Billionaire Boys Club," and Rodney Alcala, a convicted killer. *State Uses Son of Sam Law for the First Time*, L.A. TIMES, April 14, 1995, at A15. Hunt has set up a 900 number where, for $2.99 a minute, callers can hear him describe life in prison since his conviction for killing a con man who cheated him in a Beverly Hills commoditites-trading scheme. *Id.* Last year, Alcala published *You, the Jury*, proclaiming his innocence in the 1979 killing of a 12-year-old girl. *Id.* Alcala has sued California to stop the state from seizing proceeds from the book. *Inmate Sues the State to Keep Book Proceeds*, S.F. CHRON., June 12, 1995, at A20.

[59] *See infra* discussion accompanying notes 66-90.

[60] Dermot Purgavie, *From Rogues to Riches; As Tonya Harding Looks to a Lucrative Future of Infamy*, DAILY MAIL, March 21, 1994, at 9 (listing movie and television offers to the skater implicated in the assault on fellow skater Nancy Kerrigan).

[61] *See infra* notes 95-110 and accompanying text.

[62] Compare O.J. Simpson, whose fame made his alleged crime exponentially more famous, with Susan Smith, whose infamy grew out of the nature of her crime and subsequent coverup. *See* David Streitfeld, *Susan Smith Book Proposal May be Fake; Agent Circulates Idea, But Lawyer Says No Deal in Works*, WASH. POST, Aug. 2, 1995, at C1.

crimes produce not only books, movies and television shows, but an entire array of merchandise[63] and even how-to videos.[64] They create headaches for legislatures and courts.[65] As the detectives fan out and sift through these stories, they realize that the conflict lives on.

Recent stories come in many forms, but they break down into two rough categories: (1) attempts to achieve Son of Sam goals without using Son of Sam statutes; and (2) broadening of Son of Sam statutes while some big fish get away.

A. Katherine Ann Power

In the first category, Katherine Ann Power stands as the paradigm. On September 23, 1970, Katherine Ann Power, along with four other members of a revolutionary group,[66] robbed the State Street Bank and Trust Company in the Brighton section of Boston.[67] During the robbery, one of Power's accomplices, William Gilday, shot Boston Police Officer Walter Schroeder in the back with a submachine gun.[68] Schroeder died the next day.[69] While police apprehended her accomplices, Power managed to evade law enforcement authorities and eventually settled in Oregon under an assumed name,[70] "the target of the largest womanhunt in FBI history."[71]

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[63] Criminals have developed the Midas touch. People will buy: comic books, pictures, paintings, toe tags worn by the deceased criminal, trading cards, and receipts touched by the criminal. *Blood Money—The Legal Profits of Crime Are Hot Stuff* (Day One television broadcast, May 2, 1994), *available in* LEXIS, News Library, Curnws File.

[64] One former criminal marketed a videotape entitled *It Took a Thief to Stop a Thief* after being convicted for breaking and entering. *See Shaw v. Butterworth*, 616 So.2d 1094 (Fla. Dist. Ct. App. 1993).

[65] *See, e.g., id.* A lower court held that a videotape regarding home security was not an account of the appellant's crime and therefore did not fall under Florida's Son of Sam statute, FLA. STAT. ANN. § 944.512 (West Supp. 1993). *Id.* The appellate court upheld the lower court's refusal to award attorney's fees sought by defendant and his corporation on the basis that the state would not admit that the videotape he made was not an account of crime for which he was convicted. *Id.*

[66] Power, then a student at Brandeis University, planned to use the stolen cash to buy explosives, disable weapons trains, and arm the Black Panthers. Shaun B. Spencer, *Does Crime Pay—Can Probation Stop Katherine Ann Power from Selling her Story?*, 35 B.C. L. REV. 1203, 1205-06 (1994) [hereinafter Spencer, *Does Crime Pay?*].

[67] Commonwealth v. Power, 650 N.E.2d 87, 88 (Mass. 1995)

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Spencer, *supra* note 66, at 1203.

On September 15, 1993, Power surrendered to Massachusetts authorities after twenty-three years as a fugitive.[72] She pleaded guilty to armed robbery and manslaughter.[73] The judge sentenced her to eight to twelve years imprisonment, plus an extraordinary sentence of twenty years probation.[74] The written probation contract included a special condition, preventing Power from "engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to [her] involvement in the criminal acts for which [she] stand[s] convicted."[75] In imposing the condition, the sentencing judge gave voice to the sentiments stirred by profit from criminal speech:

> I will not permit profit from the life blood of a Boston police officer by someone responsible for his killing. That is repugnant to me. I could not live with myself if I permitted it.[76]

On May 18, 1995, the Supreme Judicial Court of Massachusetts upheld the special condition of probation against a First Amendment challenge.[77] The court reasoned that a condition of probation is enforceable, even when it affects a "preferred" right, when it is "reasonably related" to goals of sentencing and probation.[78] The court listed these goals as "punishment, deterrence, protection to the public, and rehabilitation."[79] After finding that the probation condition did affect Power's First Amendment rights, the court then distinguished *Simon & Schuster*, stating that the New York statute was one of general application and infringed content-based speech rights.[80] The court reasoned that these factors required strict scrutiny for the Son of Sam statute, but not for the probation condition.[81] Finally, the court noted that the Supreme Court in *Simon & Schuster* found the New York statute overbroad, "i.e., it applied not only to criminals convicted in a court of law but also to those accused of crime and those who admitted to committing a crime."[82]

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[72] *Power*, 650 N.E.2d at 88-89.

[73] *Id.* at 89.

[74] *Id.*

[75] *Id.*

[76] Patricia Nealon, *Power Given 8 to 12 Years and Warning*, BOSTON GLOBE, Oct. 7, 1993, at 1.

[77] *Power*, 650 N.E.2d at 87.

[78] *Id.* at 89.

[79] *Id.* at 90.

[80] *Id.* at 90-91.

[81] *Id.*

[82] *Id.* at 91.

The Supreme Judicial Court of Massachusetts "side-stepped" *Simon & Schuster*.[83] While admitting that the probation condition impinged Power's speech, the court's analysis implied that the condition was not content-based. The court distinguished New York's law on its "content-based" approach and insisted that the probation condition "allows the defendant to speak on any subject, including her crimes, whenever, and through whatever medium she desires."[84] This statement flies in the face of the rock on which *Simon & Schuster* built its overbreadth analysis, that the state has no interest in limiting the prevention of profit or the compensation of victims to proceeds from speech as opposed to other profit.[85]

The *Power* court's emphasis on the general applicability of the New York statute in *Simon & Schuster* also rang hollow later in the *Power* opinion when the court stated that "[t]he defendant, and *other defendants similarly situated*, are deterred from seeking profit directly or indirectly from criminality . . . ."[86] If the court meant to encourage a policy of imposing such conditions, then overbreadth analysis should attach. In addition, while the fact that the probation condition is not a law of general application may save it from being tested for overbreadth, the court implied that *Simon & Schuster* only applies to statutes that risk being found overbroad. As discussed in the final section, *Simon & Schuster* created the danger of this interpretation by shifting its analysis so quickly to other works rather than focusing on the protected nature of the speech at issue in *Simon & Schuster*.[87] Undeterred by *Simon &*

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[83] As the Court recognized in *Simon & Schuster*, characterizing the effect of the statute as the interest of the state "can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." 502 U.S. at 120. In *Power*, characterizing a probation condition as one of specific rather than general application and ignoring its content-based approach resulted in weak scrutiny.

[84] *Power*, 650 N.E.2d at 90.

[85] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 120-121 (1991).

[86] *Power*, 650 N.E.2d at 91 (emphasis added).

[87] Once a detective takes off the traditional First Amendment blinders and actually looks at true criminal speech, this shift in focus jumps off the pages of *Simon & Schuster*. Instead of holding the statute unconstitutional as applied to Henry Hill's true criminal speech, the analysis rushes to demonstrate how the political works of Martin Luther King, Jr. would be included in its overbreadth. 502 U.S. at 121. Detectives curious as to the reasons for this quick shift to overbreadth analysis will find their answer in the following sections exploring the nature of and reactions to the actual speech at issue: true criminal speech. As shown by the Supreme Judicial Court's

Schuster, the court concluded that the "reasonable relation" test, the lowest form of constitutional scrutiny, applied.[88] The court effectively read *Simon & Schuster* to prohibit only statutes of general application which attach profits of defendants not yet convicted.

In describing the interests served by the probation condition, the court alluded to the depth of feeling created by profit from true criminal speech. The court stated that "the moral foundations of our society are reinforced by the condition."[89] Apparently, such reinforcement inspires supreme judicial creativity in avoiding the holding of *Simon & Schuster*. The court's narrow characterization of *Simon & Schuster* shows the lengths to which courts will go to prevent profits from speech. In Power's case, profit prevention stood as the only goal. The probation condition said nothing about compensation.[90] However, other courts have used similarly case-specific approaches to achieve victim compensation goals as well.[91] After the *Power* case, the detectives realize that Son of Sam statutes are not the only ones driven by the anti-profit motive. The cast of suspects has widened.

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narrow application of *Simon & Schuster*, the shift weakens the opinion, and it contains an implicit devaluation of true criminal speech as compared to the other works the court found it so important to protect.

[88] *Power*, 650 N.E.2d at 91. Under the "reasonable" or "rational relation" test, a statute need merely be rationally or reasonably related to a legitimate government purpose. *Id.* at 88.

[89] *Id.* at 91.

[90] *Id.* at 89.

[91] A federal judge's restitution order in the famous Seattle Sudafed poisoning case provides an example of the use of sentencing to acheive the goal of victim compensation and avoid the exclusive focus on speech profits. A jury convicted Joseph Meling of several counts of product tampering. *See* Peter Lewis, Jack Broom, *The Meling Trial's Over, But . . . Here Comes Hollywood and the Book Offers*, SEATTLE TIMES, April 4, 1993, at A1. Meling intended to kill his wife for $700,000 in insurance money, and he tampered with other Sudafed capsules in order to throw police off his trail. *See id.* His actions resulted in severe injury to his wife and the deaths of two others, as well as numerous offers for books and interviews. *See id.* The restitution order, dated June 8, 1992, provides for the payment of $3,500,000 to Burroughs-Wellcome, the company with whose drugs Meling tampered. As to the source of funds, the order states:

> All sources of funds available to defendant, including present and future earnings derived from media contracts and book royalties negotiated by defendant or his beneficiary concerning his course of criminal conduct, shall be applied to restitution when earned.

United States v. Meling, No. CR-92-395-1-BJR, Order of June 8, 1992 (W.D. Wash. 1992).

B. New Statutes

Legislatures still pursue Son of Sam goals through Son of Sam statutes, however. Most new statutes now limit the definition of a criminal to someone who has been convicted of a crime.[92] Many old statutes already limited themselves in this regard.[93] These statutes line up with the one absolutely unambiguous holding of *Simon & Schuster*: the New York statute was overbroad because it included persons not yet convicted of crime.[94]

The limitation of Son of Sam laws to only convicted criminals led to the loss of profits to the state from the most famous (potentially)[95] true criminal author yet: Orenthal James Simpson. California cannot seek to attach profits from Simpson's book, *I Want to Tell You*, unless and until a jury convicts Simpson for one or both of the murders of Ronald Goldman and Simpson's ex-wife Nicole Brown Simpson.[96] If a jury convicts Simpson and any profits from the book remain, a California court will still have to review whether profits must be used to pay his defense lawyers before being given to the victims' families.[97]

Simpson's story also brings into focus another problem with the new statutes. Members of the new generation of Son of Sam laws have broadened their definitions of profit from crime to include profit derived from activities other than speech. In California, for example, the statute now reaches all income from the sale of anything with value enhanced by the notoriety gained from crime.[98] This statutory tactic arose out of the Court's observation in *Simon & Schuster* that the State had no interest in attaching profits from speech above and beyond any other kind of profit.[99] The New York statute's exclusive focus on profits from

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[92] *See* Shields, *supra* note 46, at n.106.

[93] *Id.* at n.106.

[94] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 121 (1991).

[95] As of this writing, the Simpson jury has not yet reached a verdict.

[96] CAL. CIV. CODE 2225(b)(1); Douglas E. Mirell, *Can O.J. Simpson Profit From the Sale of His Book?* 16 ENT. L. REP. 8 (January 1995). Taking a cigarette break, the detectives agree that Simpson wrote the book in order to pay his defense team. They coin a different title: "I Want to Sell You."

[97] CAL. CIVIL. CODE § 2225(d).

[98] CAL. CIVIL CODE § 2225(a)(10) (1995).

[99] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 119-120 (1991) ("The Board cannot explain why the State should have any greater interest in compensating the victims from the proceeds of such 'storytelling' than from any of the criminal's other assets.").

speech brought down upon it the content-based label, strict scrutiny, and the finding that the statute was not narrowly tailored to its compelling goals of preventing profit and compensating victims.[100] In effect, the new statutes solve their problems with narrow tailoring by putting on some weight to fill out the broad goals that the Court found compelling. The new statutes focus on more than profits from speech.[101] Under these statutes, courts will most likely find only an incidental impact on speech activity and apply the more lenient *O'Brien* test. *O'Brien* requires only a "substantial government" interest and a version of "narrow tailoring" that is looser than strict scrutiny.[102]

However, these amended, broader statutes add a new tension. In defining profit from crime so broadly, they potentially expand their reach to almost everything earned by a criminal after conviction.[103] If a criminal gains notoriety for his crime, every step he takes thereafter, including employment of any kind, may derive from his fame.

This broad coverage creates a phenomenon the author will call the fame-differential dilemma. If the detectives look at the true criminal crime scene of O.J. Simpson, they find a very famous man before the murders, and an even more infamous man afterwards. After the murders, how much of the value of Simpson memorabilia or other items should be attributed to notoriety derived from the crime?[104] If the jury convicts Simpson, could California attach the profits from the sale of Simpson memorabilia? This raises the difficult question of what quotient of fame existed before the crime and what existed after the crime. Simpson would face the fame-differential dilemma.

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[100] *Id.*

[101] *See, e.g.*, CAL. CIVIL CODE 2225(a)(10) (focusing on any transaction enhanced by notoriety).

[102] *See* United States v. Albertini, 472 U.S. 675, 689 (1985) (regulation is narrowly tailored if it promotes a substantial government interest more effectively than no regulation).

If these new statutes have incidental effects on advertisers using the names of famous criminals, they may benefit from the somewhat relaxed standards for regulation of commercial speech as well. *See* Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

[103] For example, California's formulation would reach the videotape entitled *It Took a Thief to Catch a Thief* addressed by the Florida courts in *Shaw v. Butterworth*, 616 So.2d 1094 (Fla. Dist. Ct. App. 1993), discussed in note 64, *supra*. The lower court found that the videotape did not fall under the Florida statute, which has the traditional Son of Sam formulation, because it was not an "account" of the appellant's crime. *Id.* at 1095.

[104] Mirell, *supra* note 96, at 8.

Under the California statute, other celebrities could find themselves confronting similar situations. For example, Mike Tyson's profits from his comeback might or might not have been attached under a California-type statute because they were arguably enhanced by his notoriety from the rape conviction.[105]

On the flip side of the fame-differential dilemma lies its distinct lack of application where persons who enjoyed no public notoriety commit notorious crimes. Crimes become notorious for a variety of reasons. Celebrity victims make unknown criminals household names.[106] Repeated crimes gain national attention.[107] Strange or particularly terrible crimes also attract public interest.[108] In the cases of these crimes, the criminal could not claim that any fame or resulting profit preexisted the crime. As a result, depending on how California construes its statute, the famous there may have an opportunity to keep more of the payoff from differential notoriety gained from crime. To put the matter concretely, in California Susan Smith would not keep the profits from selling some item,[109] but O.J. Simpson stands a chance of keeping the enormous profits he could garner by signing football cards in prison.[110] In this regard, preexisting fame gives a defendant a legal defense against the application of the statute to certain funds that is not available to a relative unknown.

Notoriety may also arise from a prevailing belief in the innocence of the person who profits. The public might even continue in this belief after the person is convicted. It would be impossible for a court

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[105] *See* Tim Kawakami, *Can Tyson Put the Punch Back in Boxing?; He will be Paid $35 Million for Six Fights, A Bounty that Shows How Vital He is to the Sport. Blurred By Hype is the Moral Issue of Rewarding a Convicted Rapist*," L.A. TIMES, Aug. 6, 1995, at A1.

[106] Most Americans can easily line up the names: Lee Harvey Oswald, Sirhan Sirhan, James Earl Ray, Squeaky Fromme, John Hinkley, Jr., and Mark David Chapman, with their victims: John F. Kennedy, Robert Kennedy, Martin Luther King, Jr., Gerald Ford, Ronald Reagan, and John Lennon.

[107] *See infra* notes 126-135 and accompanying discussion regarding David Berkowitz and other serial killers.

[108] Susan Smith drowned her two sons, then aroused national sympathy with a short-lived coverup. David Streitfeld, *Susan Smith Book Proposal May be Fake; Agent Circulates Idea, but Lawyer Says No Deal in Works*, WASH. POST, Aug. 2, 1995, at C1.

[109] Smith, sentenced to life in prison for drowning her two sons, may not even get the now traditional book deal. *Id.*

[110] *See* Rebecca Trounson, *Trading on Misfortune?; Dealers Are Offering Football Cards Offered by Simpson While in Jail*, L.A. TIMES, Aug. 24, 1994, at A20. The cards may sell for as much as $2,000 each. *Id.*

to separate the fame and profit gained by such a belief from the fame derived from guilt.

Scratching their heads at such puzzles, the detectives realize that the conflict is alive and well. They must now turn to where it all began, with the stories of David Berkowitz, the Son of Sam, and Henry Hill, the Wiseguy.

III. CONTEXT AND MOTIVE: THE TWO STORIES

Berkowitz' story inspired the law, and Hill's story killed it. The statute arose out of one context and fell in the other. Criminal detectives examine conduct rooted firmly in specific factual settings. Somewhere in the stories of these two men lies a key to what motivated the suspects, the First Amendment and the New York statute. An examination of the stories themselves and their intersection with the legal evidence can crack the case.

A. "Getting Over on Somebody'"[111]: Henry Hill as the Model Target of the Anti-Profit Interest

Henry Hill stands as the anti-profit paragon. A New York legislative memorandum described the injustice he personifies. It stated that, without the Son of Sam law, "a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity."[112] The legislators intended the statute to prevent criminals from profiting from their misdeeds by selling their stories. Any profits would be given to crime victims: "This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims . . . ."[113]

Meanwhile, Henry Hill loved "the life." He loved the "action." He loved the fact that he was different from working people. He could get things without going through the normal channels. He could steal and get away with it: "We ran everything. We paid the lawyers. We paid the cops. Everybody had their hands out. We walked out laughing.

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[111] PILEGGI, *supra* note 12, at 20.

[112] Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 783 (2d Cir. 1990) (citing Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, Act of Aug. 11, 1977, ch. 823, 1977 N.Y. Laws), *rev'd*, 502 U.S. 105 (1991).

[113] *Id.*

We had the best of everything."[114] Hill held those who lived according to the rules in contempt.[115]

For Hill, the payoff from the "action" was the money and status that provided the "life." As he was portrayed in the book *Wise Guy*, Hill was in it for the money, not the violence.[116] The goal of the "astonishing variety"[117] of crimes he described was profit. These crimes included extortion, the importation and distribution of drugs, numerous robberies, the 1978-79 Boston College basketball point-shaving scandal, and the theft of $6 million from Lufthansa Airlines.[118] He played the game for profit above all else.[119]

The New York Legislature apparently understood the motives of people like Henry Hill. Just as Hill looked at monetary gain as the ultimate method of "getting over on somebody," the Son of Sam statute targeted financial profits from criminal storytelling as an unique injustice against victims. The statute aimed to stop Hill and people like him from "walk[ing] out laughing" one more time.[120]

Ironically, the New York Crime Victims Board failed in its attempt to take speech profits from Hill, a criminal to whom money really mattered. *Simon & Schuster* won its challenge against the statute on constitutional grounds.[121] Henry got away with the loot once again. Nicholas Pileggi observed that, as a pampered federal witness, "Henry

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[114] PILEGGI, *supra* note 12, at 284.

[115] After he entered the federal witness protection program, he summed up his new, "normal" life: "Today everything is different. No more action. I have to wait around like everyone else. I get to live the rest of my life like a schnook." PILEGGI, *supra* note 12, at 284. Hill found this life so unbearable that he eventually got himself kicked out of the federal witness program for selling drugs. *Id.*

[116] Hill may have downplayed his role in any violence, but the focus of his criminal efforts was certainly profit. In *Wise Guy*, Hill admits to several assaults, some involving money, others in defense of his wife, Karen. *See id.* at 58, 77, 125, 136, 143, 157. According to *Wise Guy*, Hill's role in murders was limited to burying the bodies. *Id.* at 269. His description of the brutality of other "wiseguys" gives the impression that he considered their violence an unfortunate occupational hazard.

[117] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 113 (1991).

[118] *See id.*

[119] Justice O'Connor was charitable when she noted in her opinion that Hill sought compensation from Simon & Schuster "[b]ecause producing the book required such a substantial investment of time and effort." *Simon & Schuster*, 502 U.S. at 112 (citing Appellant's Brief).

[120] PILEGGI, *supra* note 12, at 20.

[121] *Simon & Schuster*, 502 U.S. at 123.

Hill has turned out to be the ultimate wiseguy."[122] From his point of view, Hill even "got over" on the Board with the help of the United States Supreme Court, to the tune of over $100,000.[123]

Hill's story, including the Supreme Court case, presents a frustrating picture: an unrepentant criminal boasting of his exploits and laughing all the way to the bank.[124] Hill's continued ability to show disdain for the injuries of victims and contempt for the legal system through speech and profit provides a strong motive for the application of the Son of Sam law.

While Hill stands as the prime example of what the statute's focus on profit seemed meant to stop,[125] the Son of Sam, not Henry Hill, inspired the New York law. In comparing Hill's story with that of David Berkowitz, a deeper motivation emerges.

B. "I Love the Limelight"[126]: The Son of Sam and Emotional Profit from Criminal Storytelling

From July 1976 to July 1977, New York City lived in terror of one man.[127] At one in the morning on July 29, 1976, David Berkowitz killed Donna Lauria, an eighteen-year-old emergency medical technician, and injured her friend.[128] Within eight months, he shot six more people, killing two.[129] When New York Police Commissioner Michael

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[122] PILEGGI, *supra* note 12, at 289. In support of his claim, Pileggi noted Hill's $1500 a month as a government employee, special food orders from Little Italy, and protection against the Internal Revenue Service, among other perks. *Id.*

[123] *See id.* at 486. Justice O'Connor noted that *Simon & Schuster* had already paid Hill's literary agent $96,250 in advances and royalties by the time the Board took action. $27,958 more was waiting for Hill at the publishers. *Simon & Schuster*, 502 U.S. at 114.

[124] Hill's success and the success of the movie "Goodfellas" has spawned a cottage industry of tell-all gangster books.

[125] Ironically, to the extent that crimes for profit may involve political corruption or other issues of interest to the public in its quest for self-governance, taking the profits may well remove any incentive a money-hungry speaker has to tell his story. "[W]e'll never know who didn't come forward . . . [m]aybe some guy who . . . bribed congressmen, or some guy who was behind the scenes of a major insider trading scheme." Meg Cox, *"Sam" Ruling Likely to Spark Media Scramble*, WALL ST. J., Dec. 11, 1991, at B1 (quoting Nicholas Pileggi).

[126] David Berkowitz, as quoted in ABRAHAMSEN, *supra* note 2, at 195.

[127] LAWRENCE D. KLAUSNER, SON OF SAM: BASED UPON THE AUTHORIZED TRANSCRIPTION OF THE TAPES, OFFICIAL DOCUMENTS AND DIARIES OF DAVID BERKOWITZ 1 (1981).

[128] *Id.* at 60-61.

[129] *Id.* at 3.

Codd announced that a warrant had been issued for an unnamed white male between twenty-five and thirty years old, and that police were certain that this man had murdered the three victims with the same .44 caliber handgun, Berkowitz became "The .44-Caliber Killer."[130] After taking offense at a police captain's description of him as a misogynist, Berkowitz left a note by the bodies of new victims Valential Suriani and Alexander Esau on April 17, 1977.[131] The note stated in part: "I am deeply hurt by your calling me a wemon [sic] hater. I am not. But I am a monster. I am the Son of Sam."[132]

Berkowitz sent letters to Jimmy Breslin, then a New York Daily News columnist.[133] Breslin published the letters, which Berkowitz later admitted gave him "a rush."[134] On August 10, 1976, after an eyewitness and a parking ticket led police to his apartment in Yonkers, New York, Berkowitz responded to Detective John Falocito, "You know who I am. I'm Sam."[135]

Like Henry Hill, David Berkowitz revelled in his ability to avoid getting caught.[136] Unlike Hill, however, Berkowitz sought notoriety more than money as the profit from his crimes.[137] His craving for attention:

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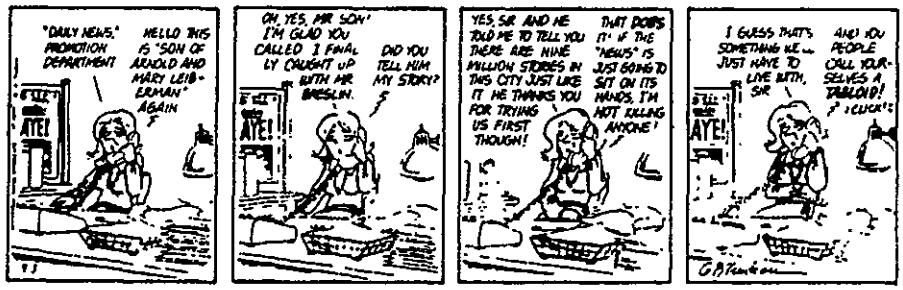
[130] *Id.* at 4.

[131] *Id.* at 141.

[132] *Id.* at 141 ("Sam" referred to Sam Carr, Berkowitz' neighbor, whose dog's barking inflamed Berkowitz).

[133] Daniel Schorr, *When Alienated, Violent Men Demand to be Publicized*, CHRISTIAN SCIENCE MONITOR, May 5, 1995, at 19.

[134] *Id.* The following perhaps best sums up the criticism of Breslin and the New York tabloids for their role in the Son of Sam tableau:



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[135] Klausner, *supra* note 127, at 6.

[136] ABRAHAMSEN, *supra* note 2, at 184, 189-90.

[137] Moreover, Berkowitz could hardly enjoy any money, as he is confined to a New York prison for several consecutive life terms.

> drove him from truancy, pilfering, lying, and fire-setting to game-playing with demons, the Son of Sam, and murder. He had to be noticed, attract attention, create a sensation, at any and all costs.[138]

In her opinion in *Simon & Schuster*, Justice O'Connor stated that "[w]hatever one might think of Hill, at the very least it can be said that he realized his dreams [to be a wiseguy]."[139] A similar observation would have well described Berkowitz' success in attracting attention to himself. He ranks with Jack the Ripper as one of history's most notorious killers.[140]

This notoriety may have come about with or without Berkowitz' cooperation in accounts of his life and crimes. Still, Berkowitz' self-promotion began with his first note announcing his moniker and daring police to catch him.[141] It continued through his "true criminal" speech. Regardless of its marginal addition to the total amount of publicity, the importance of Berkowitz' speech is its potential to bring pleasure to the criminal in the form of continued participation in his own publicity, participation of a kind that may have inspired his murders in the first place.[142]

Beyond simple notoriety, Berkowitz also desired to "relive" a situation associated both with sex and with the "sinfulness" he perceived in his natural mother.[143] He relived this situation by killing young

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[138] ABRAHAMSEN, *supra* note 2, at 195.

[139] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 112 (1991).

[140] In fact, after 16 years, Berkowitz only recently and successfully renewed his drive for attention. His interview on King World's "Inside Edition" landed the show its highest ratings ever in New York City. *See* Jim Benson, *"Son of Sam," Stern Rate Highly*, DAILY VARIETY, Nov. 10, 1993, at 6. In the interview, Berkowitz claimed that he committed the murders at the behest and with the assistance of a cult. *See* Rob Polner, *"Son of Sam" Killer Says He Had Help*, NEWSDAY, Nov. 8, 1993, at 6. Berkowitz, who claims to have embraced Christianity five years ago, also stated, "I did take some lives, and I'm very sorry for that." *See id.*

[141] "In fact, arrest often turns out to be the perfect vehicle for the killer's self-aggrandizing fantasies. Denied recognition for so long, he can suddenly strut at center stage." Mark Starr et al., *The Random Killers*, NEWSWEEK, Nov. 26, 1984, at 100.

[142] Since Berkowitz' killings, psychiatrists have disagreed over whether the media attention he received encouraged him to commit more murders. *See* Sam Roberts, *In the Mind of a Murder*, N.Y. TIMES, April 28, 1985, at 7-34.

[143] ABRAHAMSEN, *supra* note 2, at 178. Berkowitz was filled with anger at his natural mother, who gave him up for adoption. He was obsessed with the idea that his mother had conceived him in a parked car with her lover. *See id.* at 177.

women in parked cars.[144] Resonating the horror of such acts, the Son of Sam statute attached profits from any "*reenactment* of such crime, by way of a movie, book, [etc.]"[145] While by its use of the word "reenactment," the New York legislature clearly aimed at television or movie contracts, the word takes on a more sinister tone as applied to a criminal such as Berkowitz. A criminal who participates in any way in the reenactment of his crime may derive the same kind of terrible pleasure that led Berkowitz to kill in order to "relive" his twisted fantasies about his mother. Providing a forum for him to relive and revel in his experiences thus replicates a psychological element of the very murder Berkowitz committed. Generally, if criminals kill to relive experiences and fantasies, permitting them to relive their killings allows homicidal sickness to play itself out in public.

Berkowitz' story shows that there was more to the Son of Sam statute than prevention of profit or victim compensation. One analysis of the Son of Sam statute has aptly noted that the anti-profit purpose often conflicts with the victim compensation purpose.[146] For some, such inconsistencies add credence to claims that the stated purposes merely serve to cover illicit censorial or political motives.[147] For the detectives, such inconsistencies lead to the question of what demons drive those censorial or political motives. If money derived from crime was the core problem, why did it take the slaughter inflicted by David Berkowitz to inspire the law targeting money?

One clue lies in the language in which the principle underlying the anti-profit interest has been phrased. Some have described the anti-profit interest in terms that boil down to the simple "equitable principle" that "crime doesn't pay."[148] However, other formulations go beyond the money that the word "pay" implies. The Court in *Simon & Schuster* summarized the anti-profit purpose:

> Like most if not all States, New York has long recognized the "fundamental equitable principle," that "[n]o one shall be permitted to profit

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[144] *Id.*

[145] N.Y. EXEC. LAW § 632-a(1) (McKinney 1982) (emphasis added).

[146] *See* Herrera, *supra* note 17, at 580-82. Herrera argues that, by penalizing and thus chilling speech by criminals, the statute also undermines the amount available to compensate victims. Herrera also suggests that the provisions in the statute allowing nonvictim creditors to access profits conflicts with the compensation interest, and that the exclusion of victimless crimes from the statute's coverage detracts from the anti-profit interest.

[147] *See id.* at 582.

[148] *See, e.g.*, Soderberg, *supra* note 17, at 630.

> by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[149]

Phrasing the principle in this broad language, the Court demonstrated that it encompasses more than simple monetary profit. No "advantage" should be acquired as the result of a misdeed. The term "advantage" has encompassed gains beyond monetary or tangible profit.[150] One court has summed up the purpose behind the maxim that no man should take advantage of his own wrong: It is "to prevent encouragement of wrongdoing by obstructing the hopes of profit."[151] Whether the criminal seeks an advantage in money or other kinds of pleasures, preventing the advantage may prevent the wrong.

The original Son of Sam statute stood as a protection against a certain injustice to victims. However, the only type of injustice the statute could prevent involved money. Where a criminal substituted fame or other emotional gratification for cash, he could profit all he wished.[152] Such profit could never flow to victims and therefore could not serve the victim compensation motive. However, emotional profit still gives rise to the same advantage that inspired the attempt to prevent financial profits. Emotional profit cannot be quantified or traced to bank accounts, but its existence "salts the wounds" of the victims in the same way as financial profit.[153] In addition, it may

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[149] 502 U.S. 105, 119 (1991) (quoting Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (holding that a youth who killed his grandfather was prevented from inheriting because the state has a strong interest in preventing criminals from profiting from their crimes.)).

[150] Illinois v. Allen, 397 U.S. 337, 350 (1970) (Brennan, J., concurring) (invoking the maxim that "Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong" in support of holding that an accused, by persisting in disruptive conduct lost his constitutional right to be present throughout his trial). *See also* Reynolds v. United States, 98 U.S. 145, 158 (1878) (citing maxim and holding that certain evidence may be introduced against an accused who takes actions that result in a witness not testifying).

[151] Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962).

[152] Garret Epps makes a similar point regarding the statutes' focus on speech profits. Noting that the Son of Sam statutes leave open opportunities unrelated to speech for criminals to use their notoriety, Epps argues that these other methods of profit also "salt the wounds" of victims and therefore undermine the focus on speech profits. Epps, *supra* note 17 at 513 n.132 (citing Children of Bedford v. Petromelis, 573 N.E.2d 541, 548 (N.Y. 1991)).

[153] Children of Bedford v. Petromelis, 573 N.E.2d 541, 548 (N.Y. 1991).

provide inspiration for the original crimes. Either way, the victims have lost; the criminal continues to gain.

No matter how much a lawmaker would aspire to prevent emotional profit, emotional profits cannot end without stopping the criminal's speech. Emotional profit cannot be separated from the speaker as monetary profits can.[154] Emotion intertwines too completely with the speech itself. For lawmakers responding to the horror of David Berkowitz, targeting merely the monetary profit served as a poor surrogate for ending the emotional profit and banning the speech itself, and even that poor substitute failed the constitutional test. If the focus on monetary profit did not float, the focus on emotional profit would sink deeper. While the Court found that the government has compelling interests in victim compensation and prevention of profit, the Board could not justify focusing only on profits from speech.[155] This holding will motivate tinkering with the monetary focus to broaden its scope,[156] but a similar scope seems impossible for a broader focus on emotional profit. Focusing on all emotional gains by a criminal might necessitate preventing the criminal from enjoying *anything* related to expression, including composing stories or painting pictures of his crimes. Aside from imposing capital punishment,[157] this goal lies beyond the legislatures.[158]

The detectives focus on these emotional rewards reaped by the true criminal speaker because such rewards represent an "advantage" gained by the criminal and thereby an injustice inflicted upon victims. Through profiting, either emotionally or financially, from speech about their crimes, criminals continue to exploit their victims and flaunt the punishment imposed upon them by society.

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[154] For example, while the *Simon & Schuster* decision made it more difficult for lawmakers to target only speech profits, monetary profits clearly could be taken under a general restitution order covering all income of the criminal. See discussion of Sudafed tampering case, *supra* note 91.

[155] Simon & Schuster, Inc. v. New York State Victims Crime Bd., 502 U.S. 105, 119-120 (1991).

[156] See *supra* note 57, for a discussion of New York's new statute, and Smith, *supra* note 58, on California's new statute.

[157] New York recently enacted the death penalty. *Cranking Up the Killing Machine*, WASH. POST, Feb. 26, 1995, at C1 (reporting that New York has embraced the death penalty).

[158] *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.")

Having located a previously undiscovered clue to the conflict in the story of the inspiration for the Son of Sam statute, the detectives now turn back to the other suspect, the First Amendment. There, by holding up true criminal speech evidence against other First Amendment crime scenes, they find telltale similarities that move the investigation forward.

IV. The Interplay of the Motivational Inquiry with Related First Amendment Doctrines

Relating true criminal speech to various First Amendment doctrines serves the same purpose as the homicide detectives' brainstorming of possible methods used by a murderer. Even far-fetched possibilities may shed light on the crime.

A. Audience Reaction Writ Large: The Analogy to Obscenity

Under current law, the exploitation of adult victims by true criminal speech and emotional or financial profit cannot stand as a separate crime in itself. Courts view the reaction of crime victims to true criminal speech as a mere emotional response by members of the audience.[159] Still, even this disfavored approach leads in a promising direction for the homicide detectives. While the content test of First Amendment jurisprudence disallows audience response as a justification for regulation,[160] the strong emotional responses evoked from the audience do produce a clue in another area of First Amendment jurisprudence.

Negative audience reaction cannot justify government regulation.[161] However, negative feelings about the value of speech, if deeply felt and widely held in the society, can serve to place speech into one of "low value" categories established by the Court.[162] Even critics of the

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[159] *Simon & Schuster*, 502 U.S. at 118.

[160] *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (invalidating flag desecration statute). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

[161] *See* United States v. Eichman, 496 U.S. 310, 318-19 (1990); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988).

[162] *See* Chaplinsky v. Hew Hampshire, 315 U.S. 568, 571 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any

Son of Sam laws describe the injustice against victims as "appall[ing]."[163] Other observers have used a more telling word: "obscene."[164] Describing the situation as "obscene" may result from a certain carelessness with language. For the detectives picking through the physical evidence, however, even this one word suggests an area of First Amendment jurisprudence where the Court has lowered protections for speech by excluding certain speech from the protected category.[165]

The Court has historically based its obscenity decisions on the idea that certain speech lacks intrinsic value.[166] Defining a test for this "low" value, obscene speech has led the Court on perhaps its merriest chase in history.[167] While the current *Miller* test will undoubtedly not end the Court's struggle with the issue, its language demonstrates the government's constitutionally viable power to regulate the content of speech because that speech offends deeply and widely held beliefs.[168]

Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

[163] *See, e.g.* Epps, *supra* note 17, at 522.

[164] "It is as tragic as it is obscene that Miss Power intends to profit by the death of Officer Schroeder," said an attorney for the slain officer's family. Tom Coakley, *Power May Appeal Profit Prohibition; But Only for Clarification, Lawyers Say*, BOSTON GLOBE, Oct. 9, 1993, at 16.

[165] *See* Miller v. California, 413 U.S. 15 (1973) ("Obscene material is not protected by the First Amendment.") (citing Roth v. United States, 354 U.S. 476 (1957)).

[166] *Id.*

[167] The effort to define obscenity has "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-05 (1968) (separate opinion of Harlan, J.). The tests have:

moved from a view in which the obscene was unprotected *because* utterly worthless (*Roth*), to an approach in which the obscene was unprotected *if* utterly worthless (*Memoirs*), to a conclusion in which obscenity was unprotected even if not "utterly" without worth (*Miller*).

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 909 (2d ed. 1988).

[168] Here is the *Miller* test:

The basic guidelines for the trier of fact must be: (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the "prurient interest in sex"; (b) whether the work depicts or describes, in a "patently offensive way," sexual conduct spe-

Detectives brainstorming motive and modus operandi could try to formulate a *Miller* test for true criminal speech, not for use in the courtroom, but as a way of stirring up the theories about the case. The first of the three *Miller* prongs focuses the detectives on the audience's interest in the speech. The average person, applying contemporary community standards, could find that reenactments and descriptions of horrific criminal acts by unrepentant criminals appeal to only the most "morbid" of interests.[169] Deeming the interest unhealthy, the test serves to protect the audience from itself.

Finding contemporary community standards stymies the detectives, who stand confronted with a deep ambivalence in American society. "America is obsessed with murder. Our popular culture is drenched in blood."[170] Americans both loathe and love speech about crime.[171] Much of the distaste for speech about crime and violence stems from the perceived unhealthy interests it encourages in its audience.[172] While the subject may disgust us, it also pulls us closer.[173] Television shows and publishers have reaped huge profits off such speech, and public outcry over violence on television and other sources that play to this unhealthy interest has not slowed the industry down.[174] The detectives seek the reason for this ambivalence within society.[175]

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cifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks "serious literary, artistic, political or scientific value."

413 U.S. at 24 (citation omitted).

[169] One commentator has described the public's seemingly insatiable interest in crime as "morbid." *See* FRANKS, *supra* note 17, at 595.

[170] Peter Carlson, *The American Way of Murder*, WASH. POST, June 19, 1994, at W10.

[171] *See, e.g.*, Alex Pham, *Ringing Bookstore Cash Registers Show Obsession of Americans With Crime*, ORANGE COUNTY REGISTER, Mar. 26, 1995, at A09.

[172] "We are basically saying the controversy is over . . . . There is clearly a relationship between media violence and violence in society." Dr. Victor Strasburger, Chief of the American Academy of Pediatric's section on adolescents, quoted in Brenda C. Coleman, *Pediatricians Urge Cuts in TV Violence*, FRESNO BEE, June 9, 1995, at A8.

[173] *See* Soderberg, *supra* note 17, at 629, 630 nn.4, 5.

[174] *See* Elizabeth Jenson and Ellen Graham, *Stamping Out TV Violence: A Losing Fight*, WALL ST. J., Oct. 26, 1993, at B1, B8.

[175] A recent study found a puzzling division between how people viewed sex and violence. *See* Alison Bass, *Film Sex OK, Violence is Not, Surveys Find*, BOSTON GLOBE, Aug. 30, 1993, at 25. In surveys, many people responded negatively to violence, but speculated that their neighbors would not respond similarly. When asked about sex, they did not respond negatively themselves, but speculated that their neighbors would. *Id.*

Certainly the ambivalence is nothing new.[176] To the extent that society reacts in this ambivalent way towards crime, it shares deep feelings of ambivalence with David Berkowitz.[177]

In fact, society had this same ambivalent reaction to Berkowitz himself. While the public denounced and dreaded his crimes, it also stood rivetted to his story, fascinated by the killer.[178] "Thus, some people came to identify with 'Son of Sam.' Some secretly admired him, even came to root for him . . . ."[179]

This kind of identification with the criminal lies at the core of society's ambivalence about speech on crime. After a murder, neighbors and coworkers comment on the unremarkable personality of the killer so often that it now seems cliched.[180] His normal nature makes us

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[176] A New York anchorman stated: "[The coverage of the 'Son of Sam'] was not disproportionate to the human reaction to tragedy . . . From Shakespeare through history, it's always been the gory stories that have fascinated people most." Alpern, *supra* note 3, at 77.

[177] Abrahamsen describes Berkowitz as existing "in two different worlds simultaneously," one imagined, the other real. ABRAHAMSEN, *supra* note 2, at 69. This ambivalence, which for Berkowitz was created by having two sets of parents, adopted and natural, "provided the paradigm for the ambivalence that pervaded so much of his life." *Id.* at 70.

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> We were fascinated. Fascinated with the demons and fascinated with the killer's mystery. Our own hostile, frustrated, and aggressive feelings, hidden or dormant, are often mobilized and activated by any violent act, be it murder or execution. Through conscious or unconscious feelings we participate; without really knowing it, we become, in a strange way, partners to the crime.

Id. at 209.

[179] *Id.* Certainly, some others profited from this interest. In New York, the tabloid *Daily News* sold 2.2 million copies, 350,000 more than usual, and the *New York Post* topped 1 million - its biggest sale since Robert Kennedy was shot. Even the *New York Times*, which prided itself on its staid coverage, let its presses run an additional hour and a half on the morning after Berkowitz was arrested - and sold 50,000 extra copies. *See* Alpern, *supra* note 3, at 77.

[180] One newspaper described a recent example of a quiet accused killer, Timothy McVeigh:

> His few friends and many casual acquaintances say he doesn't drink, smoke or take drugs. He doesn't curse or chase women. He is frugal and keeps his room neat and orderly. He prefers listening to talking.

Scott Parks, Victoria Loe, *McVeigh Fits Pattern of Notorious Killers, Expert Says. Ex-agent Sees a "Dangerous" Profile Emerge in Bomb Suspect's History*, DALLAS MORNING NEWS, July 9, 1995, at 1A. McVeigh, the accused bomber of the Federal Building in Oklahoma City, exhibits the shy, quiet, controlled exterior of the guy next door or, alternatively, the paranoid psychopath. *Id.*

shake our heads in disbelief. How could we have missed it? More importantly, what dark ideas, struggles and tensions lie within those close to us or, even, within us? Our own problems, fears and degrees of alienation from society may resonate with the extreme doses of similar emotions that overwhelm murderers.[181] When our identification draws us in, we then must differentiate ourselves from the criminal or risk blurring the lines of good and evil we have drawn in society and in our own minds.[182] So, we focus on the differences and take comfort in every peculiarity we can find. We reassure ourselves that our interest in the stories of criminals is a form of escapist entertainment, regardless of how close to home a story hits.[183] Still, no matter how cavalierly we come to view the stories, the risk of identification remains, both seductive and repulsive.[184]

True criminal speech exists as a subset of these larger concerns about crime and violence. The outrage over violence and media exploitation has coalesced at certain points in the form of legislation. One of these points is true criminal speech. Stories and films on crime and violence all produce the fear of identification and the escapist response. The speech only heightens these responses when the story is true, and even more when, in some sense, the criminal himself speaks to us. In this regard, true criminal speech stands at the core of the concerns about violent speech. Certain speech may be more violent, and other speech is true, but only true criminal speech has the potential of being violent, true, and coming out of the mouth of the murderer. If we fear identifying with the murderer, we must fear listening to his voice. Instead, we substitute taking his profits for closing his mouth. Society's

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[181] The phenomenon of women who fall in love with murderers provides a strange twist on this identification. Jonathan Confino, *Mass Murder's Fatal Attraction*, SUNDAY TELEGRAPH, June 23, 1991, at 12.

[182] *Newsweek* faced criticism for its decision to put Berkowitz on its cover. Its response noted that at least one psychologist feared the "respectability and recognition" implied by such treatment. *See* Alpern, *supra* note 3, at 77.

[183] Escapism presents risks of its own. While no study has conclusively demonstrated the theory, many psychologists have argued that prolonged exposure to violent images desensitizes the audience. *See* Starr, *supra* note 141, at 100. *See also In re* Johnsen, 430 N.Y.S.2d 904, 906 (N.Y. Sup. Ct. 1979) (noting that witnessing a criminal's recitation of his crime "becomes an acceptable substitute for live performances in the Roman arena . . . .")

[184] The author acknowledges that the posture he takes with this article puts him in a similar position vis-a-vis the conflict between Son of Sam statutes and the First Amendment. Many persons who believe deeply in the freedoms protected by the First Amendment may find themselves feeling ambivalent about this issue.

focus on profit by the criminal sets up the true criminal category as a symbolic receptacle for fears that may apply well to the broader subjects of true crime or generally violent speech.

Continuing the search for community standards, the detectives hope to find consensus where children are concerned. When an adult society fears its response to speech, it will spotlight the response of the children. Many of the efforts to protect society from its unhealthy interest in true criminal speech focus on protecting children.[185] For example, Nassau County, New York banned the sale of criminal trading cards to minors.[186] The preamble to the law declared that the depiction of "heinous crimes and criminals" contributed to juvenile crime, impaired "ethical and moral" development of children and represented "a clear and present danger to the citizens of Nassau County."[187] While short on First Amendment legal analysis, the preamble is long on the fear that any kind of homage to criminals evokes. The trading card situation also demonstrates public ambivalence: the cards sell very well.[188]

Looking for community standards protecting children, the detectives find an extension of obsenity reasoning into the non-obsence. The Court has expanded the obscenity concept and upheld regulation of non-obscene speech on the airwaves in *Federal Communications Comm'n v. Pacifica Foundation*.[189] The Court reasoned not only that children should be protected, but also that they constituted a kind of captive audience to radio broadcasts.[190] Turning the radio off did not prevent the harm to children because they might hear indecent words before a parent had time to act.[191] Crime victims, while not exclusively children,

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[185] *See* Elizabeth Jenson and Ellen Graham, *Stamping Out TV Violence: A Losing Fight*, WALL ST. J., Oct. 26, 1993, at B1, B8.

[186] Josh Barbanel, *Nassau County Limits Sale of Crime Trading Cards*, N.Y. TIMES, June 15, 1992, at B4. Eclipse Enterprises of Forestville, California, for example, publishes a "True Crime" series of cards featuring a drawing of the subjects, who range from law officers to gangsters to mass murderers and serial killers. The cards also provide a brief biography of the subject. *Id.*

[187] *Id.*

[188] *See id.*

[189] 438 U.S. 726 (1978).

[190] *See id.* at 749-50.

[191] *See id.* at 748-49 (focusing on "unique aspects" of broadcast media, i.e., intrusiveness into the home). Commentators have criticized this aspect of the decision because the radio station issued warnings before the speech, targets an adult audience, and played the words at a time when most children should have been in school. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 937 (2d ed. 1988).

may deserve protection because of the harm they have suffered. Moreover, victims constitute a kind of "captive audience" in that their involvement in the crime may well prevent them from simply "turning off" speech about the crime. While opponents can minimize these considerations as protecting victim "sensibilities," they relate to issues similar to the protection of children's "sensibilities."

Focusing on the sensibilities of certain members of society, however, reduces the rest of the audience to their limitations. In dissent in *Pacifica*, Justice Brennan criticized the majority for reducing "the adult population [to] reading only what is fit for children . . . ."[192] Regulation of true criminal speech would similarly reduce the public to reading only what is fit for crime victims.

Pacifica notwithstanding, the trading card statute's hyperbolic use of the "clear and present danger" language[193] demonstrates the difficulty of regulating speech that the Court has not already firmly established in a low value category.[194] While the Court may allow regulation of obscenity and even indecent speech based on some notion of protecting society, it is the Court's determination that the speech lacks value that makes this regulation possible.[195]

The detectives discover that the crime scenes of violent speech and obscenity reveal a "low value" category into which, given an expansion of the "low value" concept in *Pacifica*, some true criminal speech might fall.[196] Moving forward, the impact on children highlighted in *Pacifica*

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[192] *Pacifica*, 438 U.S. at 769 (Brennan, J., dissenting).

[193] Where a regulation concerns "core" First Amendment speech, any protection of society can only be justified when the speech intends and is likely to produce imminent lawless action. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). Notwithstanding widespread theories about imitative violence and the numbing effect of prolonged exposure to violent images, true criminal speech cannot meet this requirement.

[194] The Court recognized this interest in *Pacifica*, where it upheld F.C.C. regulation of offensive but not obscene speech on the radio because of the possible presence of children in the listening audience. However, the *Pacifica* case drew much of its impetus from the categorization of obscenity as "low value." Justice Stevens, writing for the plurality, stated that indecent speech lies at the "periphery of First Amendment concern." *Id.* at 743. The fact that obscenity falls outside First Amendment concern pulls indecent speech to the periphery. True criminal speech finds no such millstone.

[195] This question of "low value" brings up the third prong of obscenity's *Miller* test: "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Miller*, 413 U.S. at 24.

[196] While this expansion might seem unlikely, the detectives eventually follow the blood trail leaving the *Simon & Schuster* crime scene and discover that this implicit expansion of the low value concept caused the injury to the First Amendment. *See infra* notes 260-271 and accompanying discussion.

leads the detectives to the only circumstance where the Court has allowed sweeping regulation of speech not placed in an explicit low value category: child pornography.

B. Regulating Victim Exploitation: the Analogy to Child Pornography

In the area of child pornography, the speech itself constitutes a permanent record of the simultaneous exploitation of a victim group, and the Supreme Court has upheld a legislative focus on a wrong inherent in the speech. In *New York v. Ferber*,[197] the Court upheld a statute criminalizing the production or sale of any material depicting a "sexual performance" by a child under the age of sixteen.[198] The court began by excepting child pornography from the *Miller* test.[199] Child pornography is not always obscene.[200] The Court found that the use of children as subjects in pornography harms the physical and mental health of the child.[201] In addition, the Court found that circulation of the materials exacerbates the harm and must be foreclosed in order to control the production of the material.[202] The Court also found that the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is "exceedingly modest, if not *de minimus*."[203] The Court concluded that child pornography is an area of expression falling outside of the speech protected by the First Amendment.[204]

The detectives try out a parallel scenario. Emotional profit for criminals from true criminal speech and the resulting pain of victims provide strong motivation for regulating true criminal speech. While victims may feel pain from any speech about crimes from which they suffered, the potential that an unrepentant criminal may hold forth on the subject salts the wounds further. The detectives ask whether this pain is so severe that it could approach the physical exploitation of children in child pornography. They hypothesize that lawmakers could

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[197] 458 U.S. 747 (1982).

[198] The Court acted unanimously as to the judgment. *Id.*

[199] *Id.* at 756.

[200] *Id.* at 761.

[201] *Id.* at 758.

[202] *See id.* at 759.

[203] *Id.* at 762.

[204] *See id.*; TRIBE, *supra* note 167, at 914. "For the first time in four decades, all nine Justices agreed that a particular kind of communicative material enjoys no first amendment protection whatsoever."

attempt to criminalize the speech itself based upon its effects on victims.

This initially leads to a dead end. The sexual exploitation of children differs in three ways from the exploitation of crime victims by speech. First, victims do not physically participate (without their consent) in the production of true criminal speech. Likewise, child pornography regulation only covers film; written descriptions are excluded. Second, true criminal speech does not always center on sexual subjects. Third, not all "victims" of true criminal speech are children.

The fact that victims do not physically participate in the creation of true criminal speech most strongly distinguishes true criminal exploitation from child pornography.[205] The Court felt little need to elaborate in *Ferber* on the ways in which child pornography harms participating children.[206] A discussion of how true criminal speech harms victims after the crime has happened would require much more elaboration and more attenuated visions of causation. Putting aside the varying emotional reaction of the individual crime victim to the speech, the "advantage" of emotional and financial profit gained by the criminal over the victim also pales in comparison to the harm conveyed by the image of children performing sexual acts on camera. The harm of the emotional profit targets a particular individual less clearly than the harm to children.

Like the circulation of child pornography, however, the circulation of true criminal stories expands the harm. It exacerbates the pain of victims, increases the emotional or financial profit of the criminal, and promotes a permanent record of the criminal's flaunting of his punishment and unrepentant revelling in his crime.

In addition, like the children, victims cannot be seen as consenting to the "harm" done to them. Children cannot give consent to child pornography.[207] Victims usually do not consent to be the "subject" of

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[205] The Court in *Ferber* clearly would not allow suppression of descriptions of sexual acts by children. In fact, the Court stated that, if a visual depiction was necessary for an artistic or other purpose, "a person over the statutory age who looks younger could be utilized." *Ferber*, 458 U.S. at 763.

[206] It is evident beyond the need for elaboration that a state's interest in "safeguarding the physical well being of a minor" is "compelling." "[The] use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Id.* at 758.

[207] This assumption has been used to distinguish the protection of child participants in pornography from the protection of adult female participants in pornography. *See* Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 473 (1984). In turn, others have strongly questioned the proposition that women consent to participate in pornography. *See infra* note 215.

the crime at which they were physically present, or of the story later. Still, the crime at which the victim was physically present (or emotionally involved, if a survivor) has presumably been criminalized and punished already. Unlike child pornography, the true criminal speech does not constitute a record of an actual, independent crime, unless the true criminal speech itself is criminalized. Only by criminalizing the speech itself, either because of its emotional impact on victims or because of its provision of emotional or financial profit, could a statute approach the child pornography situation. The psychic "crime" of victim exploitation does not approach in magnitude the tangible, physical crime of exploiting children for child pornography. It would certainly not survive content-based scrutiny.

The analogy to child pornography founders on the distinction between the underlying "crimes" inherent in the production of the speech at issue. In *Ferber*, the Court found that the government had a surpassing interest in preventing the use of children in pornography.[208] A parallel finding regarding true criminal speech would necessitate a holding that the government had a compelling interest in suppressing the speech itself. While Justice O'Connor characterized the government's interest in preventing profits by criminals as "compelling" in *Simon & Schuster*, her characterization did not imply that the interest justified making the underlying speech a crime.[209]

In addition, the magnitude of the government interest in preventing the exploitation of children formed only one half of the balance weighed by the Court in *Ferber*. The Court also found that the value of child pornography as speech was "exceedingly modest, if not de minimus."[210] The Court then balanced this low value against the government interest, and found that "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required . . . ."[211] Thus, lawmakers may regulate a category of speech that does not fall under the Court's definition of obscenity because of the compelling government interest and the "low value" of the speech.

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[208] 458 U.S. at 757-58.

[209] In fact, the Court held that the Son of Sam law was not narrowly tailored to the anti-profit interest because the board could not justify the exclusive focus on profits from *speech*, as opposed to any other profit from crime. *See* 502 U.S. at 119.

[210] *Ferber*, 458 U.S. at 762.

[211] *Id.* at 763-64; See *infra* part V, for a discussion of the inherent value of true criminal speech.

The detectives discover that the pain to crime victims fails to approach the level of direct, physical harm to nonconsenting innocents found in child pornography. They also see, however, that an extreme and immediate harm created by the speech can justify regulation of its production, marketing and even possession.[212] They then ask whether the failure of the harm of true criminal speech to justify regulation correlates to a similar failure of regulation of a related form of speech: pornography.

C. The "Mental Orgasm"[213]: True Criminal Speech as the Ultimate Pornography

The detectives immediately see that pornography parallels true criminal speech on two levels, one literal, the other conceptual. Literally, the grisly connection between sex and serial murder links certain true criminal stories directly to pornography. Almost exclusively male and often tortured by sexual inadequacy, many serial killers derive sexual pleasure from murder:

> The selection and stalking of the victim are, in essence, foreplay. The killing is the orgasm. "The idea is penetration, but they are only able to put a knife or bullet into a woman."[214]

Conceptually, pornography resembles true criminal speech in several ways. First, the issues of consent and physical participation by victims present themselves through pornography just as they do through child pornography and true criminal speech. In the context of pornography, the issue of consent fires particularly heated debate.[215] Second, both

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[212] Osborne v. Ohio, 495 U.S. 103 (1990) (upholding ban on possession of child pornography).

[213] Berkowitz describes his mental state after killing his first young female victim: "[t]hat built-up tension dissipated temporarily. While I didn't have a physical, sexual orgasm, I certainly had a mental one." ABRAHAMSEN, *supra* note 2, at 100 (quoting Berkowitz).

[214] Starr, *supra* note 141, at 100 (quoting psychologist David Abrahamsen).

[215] *See, e.g.*, Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 473 (1984). Catherine MacKinnon has used the example of Linda Marchiano, aka "Linda Lovelace," to demonstrate that consent of women to pornography is questionable and certainly cannot be inferred from the pictures on screen. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 10 (1987).

> "Almost everything that needs to be said about pornography can be said about Linda Marchiano, because everything people think about it, they think about her. As recounted in her book *Ordeal*, Linda Marchiano was coerced by abduction, systematic beatings, surveillance, and torture into the persona of 'Linda Lovelace,' the centerpiece of the pornographic film *Deep Throat*."

Id.

pornography and true criminal speech concern images and language that arguably inspire individuals to commit violent acts.[216] Finally, the motives for regulation of both types of speech converge on content and incur stringent First Amendment scrutiny.

Assuming non-consent of the participants, pornography and many true criminal stories become the rough equivalent of "snuff" films.[217] Snuff portrays the death of the woman as the ultimate climax of the sex act.[218] The victim in an actual snuff film could not possibly have consented to her death, just as a minor in a child porn film or a crime victim in true criminal speech could not have consented to their participation. If lawmakers located true snuff films, they could unquestionably regulate them as they did child pornography in *Ferber*.[219]

Here the detectives pause. Having looked at child pornography and glanced at pornography and snuff films, the detectives realize that in the elements of these analogies lies a key to the devaluation of true criminal speech. The clue appears when the detectives draw a continuum of increasing entanglement between crime and expression. At the extreme end of the continuum, child pornography presents an example of crime closely related to speech. Lawmakers may prohibit and otherwise penalize speech having an intimate connection with an under-

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[216] On the effects of television violence, *see, e.g.* Elizabeth Jenson and Ellen Graham, *Stamping Out TV Violence: A Losing Fight*, WALL ST. J., Oct. 26, 1993, at B1, B8; Juliet L. Dee, *From "Pure Speech" to Dial-A-Porn: Negligence, First Amendment Law and the Hierarchy of Protected Speech*," COMM. AND THE LAW, Dec. 1991, at 27, 30-32 (describing violent acts seemingly caused by speech).

On the violent results of pornography, *see* Catherine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 52-54 (1985) (arguing that exposure to pornography increases male aggressiveness). *See also* Sandra S. Baron, Bernard W. Bell & Robin Bierstedt, *Pornography Victims Compensation Act*, 42 REC. OF ASS'N OF BAR OF NEW YORK 326 (1992); Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 597-601 (summarizing studies); Attorney General's Comm'n on Pornography, U.S. Dep't of Justice, Final Report 852-69.

[217] A federal court meeted out a 30-year sentence to a man who plotted to kidnap, rape and murder a child, videotape the acts and then sell the film. *Court Upholds Sentence in "Snuff" Film Case*, LEGAL INTELLIGENCER, Sept. 4, 1992, at 6.

[218] Alison Bass, *Film Sex OK, Violence is Not, Surveys Find*, *supra* note 175, at 25 ("The only films that are banned outright are those that involve sexually explicit child pornography and the so-called snuff films, in which women reportedly have been killed during filming.")

[219] *See New York v. Ferber*, 458 U.S. 747, 762 (1982). The speech has minimal value, constitutes the simultaneous criminal injury of a non-consenting victim group, and, when marketed, encourages repetition.

lying crime. The Supreme Court upholds this regulation in the area of child pornography by focusing on the harm to the nonconsenting participants and the low value of the speech.[220] Assuredly, lawmakers can also prohibit snuff films. In these cases, the crime and the expression happen simultaneously, and, due to the market for the films, the speech inspires the crime.

Where crime and speech connect, the First Amendment may give way. If David Berkowitz had videotaped his murders and his modus operandi demonstrated that he killed in order to have his videotapes aired, presumably the government could prevent the display of those tapes in order to prevent more murders.[221] As incredible as such scenarios might seem, killers and terrorists often seek not only publicity but actual control over the publicity.[222]

Indeed, wrongdoers may also find themselves exploited by the media. After the murder of one participant on a television talk show by another participant,[223] detectives posit a hypothetical scenario. If producers of a show conspired to have a crime committed on tape, lawmakers could certainly argue a compelling interest in banning such expression. Given current interest in snuff and "faces of death" films,[224] they would have no difficulty demonstrating a market similar to that which exists for

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[220] See discussion of *Ferber*, *supra* notes 197-211.

[221] The Supreme Court considers lifting its presumptive ban on prior restraint of expression where the evil resulting from the reportage is great, certain and cannot be militated by less intrusive measures. New York Times Co. v. United States, 403 U.S. 713 (1971). If a killer's modus operandi clearly signalled that he killed to create videotapes to be aired on television, prior restraint of the airing of the videotapes could present such a circumstance.

[222] "The phenomenon of blackmailing the news media has grown with the growing importance of the media as the way for terrorists to achieve ego satisfaction." Schorr, *supra* note 133, at 19. The Unabomber recently succeeded in his demand to have a 35,000 word manuscript published in the *Washington Post* in return for sparing lives. Patrick M. Reilly & Joann S. Lublin, *Should Businesses Negotiate with Terrorists?*, WALL ST. J., Sept. 20, 1995, at B1. Schorr notes this demand, as well as similar media extortion by the German Bader-Meinhof gang in 1975, Croatian Nationalists in 1976, and the Son of Sam in 1977. Schorr, *supra* note 133, at 19.

[223] *See* Megan Garvey, *The Aftershock of Shock TV; Two Ordinary Lives Were Shattered in a Bizarre Triangle*, WASH. POST, March 25, 1995, at D1. Three days after a taping of "The Jenny Jones Show," where producers surprised Jonathan Schmitz with his "secret admirer," Scott Amedure, Schmitz killed Amedure with a shotgun. *Id.* The event provoked outrage over hatred of homosexuals and over the role of the media. *Id.* The episode never aired.

[224] These films purport to show persons dying violent deaths.

child pornography and justifies requiring the stemming of production, distribution, and even possession of the expression.[225]

As the connection between the motivation for the crime and the speech becomes less clear, however, the power of the government to ban the speech because of the underlying crime becomes more suspect. For the vast majority of criminals, subsequent storytelling can only be an afterthought. At some point in the continuum, crucial factors present in the case of child pornography disappear. The Supreme Court made this distinction clear when it upheld the state prohibition on possession and viewing of child pornography in the home.[226] The Court distinguished *Osborne v. Ohio* from the invalidated ban on possession of obscene material,[227] stating that the State does not rely upon a paternalistic interest in regulating viewers when it bans child pornography. Rather, the State seeks to destroy the market for the exploitation of children used in child pornography.

When expression comes after the crime, it becomes more difficult to demonstrate a compelling interest in regulating the speech. The interest in regulating speech shifts from protection of the victim to protection of the viewer. When expression does not include the physical involvement of victims, it becomes even more difficult to demonstrate the compelling interest. Simulations of crimes occur after the crime and do not physically harm the victims. While the speech may inspire later crimes, this is difficult to prove. The argument that true criminal or pornographic speech inspire crimes lacks the forceful image of the exploitation of children on camera.

The relationship between violence and true criminal or pornographic speech has not yet become clear enough to justify content regulation. For the vast majority of true criminal and pornographic expression,[228] physical harm can result only from the idea conveyed by the speech. Meanwhile, the causal link between pornographic or violent speech and actual acts of violence can only be described as the subject of an intense and inconclusive debate.[229] The idea conveyed by the speech (and not the crime inherent in the speech) motivates the regulation of

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[225] See *supra* notes 197-211 and accompanying text for discussion of *Ferber*.

[226] Osborne v. Ohio, 495 U.S. 103 (1990).

[227] Stanley v. Georgia, 394 U.S. 557 (1969).

[228] See *supra* note 215, listing Linda Lovelace as an exception.

[229] For analysis of studies that link pornography with violence or oppression against women, see Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737.

pornography and true criminal speech. As the detectives have found, the motivation to suppress true criminal speech springs from the "advantage" gained by the unrepentant speaker at the expense of the victims. This focus attaches to speech that appears in both film and print.[230]

This causal link between pornography and violence reaches a kind of climax with true criminal speech, where pornography may help inspire violence which inspires (or is further inspired by) true criminal speech.[231] However, in order to justify the prohibition of speech because it incites violence, the speech must intend and be likely to produce imminent lawless action.[232] Neither pornography nor true criminal speech can easily satisfy this requirement.

Like regulation of pornography, regulation of true criminal speech faces difficulties because it disfavors a certain content and risks discrimination against a certain point of view, no matter how egregious the harm to be prevented. Pornography regulation lost a battle with the First Amendment in *American Booksellers Association, Inc. v. Hudnut*,[233] a Seventh Circuit decision summarily affirmed by the Supreme Court.[234] Even while conceding that pornography did not convey a cognitive idea, Judge Easterbrook found that pornography regulation could not be shielded by pornography's "low value" because pornography was not obscene. It could not be regulated merely because it was offensive.[235] More importantly, the court reasoned that, even if pornography did qualify as "low value" speech, restricting only the view of women prescribed by the statute impermissibly carved out a certain viewpoint for discrimination,[236] much as the Supreme Court in *R.A.V. v. City of St. Paul*,[237] would later prohibit the restriction of a certain viewpoint in the low value category of "fighting words."[238]

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[230] Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 548 ("If the government is banning the pornographic picture because viewing such pictures leads people to form the idea of subjugating women . . . the government has an equal interest in banning the pamphlet.").

[231] In more peaceful moments, some serial killers find an outlet for their vivid sexual fantasies in pornography. *See* Starr, *supra* note 141, at 100.

[232] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[233] 771 F.2d 323 (7th Cir. 1985).

[234] Hudnut v. American Booksellers Ass'n, Inc., 475 U.S. 1001 (1986).

[235] *See* 771 F.2d at 329 ("If pornography is what pornography does . . . so is other speech [protected by the Supreme Court]").

[236] *See id.* at 328.

[237] 505 u.s. 377 (1992).

[238] *Id.* See note 41, *supra* for a discussion of *R.A.V.*

Pornography regulation discriminates against a viewpoint promoting the subjugation of women, while regulation of true criminal speech singles out speech above other forms of criminal profit.[239] If lawmakers based regulations on emotional profit or lack of repentance by the criminal, they could run afoul of the same viewpoint problem faced in *Hudnut* and *R.A.V.*[240] However, they would simultaneously sharpen their focus on the emotional "advantage" gained by the criminal. Like the regulation of pornography, the regulation of true criminal speech thus suffers from a dilemma: the more clearly and honestly the regulations convey their intent, the more likely they are to fail the First Amendment test.

Regulation of pornography and regulation of true criminal speech share another obstacle: neither type of expression fits easily within an established low value category. After *Ferber*, however, the combination of crime-entwined-with-speech and low-value-but-not-obscene speech presents the possibility that some mix of crime and value may result in a victory for those who seek to regulate the speech. In order to assess the chances of such a victory in the context of true criminal speech, the detectives must next look to its value. In examining this subject, the they unearth the demons that drive the First Amendment.

V. Assessing the "Value" of True Criminal Speech: Applying the Purposes of the First Amendment

The proposition that the "value" of speech depends on underlying purposes of the First Amendment lies implicit in the Court's setting of values.[241] Assessing the value of speech in terms of "purposes"

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[239] While the regulation of true criminal speech has not yet focused on viewpoint, the Court in *Simon & Schuster* implicitly favored certain viewpoints in its list of classic books that would fall under New York's overbroad statute. 502 U.S. at 121. In addition, much of the discussion in this article has posited the worst case scenario for true criminal speech: the unrepentant criminal revelling in his crimes. True criminal speech may include other viewpoints, including repentance, but this distinction does not find its way into any Son of Sam statute.

[240] See *infra* part V.B., on judging the remorse demonstrated through true criminal speech.

[241] As Alexander Meikeljohn argued, the First Amendment does not prohibit the abridgement of speech; it prohibits the abridgment of the freedom of speech. A. Meiklejohn, Free Speech and Its Relation to Self Government 19 (1948). "The First Amendment is not the guardian of unregulated talkativeness." *Id.* at 26. In each "low value" category, courts and commentators invoke the purposes of the First

proposed for the First Amendment risks turning the constitutional protection for free speech into a mere laundry list of ends to which the First Amendment serves as means.[242] This examination merely uses the purposes as a starting point for inquiry, however, and not as any implied restriction of the First Amendment.[243]

A. True Criminal Speech and the Marketplace of Ideas

Most principles invoked to justify First Amendment protections rest on the rhetoric of the "marketplace of ideas" and the related ideal of speech as essential to democratic self-government.[244] Stated broadly, these ideals insist that an unregulated marketplace of speech promotes the discovery of truth, especially the political truths necessary for participants in a democratic society.[245]

Amendment. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) (presuming obscenity to be "utterly without redeeming social importance" and therefore outside the protection of the First Amendment); John M. Finnis, *Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 241 (1967) ("The panderer [of obscenity] is participating in the marketplace of prurient interest . . . not the marketplace of ideas [the most venerable of First Amendment purposes].").

[242] *See* TRIBE, *supra* note 167, at 785. A chance always exists that by listing the values some speech will fall through the cracks.

[243] *See id.*; Ken Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 119-20 (1989) (arguing that "human beings dealing with practical problems not only do but should rely on a plurality of values.").

[244] While the idea that free expression leads to the discovery of truth can be found in Milton's *Areopagitica* and Mill's *On Liberty*, Justice Holmes' most famous dissent provides the quintessential statement of the marketplace principle:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution . . . .

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

Alexander Meiklejohn stands as the most recognized proponent of the theory of self-government. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[245] *See* TRIBE, *supra* note 167, at 786-87. Meiklejohn recognized that the political value of speech does not depend on its political content. He argued that education, philosophy and the arts also deserved protection as a step to political knowledge. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-257.

Taken at face value, the marketplace and self-governance ideals embrace areas of speech into which true criminal speech squarely falls. *Wise Guy* discussed corruption of police and public officials. Abrahamsen's book on the Son of Sam discussed the formulation of the insanity defense. Crime and criminals are essential issues in a democratic republic. Certainly, "the work[s], taken as a whole, [do not] lack[] serious literary, artistic, political or scientific value."[246] Whether their criminal subject matter lands them in the "core" of First Amendment protection is a more complicated question, given the reasoning of *Simon & Schuster.*[247]

Still, features of the present market tip off the detectives that perhaps the marketplace and self-governance ideals promise more than they deliver. The influence and control of the mass media[248] as the new, "free market" agent dealing in images rather than "ideas" has inspired a new vision of the state and of the First Amendment.[249] An aspect of this new vision focuses on the impact of sexual imagery on the "reasoned discourse" of the traditional marketplace ideal.[250] It questions the content of the ideas in the marketplace when sexual imagery has engulfed the market. It asks whether a marketplace of ideas can exist in an image driven world:

> Yet it is an uneasy state of affairs, for America both celebrates and condemns its love of the carnal. This janus-like view of erotic life animates our conceptions of free speech.[251]

In this quotation, "violent" could easily replace "carnal" and "erotic." Sex is not the only pervasive, seductive image that both attracts and repels us. Violence plays a similar role, and the two often merge in powerful combination. Like its pornographic counterpart, violent im-

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[246] Miller v. California, 413 U.S. 15, 24 (1973).

[247] *See infra* part VI, arguing that *Simon & Schuster* implicitly devalued *Wise Guy* by comparing it to political classics and then applying a watered down version of strict scrutiny.

[248] *See* Owen Fiss, *Why the State?* 100 HARV. L. REV. 781, 787-89 (1987) (arguing that the media market is itself a structure of constraint on speech).

[249] *See* Ronald K.L. Collins & David M. Skover, *The First Amendment in the Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990) (arguing that the tyranny of the entertainment culture has supplanted the governmental tyranny that has inspired much First Amendment thought).

[250] Ronald K.L. Collins & David M. Skover, *The Pornographic State*, 107 HARV. L. REV. 1374, 1377 (1994).

[251] *Id.* at 1374.

agery replaces ideas.[252] Simply stated, the paradigm of rational actors trading in cognitive thought for the benefit of a political democracy may have already been swamped by the imagery of violence and, indeed, the emotions of killers that both attract and repel the audience. The marketplace of ideas could slip into irrelevancy for the purpose of valuing speech.[253]

If the value of speech no longer depends on the cognitive nature of its content, the government could circle the wagons and allow regulation of all imagery or succumb to imagery and welcome the new regime.[254] Like the authors of the essay on the "Pornographic State," this article takes no position on the more desirable alternative. Regardless of the position taken, images and base emotions may play as important a role in our vision of speech as ideas always have until now. "Ambivalence remains. The old discourse is not yet dead. Still, as the vital signs of Madison's First Amendment weakon, they make way for life in the pornographic state," or the state of graphic violence.[255] When valuing true criminal speech, the possibility of violent imagery directed by the murderer calls into question the continuing validity of setting the value in the marketplace of ideas.

B. The Self-Realization of the Criminal

The traditional "self-realization" justification[256] takes on sinister qualities when applied to true criminal speech. It points to the contin-

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[252] As Collins and Skover write:

> Pornotopia emerges as the forces of self-gratification, mass consumerism, and advanced technology merge. The greater this synergy, the greater is the tendency toward a culture where self-gratification replaces self-realization, where the irrational consumes the rational, and where images dominate discourse.

Id. at 1375.

[253] "When the old utopian First Amendment becomes the new pornotopian First Amendment, James Madison's reasoned discourse bends to Robert Mapplethorpe's raw intercourse [or someone's violent recourse]." *Id.*

[254] Could Meiklejohn have imagined that his inclusion of the "arts" might mean martial arts? *See supra* note 245.

[255] Collins & Skover, *supra* note 250, at 1398.

[256] This principle states that speech can promote the self-realization of the speaker as a human or citizen. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (arguing that free speech promotes the realization of human character and potentialities); MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 20-30 (1984) (arguing that free speech enables the formation of life-affecting decisions).

gency of the value of true criminal speech on the viewpoint of the speaker. If the criminal speaker derives the kind of terrible emotional profit Berkowitz may have garnered from his self-promotion, the self-realization ideal appears in a deadly light. The emotional power of the image of Berkowitz cackling over his murders may swamp self-realization just as sexual and violent imagery have arguably swamped the marketplace of ideas.

Conversely, a criminal showing remorse may advance self realization. The focus of the Son of Sam statutes on monetary profit may provide an easily litmus test for remorse. This test would assume that if a criminal seeks profit, he does not demonstrate remorse. A remorseful but practical criminal author might question this supposition. He might find in prison that he wrote well, felt badly about his crime, and wanted a career after his release. This repentant author might desire monetary profit. In contrast, a David Berkowitz might not repent and might not want money. Berkowitz showed that a criminal may not seek money but may still gain a terrible "advantage" over his victims. Finally, a political prisoner might not care about money, might not regret his crime, and might also desire to speak. The detectives realize that valuing true criminal speech as self-realization leads to a quicksand of varying emotional responses by criminals to their crimes.

C. The Safety Valve

Having seen self-realization frozen in the cold hearts of unrepentant killers, the detectives now stumble upon the ironic reversal of another First Amendment purpose. In *Whitney v. California*, Justice Brandeis put the value of free speech in terms of a societal safety valve, stating that the discouragement of "thought, hope and imagination" has hazards, because "fear breeds repression . . . repression breads hate . . . hate menaces stable government [and] the path to safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . ."[257] According to this view, the ability to speak replaces the need to harm.

Where violent images replace thoughts and the public harks to criminals, however, the safety valve may turn into a blowtorch. For many criminals, the media protected by the First Amendment provide a motive and an opportunity for deadly gratification, not a salve for

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[257] 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

their problems.[258] Where money limits access to the media or the people feel that interests opposed to them control the media, those who desire attention fall back on violence.[259]

From these scenes of First Amendment purposes perverted by true criminal speech, the detectives conclude that the value of the speech defies traditional labels. Under current tests, it cannot lack all value, like obscenity, but its value remains murky. The detectives recognize this murkiness. It reminds them of the original crime scene. There, in a dim, dusty room lay the New York statute, struck down by a seemingly omnipotent First Amendment. But the detectives now believe that the statute had managed to inflict a wound, succeeding in this small victory because of the turbid setting created by the ambiguous value of true criminal speech. The detectives decide to do one last walk through the original crime scene, and they discover that their hunch is correct.

VI. *Simon & Schuster* and Ad Hoc Balancing

A. Simon & Schuster's Implicit, Marginal Low Value Category of "True Criminal" Literature

The *Simon & Schuster* decision implicitly devalued the true criminal speech at issue. The Court based its holding on overbreadth and thereby invited further statutory attempts, especially those which, like New York's and California's, seek to expand their coverage to all proceeds enhanced by crime.[260] The Court relied for its finding of overbreadth on the list of classic political works the statute hypothetically

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[258] *See* Schorr, *supra* note 133, at 19.

[259] *Id.* Ken Greenawalt described the perceptions of American life that could lead to violence when he explained: "Those who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek . . . radical changes . . . ." Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 672-73. Like many before and after him, David Berkowitz chafed at the fact that the world paid him no mind.

[260] See *supra* notes 57 and 97-101 and accompanying text for discussion of the specific examples of the New York and California statutes.

swept under its original coverage.[261] This argument derived its legal force from its suggestion that trivial descriptions of crime could lead to the attachment of profits from a book not merely about crime, written by someone who had not been convicted. According to the Court, these two provisions combined to make the statute overshoot the compelling interests; it "reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated."[262]

The deeper motivational force of the argument lay in the status of the books that the Son of Sam statute could have penalized. The "sobering bibliography" of "hundreds of works by American prisoners and ex-prisoners" including Emma Goldman and Martin Luther King, Jr. weighed heavily against upholding the statute.[263] The crimes described in these works may have been small, but the status of the books as political classics at the core of the speech protected by the First Amendment stood as their real importance to the decision. Significantly then, the Court applied a certain peculiar form of strict scrutiny to *Wise Guy*, the actual speech before it. Rather than identifying content discrimination and ending the inquiry at that, the Court found compelling government interests but insufficiently narrow tailoring to suit those interests.[264] If the books in question were political classics

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[261] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 121 (1991):

> Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experiences in jail; and even the *Confessions of Saint Augustine*, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring vineyard.

[262] *Id.* at 122.

[263] *Id.* at 121.

[264] Indeed, the court found the Son of Sam law so broadly written that it declined to address the Crime Victim Board's argument that the statute was content neutral under the "secondary effects" doctrine of Ward v. Rock Against Racism, 491 U.S. 781 (1989) and Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In those cases, the Court labelled statutes as content neutral where they were intended to serve purposes unrelated to content, despite their incidental effects upon some speakers but not others. *Simon & Schuster*, 502 U.S. at 121 n.** (citing *Ward* and *Renton*). In the same footnote, the Court indicated that the Son of Sam statute was so overbroad that the Court need not address Justice Kennedy's argument regarding the use of strict scrutiny. *Id.*

and did not present such a difficult presence in society, the finding of content-based regulation might have ended the inquiry. Instead, the court shifted to descriptions of classics to strike down a law motivated by deep emotions against criminals reaping rewards from their crimes.

In his concurring opinion, Justice Kennedy lamented the Court's use of narrow tailoring rather than a flat ban on content discrimination:

> The regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether the State can show that the statute "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[265]

Even Justice Kennedy suspected that this difference in strict scrutiny stemmed from an implicit "low[er] value" analysis.[266]

The Court's implicit devaluation sprung from the ambivalence created by *Wise Guy* and many other true criminal stories.[267] A book with political content but not a political classic, *Wise Guy* also presented the case of an unrepentant, unpunished, money-hungry criminal who continued to profit at his victims' expense. The Court responded with a test that looked like strict scrutiny but in fact implied a balancing of interests. The Court described as compelling the mild, broad versions of the statute's purposes — victim compensation and prevention of profit.[268] The Court recognized the interests in preventing the advantage to criminals;[269] it simply required a broader statement of the coverage to conform to the broad interests.

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[265] *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring) (citation omitted).

[266] Justice Kennedy understood the devaluation of the speech when he noted that it fit within no traditional "low value" category:

> Here a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent.

Id. He went on to outline the "low value" categories and to state:

> [T]he use of these traditional legal categories is preferable to the sort of ad hoc balancing that the Court must henceforth perform in every case if the analysis here used becomes our standard test.

Id. at 127.

[267] Even Justice Kennedy noted the connection to low value categories such as obscenity and pornography. *Id.* at 124.

[268] *See id.* at 118-19.

[269] *See id.*

In applying the specific form of strict scrutiny that it did, the Court also implicitly acknowledged that the dilemma created by the social cost of criminal profit and harm to victims involves principles of equality that resonate with equal protection. The test balancing a narrowly tailored approach to a compelling government interest against a constitutional imperative originated under the equal protection clause of the Fourteenth Amendment, not under the First Amendment. Justice Kennedy traced the importation of the test applied in *Simon & Schuster* from equal protection into the core content test of First Amendment jurisprudence:

> Thus was a principle of equal protection transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's power to regulate the content of speech.[270]

In this connection to equal protection, the detectives find the final clue.

They now know how the Son of Sam law wounded the First Amendment. They followed the blood trail out of the murky room and through warmer crime scenes like *Commonwealth v. Power*, where the Supreme Judicial Court of Massachusetts side-stepped *Simon & Schuster*, whittling it down to a modest and easily avoidable holding.[271] They examined the stories of Henry Hill and David Berkowitz, looking for the demons that drove the statutes. They journeyed to more distant locales, where the First Amendment had struggled with other regulation of speech. They examined the demons or purposes that drive the First Amendment, and they did their last walk through the old crime scene. Having come back to where they started, they discover a weakness that makes the First Amendment susceptible to future attacks. They conclude that this weakness signifies a different kind of First Amendment, more vulnerable perhaps, but more of a scrapper as well. They call it the "Son of *Simon & Schuster*."

B. Motive and Ad Hoc Balancing in the Age of "True Crime"

As the detectives found, implicit though marginal value judgments regarding the worth of speech occur because of the motivational pressures, the societal demons, involved in First Amendment cases. These

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[270] *Id.* at 125 (Kennedy, J., concurring) (citations omitted).

[271] *See supra* notes 60-90 and accompanying text.

value judgments may not alter the outcome of particular cases, but, as in *Simon & Schuster*, they may affect the Court's approach, the test applied, and the current of First Amendment jurisprudence. When courts disavow the relevance of motive and the nature of the speech before them to First Amendment inquiry and purport to rest their decisions on the effects on other speech, they divorce themselves from the particular facts of the situation. When a statute clearly discriminates on the basis of content, the application of equal protection's strict scrutiny and the undue reliance on overbreadth analysis undervalue the speech at issue.

Professor Tribe imports an equal protection analysis into First Amendment law for another purpose: to argue that even seemingly neutral regulation of speech should face strict scrutiny if it springs from impermissible motivations.[272] Tribe's point could become crucial to the next round of judicial review of new Son of Sam statutes. Those new statutes phrase the sources of profit broadly enough to appear content neutral, escaping strict scrutiny and falling under the intermediate scrutiny of United States v. O'Brien.[273] *O'Brien* requires a "substantial government" interest and a version of "narrow tailoring" that is looser than strict scrutiny.[274] Because the Court has already described the interests involved as "compelling," the success of well-worded new statutes seems assured, *unless* a motivational inquiry exposes the continuing desire to discriminate against speech under the guise of victim compensation and profit prevention.

This article's emphasis on the factual context of the speech points to the importance of the motivational inquiry for future *O'Brien* approaches. However, the article also demonstrates that courts should not forget motive even in the context of content-based regulation. Clear content regulation merits motivational inquiry in order to expose and understand any subtle effects on the courts' approach to the regulation. The inquiry may not make a difference in judicial outcomes, and its

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[272] TRIBE, *supra* note 167, at 825. Tribe cite language from Washington v. Davis, 426 U.S. 229, 244 n.11 (1976), where the Court upheld against an equal protection challenge a screening test for police recruits that had disproportionate impacts on minority applicants: "To the extent that [some of our cases suggest] a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary."

[273] 391 U.S. 367 (1968).

[274] *See* United States v. Albertini, 472 U.S. 675, 689 (1985) (regulation is narrowly tailored if it promotes a substantial government interest more effectively than no regulation).

effect on judicial formulation of tests will always remain an argument, not a fact. As an explanation for the actions of judges and legislatures, however, feelings about the particular speech at issue will always play a role in the result.

The motivational inquiry demonstrates that First Amendment jurisprudence may not always remain comfortably fixed on general evaluations of whole categories of speech. The detectives' inquiry into motive has started and ended with the specific facts of the specific cases, Hill and Berkowitz. The criminals' lack of remorse and their interest in emotional or financial profit, as well as their interaction with the media, have figured prominently in the analysis of the law as applied to their cases. The "value" of Hill's speech played an implicit role in its treatment by the Court.[275] As Justice Kennedy noted, the Court's formulation of the strict scrutiny it applied leads to the realm of "ad hoc balancing."[276] Only now do the detectives understand exactly what he meant.

Professor Nimmer, who systematized the First Amendment analysis of content based restrictions on speech, rejects ad hoc balancing.[277] In the model propounded by Nimmer and implicitly adopted by Professor Tribe,[278] if the state action discriminates on the basis of content, the regulation faces a presumption of constitutional invalidity.[279] However, the presumption can be overcome by balancing free speech and government interests. This balancing, however, must be "definitional": conducted at a sufficient level of abstraction to transcend both the parties and the equities of the individual case.[280] For example, the entire arena of true criminal speech would have to be seen as "low value" for any part of it to be regulated. The interests weighed are those of the speech generally, and in weighing these interests the Court sets rules of general application.[281]

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[275] *See supra* Part V A.

[276] Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring).

[277] *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH (Student ed. 1984). On First Amendment balancing generally, *see* T. EMERSON, THE SYSTEM OF FREE EXPRESSION 117-18, 181-89 (1970); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987); Gottlieb, *Compelling Government Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

[278] *See* TRIBE, *supra* note 167, at 789-794.

[279] *See* NIMMER, *supra* note 277, § 2.05[A], at 2-28.

[280] *See id.* §2.03, at 2-15 to 2-24.

[281] As one commentator describes:

For Nimmer and Justice Kennedy, ad hoc balancing threatens to undermine well established First Amendment categories and leave courts and speakers without sufficient guidance.[282] Ad hoc balancing conjures up fears of local government censors and chilled speech. Analyzing these fears would necessitate another investigation.

One such inquiry, however, has found that First Amendment jurisprudence sometimes necessitates and often utilizes ad hoc balancing.[283] Professor Shiffrin argues "that prudential decisionmaking in general, and first-amendment decisionmaking in particular, depends upon thorough immersion in the concrete details of social reality."[284] While Justice Kennedy and Steven Shiffrin may not agree on the desirability of ad hoc balancing, they at least agree on its existence within the doctrine.[285]

The result of the complex panoply of First Amendment stories is not a simple double track of categorical rules, but a maze of tests and approaches which detectives may enter at numerous points.[286] The detectives have traced the trail from one of those points and have discovered the aggressor.

VII. CONCLUSION

In the end, the detectives find that society's ambivalence about true criminal speech specifically and speech about crime generally started the confict that led to the killing. The Son of Sam statute arose out of this ambivalence, an ungainly champion of a society loving and hating

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> Nimmer's position was that rules had to exist for everything touching on first amendment freedoms; the concrete circumstances of individual cases should never be considered (except, of course, to determine which rule applies); factors are always inferior; ad hoc balancing is *always* wrong.

STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 11 (1990) (emphasis in original).

[282] *See, e.g.*, Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 127 (1991) (the majority's formulation of the strict scrutiny test "tends not to remain pro forma but to take on a life of its own.") (Kennedy, J., concurring).

[283] *See* SHIFFRIN, *supra* note 281; *see also* Jordan M. Steiker, *Creating a Community of Liberals*, 69 TEX. L. REV. 795 (1991).

[284] SHIFFRIN, *supra* note 281, at 124.

[285] Because of the complexities involved in the myriad of First Amendment stories, formulaic standards of review with pretensions of absolutism may be "overconfident or cynical." *Id.* at 35.

[286] *See id.* at 45.

the speech it sought to regulate. The detectives conclude that in killing the original statute, the First Amendment did indeed defend itself. The new statutes will fare better.

In addition, the First Amendment suffered. While none of the motives or demons chasing it justify an explicitly "low value" category for true criminal speech under current First Amendment jurisprudence, they have created a marginal "low value" dip in the scrutiny applied in *Simon & Schuster*.

This discovery demonstrates the usefulness of an inquiry broader than the case law and commentary generally applied to free speech issues. Free speech cases are more than outcomes and legal tests; they are stories about stories, each with its own specific twists and turns, false leads and unexpected discoveries. Detectives not willing to hit the pavement, those who focus too rigidly upon what might convince a court,[287] may overlook the clue that explains a case or a trend of the jurisprudence.

The story of true criminal speech in *Simon & Schuster* creates only more conflicts and crime scenes. The failure of the original statute symbolizes the price paid for strong protection of free speech. The form of its failure, however, may stand as the harbinger of a new, more complicated First Amendment, one that lives in streets full of images and runs from demons of its own. There, the nature of the image and the terrible story it conveys may bend the tests that once provided the illusionary comfort of definitional categories.

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[287] One reason Justice O'Connor did not address the importation of equal protection analysis that so troubled Justice Kennedy was that the parties did not brief or argue it. *Simon & Schuster*, 502 U.S. at 122 n.**.

The Door Only Opens Out: Japan's Special Measures Law for Regulation of Foreign Attorneys

I. Introduction

In April 1987, when Japan's Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Foreign Attorneys Law or the F.A.L.) went into effect, it was widely believed that Japan had taken a significant step toward the internationalization of its domestic economy.[1] Now eight years later, it is clear that while the F.A.L. has opened the way for foreign lawyers to conduct a limited legal practice in Japan, it has not had a significant impact on foreign access to the Japanese economy. In fact, the Foreign Attorneys Law may have had the reverse effect.

This article will briefly review the regulation of foreign attorney practice[2] in Japan prior to enactment of the Foreign Attorneys Law, the differing views of foreign attorney practice, and the different parties who had an interest in the F.A.L.'s passage. Next, it will review those regulations that have proven contentious and compare the F.A.L. with analogous U.S. laws. Finally, it will discuss the economic realities of practice under the F.A.L. and analyze its impact on reducing trade barriers.

II. Background of the 1987 Foreign Attorneys Law

When the Foreign Attorneys Law became effective in 1987, it closed a thirty-two-year period in which Japan had strictly regulated the legal

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[1] Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, Law No. 66 of 1986 (Japan) [hereinafter Foreign Attorneys Law].

[2] "Foreign attorney practice," in this article, refers to allowing attorneys from a foreign jurisdiction to practice law without having to take and pass the local bar exam (be it the bar exam of Japan, Hawai'i, New York, etc.).

services market by limiting the practice of law to *bengoshi*.[3] Before examining the Foreign Attorneys Law, a brief review of the history of Japan's regulation of foreign attorney practice, and the disparate viewpoints and interests involved, seems appropriate.

A. Regulation of Foreign Attorney Practice Before the F.A.L.

Before 1955, Japan had a liberal admission policy for foreign attorneys. Under Article Seven of the Practicing Attorney Law (*Bengoshi* Law),[4] "qualified foreign lawyers were allowed to represent clients, at least aliens, in Japanese court proceedings."[5] Because of this liberal admission policy, in the post World War II years, Japan experienced a substantial increase in the number of foreign attorneys providing legal services in Japan with respect to international transactions. Such activities had been "virtually nonexistent" before the war.[6]

In 1955 this liberal admission policy was changed to bar practice by foreign lawyers.[7] Article Seven of the *Bengoshi* Law was repealed giving a monopoly over the practice of law to the *bengoshi* under Article Seventy-Two of the *Bengoshi* Law.[8]

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[3] Amelia Porges, *Editor's Page*, 21 LAW IN JAPAN, 1989, at iii, iv (explaining that *bengoshi* is a specialized profession regulated by the *Bengoshi* Law (Law No. 205 of 1949)). Almost all *bengoshi* specialize in litigation. *Id.* "*Bengoshi*" refers to persons who have passed the National Legal Examination and completed training at the Legal Training and Research Institute and includes those admitted to the Japanese bar under the provision licensing law professors. Susan Kigawa, Note, *Foreign Lawyers In Japan: The Dynamics Behind Law No. 66*, 62 S. CAL. L. REV. 1489, 1491 (1989).

[4] Practicing Attorney Law, Law No. 205 of 1949 (Japan) [hereinafter *Bengoshi* Law].

[5] John Haley, *Redefining the Scope of Practice Under Japan's New Regime for Regulating Foreign Lawyers*, 21 LAW IN JAPAN, 1989, at 18, 21 (describing the history of the regulation of foreign attorneys in Japan).

[6] Kigawa, *supra* note 3, at 1492.

[7] Yoshio Iteya, *Gaikokuho Jimu Bengoshi in Japan*, 21 LAW IN JAPAN, 1989, at 141, 142.

[8] Porges, *supra* note 3, at iv. The scope of the *bengoshi*'s legal monopoly, as defined in Article 72 of the *Bengoshi* Law, is considerably narrower than a lawyer's monopoly in the United States. Thus "*bengoshi*" corresponds only loosely to "lawyer" but more closely to "*barrister*." *Id.* Article 72 of the *Bengoshi* Law reads:

> No person other than a lawyer shall, with the aim of obtaining compensation, engage in the presentation of legal opinions, representations, mediation or conciliation, and other legal business in connection with lawsuits or noncontentious cases, and such appeals filed with administrative offices . . . and other general legal cases as otherwise provided for in this law.

Haley, *supra* note 5, at 20 (quoting *Bengoshi* Law, art. 72).

Between 1955 and 1987, foreign lawyers could only regularly be found practicing in Japan in one of two situations. First, foreign lawyers who were established before the change in the law were "grandfathered-in" and allowed to continue practicing as quasi-members (*junkaiin*) of their local bar associations.[9]

Second, young foreign lawyers could be found working as trainees under *bengoshi* or *junkaiin* supervision.[10] Trainees were typically just out of law school and were employed for terms of two to three years. None were authorized to practice law, but the scope of their work varied from proofreading documents to actively working with the clients of the *bengoshi* or *junkaiin*. Even in the most liberal firms the trainee never met with clients alone and, because they had no way of qualifying as *bengoshi*, had no chance of becoming a partner.[11]

By the 1970's, growth in the Japanese economy produced a demand for international legal services in Japan and several major American law firms began to seek a presence there.[12] In 1974, with this goal in mind, the New York Bar Association established a Foreign Lawyer Practice Rule, and requested, through the offices of the American Bar Association (ABA), that the Japan Federation of Bar Associations (*Nichibenren*)[13] establish a similar rule in Japan.[14] This request was

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[9] Iteya, *supra* note 7, at 142. At that time 77 foreign lawyers were "grandfathered-in" under a supplementary provision of the 1955 law. As of 1986, 15 were still alive, but only 6 were still practicing law. *Id.* "*Junkaiin*" is the Japanese term used to refer to these quasi-members of the Japanese bar. *See generally id.*

[10] Iteya, *supra* note 7, at 142. The author estimated that at the time there were 70-100 trainees in Japan. *Id.*

[11] John Perry, Jr., *A Consumer's View of the Market for Legal Services in Japan*, 21 LAW IN JAPAN, 1989, at 177, 179.

[12] Glen Fukushima, *The Liberalization of Legal Services in Japan: A U.S. government Negotiators Perspective*, 21 LAW IN JAPAN, 1989, at 5, 6; *see* Haley, *supra* note 5, at 23.

[13] Porges, *supra* note 3, at iv. "*Nichibenren*" is the Japanese term commonly used to refer to the Japan Federation of Bar Associations. It was established by the *Bengoshi* Law as the national organization of *bengoshi*. *Id.* Each *bengoshi* must apply, through the local bar association, for inscription on the *Bengoshi* Register kept by *Nichibenren*. *Nichibenren* maintains a separate *Gaikokuho Jimu Bengoshi* Register, under the Foreign Attorneys Law. *Id.*

[14] Iteya, *supra* note 7, at 143. Establishment of the New York rule was also motivated in part by the ruling of the U.S. Supreme Court in *In re* Griffith, 413 U.S. 717 (1973). Louis Sohn, *American Bar Association Section of International Law and Practice Report to the House of Delegates Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207, 212-13 (Spring 1994). There the Court held "unconstitutional under the Equal Protection Clause of the 14th amendment a Connecticut court rule under which

refused, but the ABA, along with individual U.S. attorneys, kept up the pressure on *Nichibenren*.[15]

After eight years of negotiations, the ABA referred the matter to the U.S. government and beginning in 1982, the "foreign lawyer issue" became an item on the intergovernmental trade talks agenda. From that point on, opening the legal market to U.S. lawyers was an objective of the United States Trade Representative (USTR) in its effort to break down "non-tariff" trade barriers to U.S. access to the Japanese market.[16]

The Japanese Government's view was that the issue should come under *Nichibenren*'s domain since it was and is a self-regulated association. Accordingly, the government sent the matter back to *Nichibenren* with the suggestion that some action be taken to resolve the issue.[17] Thus, *Nichibenren* began to study the issue and in 1985 decided to support a limited opening to foreign attorneys. *Nichibenren* then drafted an outline of a law on foreign lawyers that was presented by the government to the Parliament and passed on April 22, 1986. The new law went into effect on April 1, 1987.[18]

B. Differing Views of Foreign Attorney Practice

One of the primary reasons that negotiation of the Foreign Attorneys Law took twelve years was the disparate viewpoints of the two sides concerning the problem.[19] The Japanese approached the problem with the idea that foreign attorneys practice had little to do with trade

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only citizens of the U.S. could be admitted to the practice of law in Connecticut." *Id.* at 213 n.1.

Louis Sohn, was the Chair of the American Bar Association's Section of International Law and Practice in August 1993 when this recommendation and report was adopted by the House of Delegates. *Id.* at 207.

[15] Haley, *supra* note 5, at 23. American attorney Rex Coleman, relying on an authoritative interpretation of Article VIII of the Japan-U.S. Treaty of Friendship, Commerce, and Navigation, was successful in opening an office in Japan. *Id.* American attorney Isaac Shapiro had similar success in gaining access to represent specific clients. Iteya, *supra* note 7, at 143.

[16] Iteya, *supra* note 7, at 144; Terrence Murphy, *Japan Slides the Legal Door Open*, INT'L FIN. L. REV., Mar. 1987, at 9 (echoing the view of the USTR that lawyers serve as trade facilitators, untangling import guidelines, patent procedures, or regulatory restrictions).

[17] Kigawa, *supra* note 3, at 1498.

[18] Iteya, *supra* note 7, at 145.

[19] Kigawa, *supra* note 3, at 1497.

between the two countries but was "essentially a clash between two legal cultures." [20] While America operates under the adversarial system with the maxim of zealous representation, in Japan it is quite different. "The legal profession is entrusted with a very noble task and should not just pursue economic results, thereby tarnishing the image of this noble profession."[21] The *bengoshi*, who has been educated at the public expense, has a civic duty and "may well act against the wishes of his or her client and on behalf of society or the legal system."[22] Thus, the Japanese view was that they have a sovereign right to set professional qualifications for the protection of society's interest in the legal profession.[23]

The United States, on the other hand, characterized the issue as an aspect of unequal market access.[24] American legal services were viewed as a "hot" export to Japan and other Pacific Rim and Asian countries.[25] Perhaps more significantly, attorneys were viewed as "trade and investment facilitators" who would lead the way for American business into the Japanese economy.[26] Thus, to the USTR, the prohibition of foreign attorney practice was a non-tariff barrier to services trade, impeding U.S. access to Japan.[27]

C. Interested Parties

In addition to differing views between the Americans and the Japanese over the nature of the problem, on each side of the bargaining

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[20] Fukushima, *supra* note 12, at 8.

[21] Kunio Hamada, *The Reaction of Japanese Lawyers to the New Market*, 21 LAW IN JAPAN, 1989, at 43, 45. The author explained that under the *Bengoshi* Law, "the *bengoshi* is entrusted with a mission to protect fundamental human rights and to realize social justice." *Id.* at 44.

[22] Marcia Chambers, *Sua Sponte*, NAT'L L.J., Mar. 1, 1993, at 17, 18. Japanese attorney, Akira Kawamura, is quoted:

> They [Americans] think it is a market. They think in terms of fairness. They are competing here so they think they should be given the same conditions for competition. That is what we cannot accept at all. We do not view the bar as a business. . . . [J]apanese lawyers - and there are only 14,000 of them - have a high public calling to serve the public good.

Id.

[23] Kigawa, *supra* note 3, at 1497.

[24] Fukushima, *supra* note 12, at 8.

[25] Stephen Stein, *Go East, Young Lawyer: U.S. Legal Services Hot New Export to Asia*, 75 ABA J., Sept. 1989, at 74.

[26] Michael McAbee, *U.S. Continues Pressure on Japan to Amend Foreign Lawyers Law*, E. ASIAN EXECUTIVE REP., June 15, 1990 at 14, 15.

[27] Kigawa, *supra* note 3, at 1497.

table were distinct subgroups with their own interests to protect. Although the nominal parties to the negotiations were the USTR and the Japanese Ministry of Justice,[28] each side was faced with reconciling the sometimes conflicting views of these groups.[29]

On the U.S. side, there was a lack of consensus within the legal community and "instead of assisting in establishing a unified position or even waiting until a consensus was reached, the USTR negotiators merely represented the views of those who exerted the most pressure."[30] The parties that exerted the most pressure were the large international firms "clustered primarily on the East and West Coasts."[31] These firms perceived Japan as a virgin market for international legal services and were eager to establish branch offices there to serve (1) Japanese interests in the United States and other countries, (2) American interests in Japan, or (3) as marketing offices which would attract and maintain clients and funnel work back to American bases.[32] These large firms, however, took the long term view that getting a foot in the door was important enough to justify tolerating considerable restrictions on their practice.[33]

Opposed to this view were the "trainees," lawyers from small firms, and the sole practitioners who "maintained that the U.S. government should aim for free and unfettered access to the Japanese legal services market.[34] This group, with less capital but also less overhead, saw themselves as "trade facilitators" capable of assisting American companies to export or to invest in Japan.[35] The trainees, therefore, were eager for total access so as to represent foreign companies going into Japan.

In addition to the foreign legal community, foreign companies doing business in Japan had a stake in the liberalization of the regulations. Some foreign businesses were dissatisfied with the legal services in Tokyo, resulting from the "differences in the manner in which *bengoshi* and Western lawyers relate to their clients."[36] Thus, at least some

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[28] Fukushima, *supra* note 12, at 8.
[29] Kigawa, *supra* note 3, at 1506.
[30] Haley, *supra* note 5, at 25.
[31] Fukushima, *supra* note 12, at 9.
[32] Kigawa, *supra* note 3, at 1507.
[33] Fukushima, *supra* note 12, at 10.
[34] *Id.* at 9.
[35] *Id.* at 10.
[36] Perry, *supra* note 11, at 180.

foreign businesses in Japan hoped for improved access to foreign attorneys.

On the Japanese side, liberalization was opposed by *Nichibenren*, but supported by the Japan Federation of Economic Organizations (*Keidanren*).[37] *Nichibenren* had a vested interest in maintaining the status quo for three reasons. First, *Nichibenren* saw *bengoshi* as fulfilling a unique role in Japanese culture and society.[38] Further, it was contended that allowing foreigners to practice in Japan would undermine this societal role of the *bengoshi*.[39]

Second, allowing foreign attorney practice would threaten *Nichibenren*'s total monopoly of the legal services market.[40] Loss of this monopoly would lessen demand for *bengoshi* services and threaten the income of *Nichibenren* members, particularly the high incomes of those involved in international transactions.[41] Thus, *Nichibenren* had an economic incentive to oppose liberalization.

Third, *Nichibenren* saw opening the door to foreign attorneys as a serious threat to its strict control over how many Japanese become attorneys. [42] "*Nichibenren* feared that Japanese nationals would use the

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> It [was] not the authors intention to denigrate the professional relationship of the *bengoshi* to his client. . . . [But to say that] the *bengoshi* who undertakes to serve as corporate counsel to an international company is going outside of his own legal culture and entering a foreign one. He is also taking responsibility for a sensitive and important role which in many cases [the *bengoshi*] is ill-prepared to assume single-handedly.

Id.

[37] Kazuo Nukazawa, *Testimony at the Committee on Judicial Affairs of the House of Councilors on May 13, 1986*, 21 LAW IN JAPAN, 1989, at 171 (stating that "*Keidanren*" is the Japanese term commonly used to refer to the Japan Federation of Economic Organizations).

[38] Chambers, *supra* note 22, at 19; *see generally* Hamada *supra* note 21. *Nichibenren* emphasized that cultural role of the *bengoshi*, who did not practice law merely to make profit, but to serve a public purpose as well. Chambers, *supra* note 22, at 19.

[39] Fukushima, *supra* note 12, at 8. *Nichibenren* characterized the problem as a "clash of legal cultures." *Id.*

[40] Arthur Alexander & Hong Tan, *Barriers to U.S. Service Trade in Japan*, RAND NOTE R-3175, 1984, at 1, 16-17.

[41] *Id.* at 19.

[42] *Id.* at 16-17; Edward Chen, *Legal Training and Research Institute of Japan*, 22 TOLEDO L. REV. 975, 975-80 (1991). To be admitted to the legal profession in Japan one must pass the National Law Examination and then successfully complete two years training and legal apprenticeship at the Legal Training and Research Institute of Japan. On average, under 500 persons are admitted to the Institute out of twenty

new law as a 'loophole' through which they could practice [law] in Japan without passing the National Legal Examination and studying at the Law Institute."[43] *Nichibenren* feared being inundated by a flood of Japanese graduates of U.S. law schools who had never passed the National Examination. These Japanese cum U.S. attorneys would return to Japan to practice as foreign lawyers, thereby blurring the distinction between *bengoshi* and *gaikokuho jimu bengoshi* (*gaiben*).[44]

In contrast to *Nichibenren*'s view, "the attitude of *Keidanren* on the issue [was] consistently for positive promotion of market liberalization . . . as a necessary concomitant of the internatio nalization of our [Japan's] economy." [45] *Keidanren* felt that the need for foreign attorneys was increasing with the increase in Japanese industries 'foreign direct investment and foreign financing activities, and that the use of foreign attorneys in Japan on a short term basis as "trainees" was "inconvenient."[46] *Keidanren*'s desire for U.S. attorneys capable of helping Japanese business invest in the U.S. must have been quite strong in the late 1980's, near the peak of Japan's "bubble economy." Thus, unlike *Nichibenren*, *Keidanren* favored opening the door for foreign attorneys to satisfy the needs of Japanese business.[47]

III. The 1987 Foreign Attorneys Law

Since its implementation, the Foreign Attorneys Law has allowed foreign attorneys to practice in Japan, but under considerable regulation

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to thirty thousand annual test takers. The Examination is administered by the Ministry of Justice. *Id.* at 979-80. The Institute is administered by the Supreme Court. *Id.* at 978.

In 1995 there may be a record number of persons, about 800, being admitted to the Legal Institute. Telephone interview with Mr. Takehiro Hoshino, *Bengoshi*, Hashidate Law Office, in Tokyo, Japan (Mar. 8, 1995) [hereinafter Hoshino Interview].

[43] Kigawa, *supra* note 3, at 1512.

[44] Iteya, *supra* note 7, at 141. The term used in the F.A.L. is *Gaikokuho Jimu Bengoshi* (Foreign-Law Office Barrister) popularly called a *gaiben*. The term "Office" was included in the title because a foreign lawyer would not be allowed to appear in court. *Id.*

[45] Nukazawa, *supra* note 37, at 171.

[46] *Id.* at 172-73.

[47] Mihoko Iida, *Restrictions on Foreign Lawyers Affect Firms' Legal Staff Needs: Japanese Lawyers Can't Meet Demands of Global Business*, Nikkei Weekly, July 19, 1993, at 3. "This view continued to persist under the 1987 version of the law [the F.A.L.], with the assistant director at *Keidanren*'s international economic affairs department quoted as saying Japanese lawyers cannot meet the growing global demands of Japanese companies." *Id.*

This section will examine those regulations which have proven contentious and compare the Foreign Attorneys Law to both the Model Rule for the Licensing of Legal Consultants adopted by the ABA (Model Rule)[48] and to Hawaii Supreme Court Rule 14 for the Licensing of Foreign Law Consultants (Hawai'i Rule).[49]

A. Substantive Regulations Under the Foreign Attorneys Law

The purposes of the law which *Nichibenren* eventually drafted and the Parliament adopted were to; "promote stability in relation to international business law affairs," and "contribute to the improvement in the handling, in foreign countries, of legal business concerning Japanese law," by allowing qualified lawyers, from jurisdictions which grant reciprocal right to *bengoshi* to conduct legal business concerning foreign law in Japan.[50] Thus, the purpose in enacting the Foreign Attorneys Law, was to create a door which opened both ways to allow access both in and out of Japan.

While the F.A.L. did open the door to foreign attorney practice, the ABA and USTR always regarded it as only a first step and looked forward to its joint review in the future.[51] The ABA criticized the Foreign Attorneys Law as giving *bengoshi* a competitive advantage. According to the ABA, certain of the regulations were "manifestly unnecessary and irrelevant to the legitimate purposes of professional regulation."[52] In addition, *Keidanren* criticized the F.A.L. for hampering its access to foreign legal services and was consistent in its call for further liberalization.[53]

In answer to the criticism *Nichibenren* began negotiations with the Ministry of Justice in 1993 and released a draft of proposed amend-

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[48] Sohn, *supra* note 14, at 207.

[49] RULES OF THE SUPREME COURT OF THE STATE OF HAWAII, Rule 14 [hereinafter HAWAI'I RULE].

[50] Foreign Attorneys Law, *supra* note 1, art. 1. *See generally* Linda Cooper, *Is the Door Half Open or Half Shut? Japan's Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*, 18 N. KY. L. REV. 417, 422 (1991).

[51] Fukushima, *supra* note 12, at 16 (citing letter from U.S. Ambassador to Japan to the Japanese government).

[52] Sohn, *supra* note 14, at 216 n.23. These purposes are twofold: "first, the protection of the public, as consumers of legal services, against the risks of unknowingly relying upon legal advice rendered by those who are not competent to render such advice, and second, the preservation of the integrity, and public respect, for the legal profession as a whole." *Id.*

[53] Iida, *supra* note 47, at 3.

ments to the Foreign Attorneys Law to the House of Representatives' Justice Committee in March 1994.[54] The amendments (the 1995 Amendments) went into effect on January 1, 1995.[55] The controversial sections of the amended law are discussed below.

1. Qualifications

To qualify to become a *gaiben*,[56] (i) an attorney must have practiced for at least five years in the country or state in which the attorney is licensed ("jurisdiction of primary qualification");[57] (ii) that state or country must recognize reciprocity, unless requiring reciprocity would violate an international treaty or agreement; [58] (iii) the attorney must satisfy financial requirements;[59] and (iv) the attorney must maintain a residence in Japan for at least 180 days per year.[60]

These qualifications are problematic for several reasons. First, the mobility of U.S. attorneys and the fluidity of interstate practice have led to disputes regarding the interpretation of the five year rule in conjunction with the reciprocity requirement.[61] Though the purpose of the requirement is to ensure good legal service, it may exclude an

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[54] *Lawyers Liberalized: Foreigners, Japanese May Share Firms*, YOMIURI SHIMBUN, Nov. 27, 1993, at 1.

[55] Letter from Mr. Eigi Okamori, Director for the Committee on Foreign Lawyers, Japan Federation of Bar Associatio ns (*Nichibenren*), to J. Ryan Dwyer III, Student Author, *University of Hawai'i Law Review* (Mar. 3, 1995) [hereinafter Okamori Letter 1] (on file with author).

[56] *See* Iteya, *supra* note 7, at 145-46.

[57] Foreign Attorneys Law, *supra* note 1, art. 10.1.1.

[58] *Id.* art 10.2; Kigawa, *supra* note 3, at 1506 (explaining that a jurisdiction which accords reciprocity, from Japan's perspective, is one that allows *bengoshi* the right to practice law within its territory under a foreign attorneys practice rule).

The issue of reciprocity was a contentious issue for the government negotiators. Initially Japan demanded that all U.S. states had to open up to *bengoshi* before a single U.S. attorney could be licensed in Japan. This demand was later changed to the more moderate "substantial number of major states." Since passage of the F.A.L., reciprocity, itself, has not been problematic because individual states can easily change their rules to accommodate the requirement. Fukushima, *supra* note 12, at 11. *See* Okamori Letter 1, *supra* note 55.

[59] Foreign Attorneys Law, *supra* note 1, art. 10.1.3; Kanter, *Small-Firm American Lawyers Could Help Small American companies in Japan, but the Door is Still Shut*, 21 LAW IN JAPAN, 1989, 49, 57. These requirements include, having a residence, an office lease, a financial plan, and malpractice insurance. *Id.*

[60] Foreign Attorneys Law, *supra* note 1, art. 48.1.

[61] Iteya, *supra* note 7, at 146-47.

attorney with years of experience if less than five of those years have been in a state which affords reciprocity to *bengoshi*, or his years are split among states which do.[62] For example, if an attorney had ten years of experience but only two were in a state like New York, which allows foreign attorney practice by *bengoshi*, would the attorney qualify as a *gaiben*?[63]

While under a literal reading of the Foreign Attorneys Law such an attorney would not qualify, in practice, *Nichibenren* has been flexible in its application of this requirement.[64] They have, however, only dealt with such problems on a case-by-case basis and have not made public their reasoning or how it may apply in other cases.[65] Thus, *Nichibenren* retained the option of strictly applying the F.A.L.'s requirements, should it so choose.

Nichbenren's discretion to do so, however, may be limited by the recent amendments to the Foreign Attorneys Law. These amendments, which ease the F.A.L.'s absolute reciprocity requirement, represent an attempt to bring the F.A.L. into compliance with "most-favored-nation" treatment of the General Agreement on Trade and Tariffs (GATT).[66] The amendment provides that "the Minister of Justice shall

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[62] *Id.* at 146.

[63] *See id.* at 147.

[64] Iteya, *supra* note 7, at 147.

In one case, a lawyer who had been admitted and practiced for less than five years in a state recognizing reciprocity, sought to add his experience in a third country which satisfied the reciprocity requirement but where he was not admitted to practice. Furthermore, he chose one reciprocity state as a state of primary qualification, but he had been approved in another reciprocity state before he was admitted in the state of primary qualification, and his experience in the two states totaled more than five years. The first question was whether his experience in the third country could be added to meet the five-year requirement. The second question was whether his former experience in another reciprocity state where he had practiced before practicing in his reciprocity state of primary qualification could be added to meet the five-year requirement. The case was approved by *Nichibenren*, but no reasoning was made public. According to strict reading of the F.A.L. the answer to the first question should be no because experience outside the U.S. is different in quality from experience in the U.S.

Id.

[65] *Id.*

[66] Okamori Letter 1, *supra* note 55. Under the GATT provision concerning trade in services, each signatory nation must accord to the products and services of the other contracting parties treatment known as "unconditional most-favored-nation"

give approval [to a foreign attorney's application] when the non-approval violates the sincere implementation of treaties and other international agreements."[67]

The result of the amendment is that reciprocity is removed as a precondition for attorney's from GATT signatory nations for becoming *gaiben*. Thus, presuming that the U.S. becomes a GATT signatory nation, U.S. attorneys from any state, not just those which allow foreign attorney practice, will be able to become *gaiben*.

The second reason the qualifications are problematic is that the Foreign Attorneys Law imposes a geographic restriction on the five years experience requirement. Not only must the lawyer have five years experience, but the five years must be spent practicing law in the lawyer's jurisdiction of primary qualification.[68]

The 1995 Amendments, however, create a partial exception for foreign lawyers who have been working in Japan as "trainees," primarily practicing the law of the jurisdiction of primary qualification, while employed by either a *gaiben* or a *bengoshi*.[69] These foreign attorneys will be able to count up to two years employment in Japan toward the five year experience requirement.[70]

In the past, *gaiben* firms have complained that their younger associates' experience in Japan could not be counted. The feeling was that the regulation unfairly forced foreigners who had gained some familiarity with Japanese law to leave the country, interfering with the continuity of personnel in the Tokyo office.[71]

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treatment. This means that a country cannot discriminate among the sellers of goods or providers of services from various other contracting sates even on grounds of reciprocity. Sohn, *supra* note 14, at 225 n.51.

[67] Okamori Letter 1, *supra* note 55. One such treaty may be the Japan-U.S. Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063. *See* Haley, *supra* note 5, at 23.

[68] Foreign Attorneys Law, *supra* note 1, art. 10.1.1. The Japanese government did allow "trainees" who were in Japan, at the time the new system was adopted, up to two years of credit for previous experience working under a *bengoshi*. *See generally* Richard Wohl, *Operating Under Japan's Foreign Lawyers Law: Japan's System for Governing Foreign Lawyers*, E. ASIAN EXECUTIVE REP., Aug. 15, 1990, at 9 [hereinafter Wohl I].

[69] Okamori Letter 1, *supra* note 55.

[70] *Id.*

[71] Wohl I, *supra* note 68, at 10. Five out of eight foreign law offices surveyed complained that their young associates' experience in Japan could not be counted though they practiced only American law and therefore had the requisite experience. Iteya, *supra* note 7, at 156.

While the amended requirement does ease the restriction, it nevertheless, requires three years experience practicing law in the jurisdiction of primary qualification. Consequently, young attorneys, just out of law school, will be discouraged from taking employment in Tokyo offices. Thus, these offices will be forced to use more experienced attorneys to do work which could be done by less experienced and lower salaried attorneys.

The third reason that the qualifications are problematic is that compelling foreign firms to staff their Tokyo offices with more experienced lawyers, inevitably forces them to pay higher salaries. For law firms concerned about the profitability of their Tokyo offices and the high cost of doing business there, the five-year requirement imposes added expense.[72]

Fourth, the stringent financial requirements which *gaiben* must satisfy are somewhat discriminatory, because they mandate certain requirements which do not apply to *bengoshi*. For example, only *gaiben* are required by law to have "assets and malpractice insurance available to satisfy a claim for damages by a client."[73] *Bengoshi* need satisfy no such requirement.[74] Thus, the complaint here is not that having malpractice insurance is an unnecessary burden, but that it is an added cost which *bengoshi* do not have to bear.

To add insult to injury, *gaiben* are ineligible to receive the malpractice insurance which *Nichibenren* sells to its members, and "no Japanese insurance company will sell malpractice insurance to *gaiben*."[75] Prospective *gaiben* have no alternative but to buy malpractice insurance in the U.S. or elsewhere.[76]

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[72] Richard Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 767 (1994). For example, "Richards Butler closed [its Tokyo office] in 1992, five years after it opened, the 1.5 million a year cost could not be justified." *Id.*

See generally Chambers, *supra* note 22 (explaining that the cost to keep a lawyer in Tokyo is more than double the cost in New York).

[73] Kanter, *supra* note 59, at 59. In 1989, the required amount of malpractice insurance or assets was understood to be 50,000,000 yen. *Id.*

[74] *Id.* at 59. Only 2,000 out of over 13,000 *bengoshi* have any malpractice insurance. *Id.*

[75] *Id. Nichibenren* has a 20,000 yen per year premium malpractice policy for members who desire such insurance. *Id.*

[76] *Id.* "One *gaiben* reportedly obtained insurance in Hong Kong for use in covering him in Japan but the premium is 700,000 yen which is 35 times *Nichibenren*'s premium of 20,000 yen." *Id.*

Practically speaking, however, *bengoshi* engaged in foreign attorney practice in Hawai'i, for example, may face the same problem. Local insurance companies may be unable to assess the risk of insuring a foreign attorney who wishes to set up her own practice in foreign law with exclusively foreign clients.[77] Thus, the Japanese insurance industry's refusal to insure *gaiben* may be attributable to the practicalities of the insurance business rather than any codified discrimination.

2. Firm names

Prior to the 1995 Amendments, the F.A.L. required that the name of the office of a *gaiben* include the surname and given name of at least one of the *gaiben* employed there and could not include the name of any other individual or organization.[78] Thus, *gaiben* were forbidden to use the name of a larger law firm, with which they may have been affiliated, as their primary means of identification, though they could use firm names in addition to the names of the person in the office.[79]

The complaint here was that the regulation put the *gaiben* law office at a competitive disadvantage, because the regulation did not apply to *bengoshi* firms. While *bengoshi* firms enjoyed the continuity of a firm name, the *gaiben* law office had to change its name every time a *gaiben*, whose name appeared in the firm name, moved in or out of the office.[80]

Furthermore, while clients may have recognized that the office was a branch of a larger firm, compliance with the regulation was "unwieldy and hindered firms in developing goodwill and name recognition."[81] It is easy to surmise why international law firms based in New York, for example, which had established expensive Tokyo offices to maintain

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[77] Telephone interview with Bradley C. Oliver, Assistant Vice President, Marsh & McClennan Inc. of Honolulu, Hawai'i (Mar. 18, 1995). Because it is not clear what foreign law consultants would be doing, they probably would not fall within underwriting schemes for errors and omissions insurance. Therefore, the foreign law consultant that attempts to go into solo practice in Hawai'i would be unable to get insurance locally. The situation would be different if the foreign law consultant was associated with an established firm. *Id.*

[78] Foreign Attorneys Law, *supra* note 1, art. 45.2.

[79] Iteya, *supra* note 7, at 152. For example, "Raymond W. Vickers, *Gaikokuho Jimu Bengoshi Jimusho*, White & Case." *Id.*

[80] *Id.*

[81] Richard Wohl, *Operating Under Japan's Foreign Lawyers Law: Issues and Outlook*, E. ASIAN EXECUTIVE REP., Sept. 15, 1990, at 15, 16 [hereinafter Wohl II].

Japanese clients,[82] would be concerned about their inability to use their firm name to identify their office. First of all, to Japanese, loyalty to the company is very important. Japanese are not used to the rapid personnel turn-over of U.S. law firms. Firm names that changed every time a principle attorney left the office must have highlighted this cultural difference and been unsettling to clients.

Second, clients would begin to identify with the attorney as if he were a solo practitioner, rather than with the firm.

The 1995 Amendments totally eliminate firm name restrictions. *Gaiben* will now be able to identify themselves by the names of the international law firm for which they work.[83] Thus, *gaiben* firms will be treated the same as *bengoshi* and be able to develop firm-name recognition.

3. Scope of practice

The scope of law within which the *gaiben* may render advice is narrow. The F.A.L. states that the *gaiben* may only handle legal business concerning the law of the attorney's jurisdiction of primary qualification and the law of additional "designated" jurisdictions on which the *gaiben* has shown expert mastery.[84] The *gaiben* is thus prohibited from advising on third country law unless the attorney makes a separate application and obtains permission from *Nichibenren* to do so. Furthermore, the *gaiben* is totally barred from rendering any opinion or interpretation of any Japanese law, regulation, or procedure.[85]

There have been two primary objections to the scope of practice restrictions. The first, concerns the scope of law within which *gaiben* may render advise. The ABA has taken the position that in addition

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[82] Interview with Professor Paul Carrington, Visiting Professor, University of Hawai'i, Richardson School of Law, in Honolulu, Hawai'i (Mar. 3, 1995) [hereinafter Carrington Interview].

[83] Okamori Letter 1, *supra* note 55.

[84] Foreign Attorneys Law, *supra* note 1, art. 3; Wohl I, *supra* note 68, at 9, 10. "The Japanese government adopted a more flexible interpretation that permits a U.S. lawyer to apply for and receive automatic designation to practice the laws of all common law U.S. jurisdictions." *Id.* at 15. Thus, presumedly the *gaiben* could advise on U.S. federal common law in addition to the common law of any jurisdiction in the U.S. The *gaiben* would only be prohibited from interpreting the statutes of other jurisdictions.

[85] Foreign Attorneys Law, *supra* note 1, art. 3-5. In certain circumstances involving Japanese law, citizens, or property, the *gaiben* must work jointly with a *bengoshi*. *Id.*

to the law of the jurisdiction of their primary qualification, foreign lawyers should be allowed to advise on international law and to the extent allowed to members of the local legal profession, the law of third countries.[86] The reason being that:

> Practice at the transnational level inevitably involves advice on transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions, as well as international law . . . [and as] a practical matter, it is simply not feasible to break that advice down into independent elements to be advised upon separately by different lawyers. Rather, the rendering of such advice is an inherently synthetic process, involving close collaboration among lawyers with the requisite experienc e and qualifications in dealing with the various bodies of law that are actually or potentially involved.[87]

The position of the ABA is, therefore, that the Foreign Attorneys Law disrupts the fluidity of an international/multinational law practice. Thus, the ABA characterizes the F.A.L. as "unnecessarily restrictive," stating that the protection of the public against incompetent advice on matters of local law can be afforded by considerations of professional responsibility and malpractice liability. [88]

The second issue is whether *gaiben* may represent clients in commercial arbitration. Commercial arbitration in the U.S. and most international settings may be conducted without representation by attorneys since arbitration generally involves interpretation of contract terms and not law.[89] At arbitration proceedings in the U.S., parties may be represented by whomever they please, if in accordance with the terms of a given contract.[90] This is not the case in Japan, however, which strictly requires legal representation in arbitration.[91] Thus, the

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[86] Sohn, *supra* note 14, at 228; Fukushima, *supra* note 10, at 11. The USTR sought permission for American attorneys to give advice on "any law—with the exception of Japanese law—about which the foreign attorney was knowledgeable and competent." *Id.*

[87] Sohn, *supra* note 14, at 227.

[88] *Id.* at 228.

[89] Carrington Interview, *supra* note 82. In the United States, parties to arbitration are not required to be represented by attorneys. Very often, parties involved in a contract dispute may arbitrate in accordance with the contract without ever involving lawyers at all. Arbitrators will attempt to reach an equitable result based on common sense interpretation of the contract terms and not law. *Id.*

[90] *Id.*; Telephone interview with Robert F. Grondine, *Gaikokuho Jimu Bengoshi*, White & Case, Tokyo Office (Mar. 18, 1995) [hereinafter Grondine Interview].

[91] Grondine Interview, *supra* note 90.

issue is whether *gaiben* are qualified to fulfill this form of legal representation.

Bengoshi have argued that foreign attorneys should be permitted to represent Japanese and non-Japanese parties in arbitration proceedings only if they are licensed to practice Japanese law.[92] *Gaiben* have countered that this is, in effect, discrimination based on nationality and that "[p]arties to arbitration in most major trade centers may choose their representatives without nationality restrictions."[93]

Nichibenren has taken a middle road on this issue, allowing *gaiben* to participate in limited circumstances. In a formal opinion released in April, 1990, *Nichibenren* stated that while *gaiben* may represent a party in an arbitration proceeding when the governing law to be applied is that of the *gaiben*'s home jurisdiction, they are forbidden by the F.A.L. from interpreting provisions of Japan's Civil Litigation Procedure Law which may arise and from filing motions with the court concerning the results of the arbitration.[94]

Thus, *gaiben* are permitted to represent clients in commercial arbitration, but their actions must nevertheless be within the scope of the Foreign Attorneys Law. In the long run, however, the real losers of such regulation may be Japanese business, since foreign partners may shy away from Japan as the forum for arbitration if they are limited in selection of their representatives.[95]

4. Association with Bengoshi

Limitations on scope of practice are compounded because *gaiben* association with *bengoshi* is also limited. The Foreign Attorneys Law

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[92] Wohl I, *supra* note 68, at 10. Article Three only forbids *gaiben* from appearing before "a court, public prosecutor's office, or other public agency," and thus *gaiben* have been taking part in arbitration proceedings. *Id.* (discussing Foreign Attorneys Law, art. 3).

[93] Wohl I, *supra* note 68, at 10.

[94] McAbee, *supra* note 26, at 15.

[95] *Id.*; Carrington Interview, *supra* note 82. U.S. businesses in contracting with Japanese businesses would be well advised to stipulate the U.S. as the forum for arbitration, especially in light of federal case law under which U.S. courts will not interfere with contractual agreements naming Japan as the forum for arbitration though substantial issues of U.S. federal law are involved. *Id.* (referring to Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, 814 F.2d 844 (1987), in which arbitration was required to be held in Japan though Defendant claimed violation of the Sherman Anti-Trust Act).

forbids a *gaiben* from employing or forming a partnership with a *bengoshi*.[96] The restriction against employment is one sided since *bengoshi* may freely employ either *gaiben* or trainees. Thus, only *bengoshi* firms can provide "one stop shopping," that is, provide advice on Japanese and foreign law, to their clients. The *gaiben* firms on the other hand cannot independently render advice on Japanese law and cannot employ or join in partnership with those who can.

This situation has had two effects. First, the competitiveness of *gaiben* vis-a-vis the *bengoshi* firms has been substantially impaired. Jeffrey L. Pote, partner in charge of Milbank Tweed in Tokyo has said: "Some clients really don't like the fact that when we are asked a question about Japanese law we have to speak to someone else about it."[97] Not only has this situation been bothersome, but it has also increased the cost to the client.[98] Ideally, the foreign law firms would like "to provide the foreign law expertise and assistance with negotiations and transactions not normally available from *bengoshi* while also having *bengoshi* partners litigating and advising on Japanese law."[99] At present, only *bengoshi* firms can legally offer such service.

Second, the inability of the *gaiben* to independently handle transactions taking place under Japanese law has made them all but useless to foreign companies doing business in Japan.[100] Thus, *gaiben* have been effectively limited to offering their services to Japanese clients seeking to do business abroad.

These problems have been partially alleviated by the 1995 Amendments. Not withstanding that the prohibition against partnership be-

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[96] Foreign Attorneys Law, *supra* note 1, art. 49. Article 49.2 reads:

> A *gaiben* shall not, based on a partnership or any other kind of agreement, engage in a joint enterprise with a specific *bengoshi* for the purpose of performing legal business or receive a share of the fees or other profits gained by a specific *bengoshi* in the performance of legal business.

Id.

[97] Chambers, *supra* note 22, at 19.

[98] Perry, *supra* note 11, at 179-80.

[99] Kigawa, *supra* note 3, at 1509 n.95.

[100] Perry, *supra* note 11, at 179-80. The author says that "to a limited degree the *gaiben* can be involved in representing a foreign company in matter involving Japanese law. However, this requires the *gaiben* to obtain a *bengoshi*'s opinion on the legal issues, upon which the *gaiben* must base his own opinion." *Id.* Hamada suggests that some *bengoshi* feel that for *gaiben* to engage to the "limited degree" described by Mr. Perry, is to encroach upon Japanese law and is therefore illegal. Hamada, *supra* note 21, at 46.

tween *bengoshi*, and *gaiben* and employment of *bengoshi* by *gaiben* remains unchanged, *gaiben* and *bengoshi* will now be allowed to operate "joint enterprises."[101] The amendment allows *gaiben* and *bengoshi* in duly registered joint enterprises, to share offices, personnel, costs, and profits.[102]

The significant benefit to *gaiben*, of joint enterprises, is that the *bengoshi* is permitted to hire other *bengoshi* as employees. Through the *bengoshi* member of the joint enterprise, the *gaiben* may request a *bengoshi*, who is employed by the joint enterprise *bengoshi*, to handle the *gaiben*'s business. Thus, joint enterprises create a form of indirect employment of the junior *bengoshi* by the *gaiben*. The *gaiben* firm will thereby be able to provide "one stop shopping" to its clients because it will have the ability to provide advice on Japanese law.

This amendment may in fact be no more than recognition of what has already become reality. Given the prohibition of *gaiben* employment of or partnership with *bengoshi*, many *gaiben* firms have established "shop relationships" with *bengoshi*.[103] Working under these relationships, the *gaiben* and *bengoshi* have been informally sharing office space, and referring work to each other.[104] Through these associations, *gaiben* and *bengoshi* have circumvented the letter of the law to provide one stop shopping for their clients.[105]

5. Disciplinary provisions of the Foreign Attorneys Law

Under the Foreign Attorneys Law, *gaiben* may be subject to *Nichibenren* and penal discipline. *Nichibenren* may discipline a *gaiben* who fails to observe the rules of *Nichibenren* concerning *gaiben*, damages the reputation of *Nichibenren*, or in or out of practice is guilty of disgraceful

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[101] Okamori Letter 1, *supra* note 55.

[102] *Id.*

[103] Wohl I, *supra* note 68, at 11; Kigawa, *supra* note 3, at 1509. Even before the amendment, the Japanese government agreed to define the concept of "partnership" narrowly so that joint activities between foreign lawyers and *bengoshi*, such as the sharing of offices and expenses, is permitted so long as there is no sharing of profits. This concession is important because it allows the splitting of major cost items such as office rent and staff salaries. Wohl I, *supra* note 68, at 11.

[104] Kigawa, *supra* note 3, at 1509 n.95. Noted associations are Baker & McKenzie with Tokyo Aoyama Law Office and Marks, Murase, & White with Showa Law Office. *Id.*

[105] Murphy, *supra* note 16, at 10.

conduct.[106] *Nichibenren* may, at its discretion, issue a warning, suspension of up to two years, order to resign as a *gaiben*, or order of expulsion from *Nichibenren*.[107]

It is important to note that *Nichibenren*'s authority extends to the *gaiben*'s in-country behavior which may have no direct connection to the practice of law. One can imagine, for example, *Nichibenren* censuring a *gaiben*, if he appears on television making disparaging remarks about, for example, *Nichibenren*, or the Japanese government or culture, or has a dispute with his landlord. The point is that under the plain language of the F.A.L., *Nichibenren* has complete discretion.

This disciplinary power of *Nichibenren* seems to be an expression of the Japanese culture and custom that once a person is accepted as a member of group, the group is responsible for his every action, and his every action is a reflection upon the group. Most would agree, that the distinction made between the public action and private action of a member of a group, is different in the Japanese mind as compared to the western.[108] Thus, the *gaiben* must remember that he is a member of *Nichibenren* both in and out of practice.

Exceeding the scope of practice authorized by Article Three of the Foreign Attorneys Law is considered unauthorized practice of law and therefore a crime.[109] Thus, *gaiben* who exceed the scope of practice authorized in Article Three are subject to criminal prosecution.[110] As with other non-*bengoshi* who engage in the unauthorized practice of

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[106] Foreign Attorneys Law, *supra* note 1, art. 51. Though disciplined under different laws, *bengoshi* are essentially subject to the same penalties as *gaiben* for acts similar to those described in Article 51 of the Foreign Attorneys Law. *Bengoshi* Law, *supra* note 4, art. 56.

[107] Foreign Attorneys Law, *supra* note 1, art. 51. Because registration with *Nichibenren* is required by law, expulsion from membership effectively disqualifies a person from practicing as a *gaiben* or a *bengoshi*. Murphy, *supra* note 16, at 11.

[108] The author bases these conclusions on personal experience while living in Tomakomai-shi, Hokkaido and Akita-shi, Akita-ken, Japan from 1990-1993.

[109] Foreign Attorneys Law, *supra* note 1, art. 63 (setting forth penal provisions for performance of legal business outside the scope of practice). To date no *gaiben* has been punished or even investigated for exceeding the scope of practice. Okamori Letter 1, *supra* note 55. The fine line between what is and what is not rendering advice on issues of Japanese law is being tested. Some *bengoshi* complain, saying that "in some cases Japanese law questions that used to come from New York now come from representatives at Tokyo law offices. Apparently answers to Japanese law questions are being provided to foreign clients in Japan." Hamada, *supra* note 21, at 46.

[110] Foreign Attorneys Law, *supra* note 1, art. 63.

law, *gaiben* may be punished with imprisonment at hard labor for up to two years, or fined up to 1,000,000 yen.[111]

These are the substantive regulations of the Foreign Attorneys Law as amended. Though criticized by the ABA, there is no comparable national law in the U.S. due to the federal nature of our government. Regulation in the U.S. has come on a state-by-state basis in the form of judicially created rules.

B. Comparison of the Foreign Attorneys Law to the ABA's Model Rule

In 1974, with a view to securing its position as an international legal center and ensuring admittance of its attorneys to practice in foreign jurisdictions, New York became the first U.S. jurisdiction to pass a foreign attorneys practice rule.[112] Subsequently, other jurisdicitions began to consider and adopt similar rules as the need for access to foreign legal expertise increased and became more widespread in the late 1970's and 1980's.[113] Many of these jurisdictions modeled their rules on New York Rules of Court, Rules of the Court of Appeals, Part 521 (New York Rule) which is regarded by the ABA as having been highly successful.[114] Today seventeen states and the District of Columbia have rules allowing foreign lawyers to register as foreign law consultants[115] and to engage in some form of the practice of law without requiring them to take the local bar examination.[116]

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[111] *Id.* art. 63; *Bengoshi* Law, *supra* note 4, art. 72 (prohibition of practice by non-lawyers). Foreign lawyers in Japan are considered non-*bengoshi* and may be punished for violation of *Bengoshi* Law, Article 72, unless they are registered *gaiben*. Letter from Mr. Eigi Okamori, Director for the Committee on Foreign Lawyers, Japan Federation of Bar Associations (*Nichibenren*), to J. Ryan Dwyer III, Student Author, *University of Hawai'i Law Review* (Mar. 30, 1995) (on file with author).

[112] Sohn, *supra* note 14, at 213 (referring to N.Y. R. OF CT. Part 521).

[113] Sohn, *supra* note 14, at 214.

[114] *Id.* at 214. Between 1974 and 1994 some 170 foreign attorneys registered as legal consultants in the state of New York. "Many New York practitioners have found that the possibility of local access to foreign lawyers has enhanced their ability to render effective legal services to their clients." *Id.* The Model Rule itself closely follows the New York Rule. *Id.*

[115] *See, e.g.*, HAWAI'I RULE, *supra* note 49. The term "foreign law consultant" is used in the Model Rule, the Hawai'i Rule, and the rules of most other states. Some variations do appear in the statutes of other states. *See infra* note 116. The term

In the opinion of the ABA, however, many state rules imposed "unnecessary restrictions" which were not only seized upon as justification for similar restrictions in foreign laws, but also had the "unintended effect of interfering with the development of smooth and effective professional interaction between legal consultants and members of local bar associations."[117] Thus, in the spring of 1994, the ABA put forth its Model Rule for the Licensing of Legal Consultants (Model Rule), and recommended that all states, even those not presently having such a rule, adopt a rule conforming to the Model Rule.[118]

The ABA's Model Rule closely follows New York's rule, and when compared to the Foreign Attorneys Law, proves to be the less restrictive of the two. The Model Rule and the Foreign Attorneys Law differ primarily in the areas discussed below.

1. Qualifications

As with the Foreign Attorneys Law, the Model Rule stipulates an experience requirement. To meet the requirement, an applicant must have been qualified as a member in good standing of a recognized legal profession of a foreign country for at least five of the seven years immediately preceding application.[119]

"foreign law consultant" as used in this note means a foreign attorney who has registered under a foreign practice rule.

[116] ALASKA BAR ASSOC. Rule 44.1; SUP. CT. OF ARIZ. Rule 33; CAL. R. OF CT. Rule 988; SUP. CT. OF CONN. Rule 24B-24E; D.C. R. OF CT. Rule 46; R OF THE FLA. SUP. CT. Ch. 16; SUP. CT. OF GA. GOVERNING ADM. TO THE PRACTICE OF LAW Part D; R. OF THE SUP. CT. OF HAW. Rule 14; ILL. SUP. CT. Rule. 712; IND. R. FOR ADM. TO THE BAR AND DISCIPLINE OF ATT. Rule 5; R. OF THE MICH. BRD. OF BAR EXAMINERS Rule 5(E); MINN. SUP. CT. R. ON ADM. TO THE BAR, VII; N.J. R. OF CT. Rule 1:21-9; N.Y. R. OF CT. Part 521; SUP. CT. R. FOR THE GOV. OF THE BAR OF OHIO Rule XI; ORE. ST. BAR Rule 10.05; BAR OF TX. Rule XVI; WASH. R. OF CT. Rule 14. *See* Sohn, *supra* note 14, at 212-14 (listing the dates when the rules of individual states were enacted). Several of these states appear to have been moved to action by the Japanese law's reciprocity requirement. *Id.*

[117] Sohn, *supra* note 14, at 214. For example, states have imposed: geographic restrictions on the experience requirement, residency requirements, strict reciprocity requirements, and extensive scope of practice restrictions. *Id.*

[118] *Id.* at 219.

[119] *Id.* at 208 (citing MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS § 1(a)&(b) (1994) [hereinafter MODEL RULE]). The comment states, however, that Section 1(b) is optional and may be modified through the substitution of shorter periods than five or seven years respectively or omitted entirely. *Id.*

While the Model Rule is similar to the Foreign Attorneys Law in requiring five years experience, it does not, however, impose the additional geographic restriction of the F.A.L.[120] The Model only requires that the applicant have been engaged in a practice "substantially involving or relating to the rendering of advice on legal services concerning a foreign country's law."[121] Thus, the Model Rule avoids the problem of excluding experienced attorneys who have been practicing in the U.S. or somewhere else outside of their jurisdiction of primary qualification.

Furthermore, the Model Rule does not require that the applicant's jurisdiction of primary qualification recognize reciprocity.[122] Instead, the Model Rule replaces a strict reciprocity requirement with a "reasonable and practical" standard.[123] This allows the licensing authority of a particular jurisdiction to consider whether a member of the local bar would have a "reasonable and practical" opportunity to engage in legal practice in the applicant's home jurisdiction.[124] Thus, the Model Rule is an attempt to eliminate the strict and non-discretion ary form of reciprocity requirement which created significant problems in the Japan-U.S. negotiations.[125]

It can be argued, however, that such a discretionary standard may give rise to problems of interpretation which do not arise under an

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[120] Foreign Attorneys Law, *supra* note 1, art. 10. The F.A.L. requires the applicant to have practiced for five years in a jurisdiction which recognizes reciprocity unless excluding the foreign attorney on reciprocity ground would violate international treaties of agreements. *Id.* States imposing some sort of geographic restriction are: Alaska, Connecticut, D.C., Hawai'i, Michigan, New Jersey, and Washington. Sohn, *supra* note 14, at 221.

[121] Sohn, *supra* note 14, at 208 (citing MODEL RULE § 1(b)).

[122] *Id.* at 225 (explaining that a strict reciprocity standard creates unwarranted obstacles to practice, based on immaterial differences in systems of professional regulation).

[123] *Id.* at 225-26 (referring to MODEL RULE § 3).

[124] *Id.* This construction is more in line with international trade law under GATT. GATT will require each contracting state to accord to the products and services of the other contracting parties treatment known as "unconditional most-favored-nation" treatment. Thus, no state could discriminate against any other on grounds of reciprocity. *Id.*

[125] *Id.* at 225. Strict reciprocity requirements "created such significant problems in the intergovernmental negotiations relating to trade in legal services, that at one point the USTR Ambassador, Carla Hills, wrote to the Supreme Courts of Texas and Florida, in December, 1991 urging them to drop such requirements from their Rules, which they subsequently did." *Id.*

objective standard. For example, to make an application to become a *gaiben*, the applicant must secure a lease of office space which could cost several hundred thousand dollars.[126] Arguably a sole practitioner could not "reasonably and practically" raise the cash necessary to make an application and would be precluded from becoming a *gaiben*. Given these circumstances, would the Hawaii Supreme Court, for example, deny *bengoshi* the right to become foreign law consultants in Hawai'i because the financial burden imposed by the Foreign Attorneys Law prevented sole practitioners from becoming *gaiben*? Clearly such an interpretation could be made under the Model Rule's recommended standard. Thus, in its attempt to avoid inflexible objective standards in hope of increasing openness, the ABA may have created a standard that raises more obstacles to foreign attorney practice than it does away with.[127]

2. Residency requirements

Unlike the Foreign Attorneys Law, the Model Rule does not impose a residency requirement. It does, however, require evidence of the foreign attorney's intent to practice in the jurisdiction and to maintain an office there.[128]

The ABA did not adopt a residency requirement for two reasons. First, the constitutionality of such requirements is questionable. The United States Supreme Court has held that residency requirements for admission to the bar of a particular state violate the Privileges and Immunities Clause of Article IV of the Constitution.[129] The ABA expressed the opinion that "while the direct applicability of the Privileges and Immunities clause to foreign nationals is doubtful," the principles enunciated in U.S. Supreme Court caselaw might produce a similar result in relation to foreign nationals.[130] Thus, residency requirements were left out of the Model Rule to avoid constitutional challenges .

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[126] Foreign Attorneys Law, *supra* note 1, art. 10; Kanter, *supra* note 59, at 58.

[127] Sohn, *supra* note 14, at 225. "The principle objective of legal consultant rule is to foster an open system which makes the conduct of transnational practice possible as a reasonable and practical matter. . . ." *Id.*

[128] *Id.* at 223. New York and Texas require the foreign law consultant to be a state resident and Washington requires U.S. residency. *Id.*

[129] *Id.* (referring to Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)).

[130] *Id.* at 223 n.45 (discussing *Piper* and *Griffith*); *see supra* note 14 (discussing *Griffith*).

Second, the ABA did not adopt a residency requirement, because it imposes a hardship which cannot be justified by a legitimate purpose.[131] Considering the nature of international law practice in which attorneys are continually moving between offices and countries, a residency requirement would "complicate the process without any commensurate benefit."[132] Thus, the ABA adopted a requirement that imposes the lighter burden of only requiring the foreign law consultant to maintain permanent place of business in a particular jurisdiction.[133]

3. Title and firm name

Like the amended Foreign Attorneys Law, the Model Rule allows the foreign law consultant to use her own name or the name of a law firm with which the foreign attorney is affiliated.[134]

The Model Rule is more restrictive than the F.A.L., however, in its use of the term "Legal Consultant" versus the Japanese use of *Gaikokuho Jimu Bengoshi* which recognizes *gaiben* as *bengoshi*.[135] The difference in terminology stems from the fact that under the Model Rule the foreign attorney in the U.S. does not become an actual member of the local bar, but is only considered a "lawyer affiliated with the bar."[136] The *gaiben* in Japan, on the other hand, becomes a member of the bar.[137] The difference may be only in the terminology for under both the Model Rule and the Foreign Attorneys Law, the

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[131] Sohn, *supra* note 14, at 223.

[132] *Id.*

[133] *Id.* Such a requirement would not require the permanent presence of the foreign law consultant, as the place of business could be maintained by a junior associate, or even a secretary. *Id.*

[134] *Id.* at 209-10 (citing MODEL RULE § 4(g)(I)&(i i)). This provision appears to have been put into the Model Rule to improve the ABA's bargaining position when renegotiating the Foreign Attorneys Law. The ABA protested the Japanese restriction on the use of firm names in August 1986, and considers it to be, "beyond what is objectively justified to achieve the only apparent purpose of such a requirement, namely that of ensuring that consumers of legal services can readily determine the identity of the lawyers in the branch office." *Id.* at 230.

[135] *Id.* at 209 (citing MODEL RULE § 4(g)(iv)); Foreign Attorneys Law, *supra* note 1, art. 7; *see supra* note 44 (explaining the translation of the Japanese term).

[136] Sohn, *supra* note 14, at 230.

[137] Hamada, *supra* note 21, at 44. Thus accorded "special membership" status, the foreign attorney would be bound by the *Bengoshi* Law which prescribes that the *bengoshi* "is entrusted with a mission to protect fundamental human rights and to realize social justice." *Id.* (citation omitted).

foreign attorney has all the rights of a bar member not otherwise restricted.[138]

4. Scope of practice restictions

The Model Rule differs from the Foreign Attorneys Law in that the foreign law consultant may render legal advice on local state or federal law. While the foreign law consultant may not prepare certain types of legal instruments which require an "independent knowledge of local law," she may give advice on local law, if based on the advice of a person duly qualified and entitled to render such advice.[139] This is in contrast to the Foreign Attorneys Law which limits the *gaiben* to the law of that attorney's state of primary qualification.[140] Thus, on its face, it seems that the foreign law consultant in the U.S. may have a degree of independence in dealing with third country, international, and even local law, which the *gaiben* does not have.

Bengoshi claim that the difference in scope of practice under the Foreign Attorneys Law and under the Model Rule is a matter of form rather than substance. [141] Under either the Foreign Attorneys Law or the Model Rule, when asked for an opinion regarding matters of local law, both the *gaiben* and the foreign law consultant would likely get a written opinion letter from a local attorney.[142] This letter would then be presented to the client along with the *gaiben*/foreign law consultant's own explanation.[143] This method of handling questions of local law appears to be common practice in Tokyo today.[144]

Gaiben argue that there is a discrepancy between what *Nichibenren* and *bengoshi* say *gaiben* can do and what the language of the Foreign Attorneys Law will permit.[145] They feel that if *Nichibenren* means what

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[138] Sohn, *supra* note 14, at 210 (citing MODEL RULE § 5); *see supra* part III.A.4 (discussing limitation of *gaiben-bengoshi* association).

[139] Sohn, *supra* note 14, at 209 (citing MODEL RULE §§ 4(b-e)). The foreign law consultant may not prepare instruments: effecting transfer or registrations of title to real estate; any will or instrument effecting disposition of a deceased person's U.S. property if such person was a U.S. resident; any instrument relating to administration of decedents estate; or any instrument in respect to marital or parental relations rights or duties. *Id.*

[140] Foreign Attorneys Law, *supra* note 1, art. 3.1.3; *see supra* part III.A.3.

[141] Hoshino Interview, *supra* note 42.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Grondine Interview, *supra* note 90.

it says, then it should seek amendment of the F.A.L.[146] In not doing so, *Nichibenren* is "playing games" with them and is in effect asking *gaiben* to base an integral aspect of their practice on the "goodness of *Nichibenren*'s heart."[147] The problem is that unless the language of the F.A.L. is changed, *gaiben* will never know when *Nichibenren* will decide to follow a strict interpretation and prosecute a *gaiben* for unauthorized practice of law.[148] This leads to an uncertainty in the scope of their practice which has negative ramifications on attorney-client relations.[149]

Thus, *gaiben* claim that there is a substantial difference between the Foreign Attorneys Law and the Model Rule. That difference is that one expressly allows the foreign attorney to give opinions on local law based on a local attorneys opinion while the other expressly prohibits this practice but allows it to go on in fact.[150]

5. Association with local bar members

The significant difference here is that a foreign law consultant has all the rights of any member of the bar, including the rights to partnership with and employment of members of the local bar.[151] As compared to the *gaiben*, the foreign law consultant has the freedom to participate in and establish firms which can provide integrated, "one stop shopping" legal service to clients.

It is important to note, however, that the legality of foreign law consultant-local bar member partnership has been questioned due to the quasi-attorney status of the foreign law consultant. The Model Rules of Professional Conduct provides that:

> A lawyer or law firm shall not share fees with a non-lawyer . . . that a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership shall consist of the practice of law; and that a lawyer shall not practice with or in the form of a professional corporation authorized to practice law for profit, if a non-lawyer owns any interest therein. [152]

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[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Sohn, *supra* note 14, at 210 (citing MODEL RULE § 5(b)(I)(A) &(B)).
[152] *Id.* at 231 n.63 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4). The Hawaii Rules of Professional Conduct impose the same restriction. HAW. RULES OF PROFESSIONAL CONDUCT Rule 5.1 (a)(1) & (b).

Thus, the issue is whether the foreign law consultant is considered a lawyer for purposes of association and partnership with lawyers to conduct the practice of law.[153]

In Formal Opinion 646, the New York State Bar Association Committee on Profession Ethics considered this issue and held that in determining whether a foreign law consultant is a lawyer "depends on factual issues, such as whether the training of and ethical standards applicable to the foreign lawyer are comparable to those of an American Lawyer."[154] The Committee therefore found that the education and ethical standards of *bengoshi* satisfy this test and that they are to be considered lawyers.[155]

The ABA supports this finding. In the report issued with the Model Rule, the ABA stated that neither employment of members of the bar by foreign law consultants nor their entry into law partnership with foreign law consultants should be prohibited or restricted in any way.[156] The reasons it gave were twofold. First, the New York State Bar Association Committee on Professional Ethics had found authoritatively that a duly-qualified foreign lawyer is not a non-lawyer.[157] Second, there is no valid policy reason for a contrary interpretation so long as the test in the New York opinion is satisfied.[158]

Under the ABA Model Rule, therefore, foreign law consultants are, at the very least, not considered non-lawyers for purposes of professional associations with local attorneys. Thus, *bengoshi* potentially have rights of association which *gaiben* currently do not have.

6. *Disciplinary provisions*

As under the Foreign Attorneys Law, foreign law consultants are subject to the discipline of the local bar as is any other attorney. The Model Rule requires that the foreign law consultant observe the Rules of Professional Responsibility and the rules of the court governing the members of the bar, and practice law within the scope authorized by the Model Rule, section 4.[159] For violation of these requirements the

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[153] *State Ethics Opinion 646 Issued by the Committee on Professional Ethics of the New York State Bar Association*, N.Y.L.J., Dec. 6, 1993, at 8 [hereinafter *N.Y. Ethics Opinion*].

[154] *Id.* at 9.

[155] *Id.*

[156] Sohn, *supra* note 14, at 232.

[157] *Id.* at 231 n.63; *see generally N.Y. Ethics Opinion*, *supra* note 153.

[158] Sohn, *supra* note 14, at 231 n.63; *see generally N.Y. Ethics Opinion*, *supra* note 153.

[159] Sohn, *supra* note 14, at 210-11 (citing MODEL RULE § 6(a)(ii)(A)).

local bar may censure, suspend, remove, or revoke the license of the foreign law consultant.[160]

The Model Rule varies from the Foreign Attorneys Law in that it does not proscribe criminal penalties for unauthorized practice of law.[161] Unauthorized practice of law may, nevertheless, be punishable as a crime under state statutes.[162]

In drafting the Model Rule, the ABA apparently intended that foreign law consultants to be regulated and disciplined in the same manner as U.S. attorneys. Thus, in the notes accompanying the Model Rule, the ABA pointed out that the foreign law consultant is subject, "not only to the disciplinary powers of the court having responsibility for the same but also to private civil suit in a United States court for any failure to observe established standards of professional responsibility."[163] The foreign law consultant in the U.S. must therefore, practice law in light of the potential for malpractice.

C. Hawai'i's Rule for Foreign Law Consultants

Since 1986, Hawai'i has allowed foreign attorneys to practice foreign country law as foreign law consultants under Supreme Court Rule 14.[164] The Hawai'i Rule is based on the New York Rule and District of Columbia Court of Appeals Rule for the Licensing of Special Legal Consultants.[165] Since there has not been a host of would-be foreign law consultants pounding on the door of the Hawaii Supreme Court demanding to become Hawai'i foreign law consultants,[166] it seems that

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[160] *Id.* (citing MODEL RULE § 6(a)(i)). In jurisdictions where bar membership is required to practice law, removal or revocation by the bar would effectively disqualify the foreign law consultant from practicing as such. *Id.*

[161] *Id.*

[162] HAW. REV. STAT. § 605-14 (1993). In Hawai'i, for example, Hawaii Revised Statutes § 605-14 prohibits the unauthorized practice of law. *Id.*

[163] Sohn, *supra* note 14, at 233.

[164] HAWAI'I RULE, *supra* note 49, at 14. Hawai'i adopted the term "foreign law consultant" over the term "special law consultant" because it "more accurately informs the public of the limited nature of the license to be granted and is easier to understand." Richard S. Kanter, *Hawai'i State Bar Association Ad Hoc Committee on Foreign Legal Consultants Final Report*, May 30, 1986, at 8 [hereinafter *HSBA Report*].

[165] *Id.* at 8.

[166] Telephone interview with Daryl Phillips, Chief Clerk of the Hawaii Supreme Court (Mar. 6, 1987) [hereinaft er Phillips Interview]. Since 1987, only six foreign attorneys have registered under the Hawai'i Rule. *Id.*

passage of this rule was motivated, at least in part, by the desire of Hawai'i attorneys to satisfy the reciprocity requirement imposed by Japan's Foreign Attorneys Law.

The Hawai'i Rule varies slightly from the ABA's Model Rule two areas. First, the rule does not require the foreign law consultant to maintain a permanent office in Hawai'i.[167] The decision to eliminate this requirement was made in light of United States Supreme Court decisions and the fact that maintaining an office for the practice of law in a state, as a condition to bar membership, is not a requirement generally imposed on U.S. attorneys.[168] Therefore, the committee reasoned that it would be discriminatory to impose such a requirement on foreign law consultants.[169]

Second, the Hawai'i Rule slightly varies the scope of practice as allowed under the Model Rule. As under the Model Rule, the foreign law consultant in Hawai'i may render advice on issues of state or federal law on the basis of advice from a person duly admitted to do so.[170] Under the Hawai'i Rule, however, this requirement applies to opinions concerning third-country law and presumedly international law as well.[171] Furthermore, unlike under the Model Rule, the foreign law consultant in Hawai'i must disclose to the client the name of the lawyer consulted on any particular issue.[172] Thus, while the Hawai'i Rule is a bit more restrictive than the ABA Model Rule, it still allows foreign law consultants the basic scope of practice afforded under the Model Rule.

The disciplinary provisions of the Hawai'i Rule mirror the Model Rule. For a violation of the Code of Professional Responsibility, the rules of the court governing the members of the bar, or the Hawai'i Rule, the foreign law consultant is subject to the disciplinary jurisdiction of the Hawaii Supreme Court and the Disciplinary Board.[173]

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[167] HAWAI'I RULE, *supra* note 49, at 14.1(c).

[168] *HSBA Report*, *supra* note 164, at 14 (referring to the concurring opinion of Justice White in *Piper*); *see supra* part III.B.2.

[169] *Id.*

[170] HAWAI'I RULE, *supra* note 49, at 14.4.

[171] *Id.* at 14.4. This restriction does not apply when a foreign law consultant' jurisdiction of primary qualification is a political subdivision of a country with a federal system, like Australia, and the foreign law consultant seeks to render advice on law of another political subdivision of the same country. *HSBA Report*, *supra* note 164, at 19-20. *See supra* part III.B.4.

[172] *HSBA Report*, *supra* note 164, at 19-20. The purpose of these additional requirements is to provide additional protection to Hawai'i consumers of legal services. *Id.*

[173] HAWAI'I RULE, *supra* note 49, at 14.5 (Disciplinary Provisions). No foreign

Furthermore, the Hawai'i Rule does not proscribe penal provisions for practice of law beyond the scope authorized by the Hawai'i Rule. Such unauthorized practice may however be punishable as a crime under Hawaii Revised Statutes Section 605-14, Unauthorized Practice of Law.[174]

Whether foreign law consultants may become partners in Hawai'i law firms has not yet been addressed in Hawai'i.[175] Because the Hawai'i Rule is based on the New York Rule, resolution of this issue would likely be in accordance with New York's decision to allow foreign law consultants to become partners in law firms.[176]

IV. Practice under Japan's Law

Since the passage of the Foreign Attorneys Law, many large international law firms have come and gone from the Tokyo scene. It appears that after an initial rush by the large international law firms to establish branch offices in Tokyo, the industry settled down to the realities of actually practicing law in Japan.[177] This section will take a look at the economic realities of foreign law practice in Japan, and analyze whether the practice has impacted foreign access to Japan.

A. Economics Vis-a-Vis the Foreign Attorneys Law

The reality is that "[t]he cost of doing business in Tokyo could prove to be the biggest constraint on the long-term viability of the foreign legal community in Japan."[178] The initial investment needed

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attorneys have been disciplined for violation of the Hawai'i Rule. Telephone Interview with Carole Richelieu, Hawaii Supreme Court Office of Disciplinary Counsel (Mar. 5, 1995); Phillips Interview, *supra* note 166.

[174] HAW. REV. STAT. § 605-14 (1993). The remedy for violation of § 605-14 is injunctive and declaratory relief, and other existing remedies. *Id.* § 605-15.2. In addition, the attorney general may maintain a criminal action against any person who violates § 605-14. *Id.* Any person violating § 606-14 is guilty of a violation; upon subsequent violation, the person is guilty of a misdemeanor. *Id.* § 605-17.

[175] Phillips Interview, *supra* note 166.

[176] *See HSBA Report, supra* note 164, at 7. Neither employment of members of the bar by foreign lawyers nor their entry into law partnership with foreign lawyers should be prohibited or in anyway restricted. Sohn, *supra* note 14, at 232. *See also N.Y. Ethics Opinion, supra* note 153.

[177] See *infra* notes 180-81.

[178] Wohl II, *supra* note 81, at 11.

to open a two to four person law firm is in the millions of dollars.[179] Once open, the cost of paying the salaries and housing of attorneys staffing Tokyo branch offices is "twice that of New York City."[180]

It is not surprising, therefore, that the undoing of some of the first foreign firms to establish offices in Japan, after the F.A.L. went into effect, may be attributed to high costs.[181] Despite the optimism felt in 1987, only 77 practicing *gaiben*, working in 46 offices, remain in Tokyo today.[182] The sparse numbers are indicative of the fact that firms which hoped to facilitate foreign investment in Japan have not been profitable.[183]

In contrast, those firms that have survived the burgeoning cost of doing business in Tokyo have done so by taking advantage of the boom in Japanese overseas investment.[184] In 1987 as Japan approached the peak of its bubble economy, the prayers of *Keidanren* were answered. Foreign law firms appeared on the scene, in Tokyo, to guide Japanese business investment in the U.S. and elsewhere.

Indeed, the firms that have done best in the Tokyo market tend to be engaged in transactional, merger and acquisition, and financial work for Japanese clients doing business abroad.[185] Thus, the foreign firms

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[179] *Id.*

[180] Chambers, *supra* note 22, at 21; *but see* Hamada, *supra* note 19, at 47 (explaining that some large New York firms have been criticized for providing luxurious lifestyles for partners and associates while expecting Japanese clients to pay higher bills); *see also* Tasuku Matsuo, *Recent Developmen ts in and Japanese Attorneys' Perceptions of Gaikokuho Jimu Bengoshi Status*, 21 LAW IN JAPAN, 1989, at 27, 31 (commenting on the foreign law firms' offices which are overly large by Tokyo standards).

[181] Abel, *supra* note 64, at 767 (listing international firms which closed Tokyo branch offices due to high costs: Stokes & Master (of Hong Kong); Clifford, Chance & McKenna; Slaughter & May; Linklaters & Paines; Richards Butler; Freshfields).

[182] Okamori Letter 1, *supra* note 55 (providing the total number of *gaiben* by country of primary registration: U.S.A. 51, U.K. 19, Germany 2, France 1, Netherlands 2, Australia 2).

[183] Kigawa, *supra* note 3, at 1507.

[184] Isaac Shapiro, *Current Opportunities and the Changing Market: The Future of Foreign Law Offices in Japan*, 21 LAW IN JAPAN, 1989, at 79, 81.

[185] Iteya, *supra* note 7, at 154. These firms are: setting up joint ventures; representing Japanese companies in U.S. litigation and arbitration, in acquisitions of U.S. companies, in banking and securities transactions; and advising on opening businesses in the U.S., international business transactions, and U.S. taxation. *Id.* It is questionable whether any foreign law office in Tokyo is actually profitable. Many offices are rumored to operate at a loss but remain open to maintain the Japanese clients of the parent international law firm based in New York or L.A. Carrington Interview, *supra* note 82.

in Tokyo tend to have more Japanese clients than non-Japanese clients and to use their offices as a focus for business development activities among prospective Japanese clients.[186]

The positive reaction of *bengoshi* to the presence of *gaiben* in Tokyo, belies the fact that foreign businesses that wish to become active in Japan still have no alternative to the *bengoshi* firms. Rather than losing business in a head-to-head competition with *gaiben*, *bengoshi* have enjoyed an increase in the volume of work referred to them by foreign lawyers.[187] While foreign businesses may initially approach *gaiben* firms for service, they must ultimately be referred to *bengoshi* when the work involves Japanese law. The truth of the matter is that under the Foreign Attorneys Law, *gaiben* can do little for American business in Japan.[188]

B. Is This Just an Illusion?

While one might have hoped that the Foreign Attorneys Law would open Japan's legal services industry to foreign attorneys, and thereby impact international trade relations, that hope has been illusory, as the Foreign Attorneys Law has not opened the door to the Japanese market.

When the USTR put the issue of foreign law practice on the agenda of the intergovernmental trade talks in 1982, it was undoubtedly done with the idea that U.S. attorneys would become familiar with the Japanese way of doing business and thereby open the door to Japan, for American business.[189] Indeed, the U.S. Ambassador to Japan said as much, when he characterized the Foreign Attorneys Law as "a good first step toward access by American business to adequate legal service in Japan."[190]

The USTR, would have been wise, however, to heed the words of the American Chamber of Commerce in Japan which, in a letter to then Prime Minister Yasuhiro Nakasone predicted,

> [T]he result will be that foreign law firms in Japan will be unable to be of any assistance to foreign businesses insolving problems of market

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[186] Wohl II, *supra* note 81, at 16.

[187] Hamada, *supra* note 21, at 45.

[188] Kanter, *supra* note 59, at 52.

[189] S. Linn Williams, *Introduction*, 21 LAW IN JAPAN, 1989, at v; Murphy, *supra* note 14, at 9 (non-tariff trade barriers).

[190] Michael McAbee, *Japan's Foreign Lawyers Law; U.S.-Japan Talks Near Impasse*, E. ASIAN EXECUTIVE REP., Mar. 15, 1991, at 15; Murphy, *supra* note 16, at 11 (discussing lawyers as trade facilitators).

> access and investment in Japan. Ironically, the only foreign law firms that will enter Japan under this bill will be those whose primary interest is in assisting Japanese businesses in solving their problems of market access and investment abroad.[191]

This predication has rung true. As the Foreign Attorneys Law stands today "American lawyers have been prevented from acquiring a capacity in Japanese law and thus have been driven to represent only Japanese clients 'going out' rather than foreign clients 'going in.'"[192]

This effect is attributable to drafting and restictions. First, the F.A.L.'s prohibition of a *gaiben* rendering any opinion on any issue touching on Japanese law, or non-primary jurisdiction law for that matter, leaves only a narrow arena in which the *gaiben* may legally operate.[193] While few would argue that *gaiben* should be allowed full freedom to render opinions on Japanese law, as if they were *bengoshi*, many would agree that at least they should be able to do that for which no *bengoshi* license is required to do.

Yet, the scope of practice allowed the *gaiben* is so narrow, that *gaiben* are actually prohibited from providing information that non-*bengoshi* are usually allowed to give.[194] For example, non-*bengoshi* Japanese trading companies can supply American companies "going-into" Japan with trade facilitation and market access information.[195] No *bengoshi* license is required to provide this information, but *gaiben* are prohibited from giving it because such advice concerns Japanese law.[196] In the

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[191] Kanter, *supra* note 59, at 52 (citing a letter from Herbert F. Hayde, President, American Bar Association in Japan, to the Honorable Yasuhiro Nakasone, Prime Minister of Japan on May 12, 1986).

[192] Williams, *supra* note 189, at v. At the time the article was written, Williams was Deputy U.S. Trade Representative. *Id.*

[193] Kanter, *supra* note 59, at 54-55 (citing Foreign Attorneys Law, arts. 3 & 4).

[194] *Id.* at 54. Close reading of the pertinent sections reveals that Article 4 of the Foreign Attorneys Law prohibits American lawyers licensed under the F.A.L. from engaging in activities not specifically mentioned in Article 3. Thus, *gaiben* may not engage in activities open to the, non-*bengoshi*, general public because the scope of practice granted under Article 3 is narrower than the scope of activities not prohibited by the unauthorized practice of law provisions in Article 72 of the *Bengoshi* Law. *Id.*

[195] *Id.*

[196] *Id.* at 59. The type of information usually provided to foreign firms interested in exporting to the Japanese market by trading companies includes information on the structure of various industries, on the distributi on system, on potential joint venture partners, on government policies, laws, regulations, and on negotiation strategies. *Id.*

same way, foreigners experienced in doing business in Japan could market themselves as "business" or "market access" consultants, and be able to render advise on a broader range of issues than could a *gaiben*.

Possibly such narrowness in drafting was intended by *Nichibenren* to limit *gaiben* independence and thereby their effectiveness as facilitators of foreign business access. Considered in light of this capacity of non-*bengoshi* to provide legal advice, registration as a *gaiben* appears to place the foreign attorney in a straitjacket, rather than encourage the rendering of legal services.[197]

Second, the *gaiben*'s inability to render advise on matters concerning Japanese law is compounded by the prohibition against *gaiben* employing or forming true partnerships with *bengoshi*. This prohibition, prevents *gaiben* from circumventing the limitations on scope of practice by joining with those who are authorized to practice Japanese law. Thus, unable to offer services valuable to American business by themselves, and unable to employor join as partners with *bengoshi*, *gaiben* have no alternative but to service Japanese clients interested in doing business in the U.S. or to work for *bengoshi*.[198]

Third, stringent financial requirements which must be met favor large law firms to the detriment of small firms and sole practitioners.[199] The cost of registering as a *gaiben* is so high that only the large international law firms can afford it. This trend has contributed to the present situation because the big international firms may bring in lawyers with little experience in Japan.[200] Thus, the large international

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[197] Grondine Interview, *supra* note 90. Mr. Grondine indicated that, in fact, there may be more "in-flow" work going on than most *gaiben* are willing to admit, but because *Nichibenren* clearly intended to set up an outflow system when it wrote the F.A.L., *gaiben* prefer not to disclose just how much. *Id.*

[198] Kanter, *supra* note 59, at 56-57. *See supra* part III.A.4. (discussing joint-enterprises between *bengosh* and *gaiben* which allow the *bengoshi* and *gaiben* to share offices but do not allow the *gaiben* to directly employ or form partnerships with *bengoshi*).

[199] *Id.* at 57. For example, under Article 10 of the F.A.L., *gaiben* are:

> required to put down an office lease deposit and have the office space reserved—meaning payment of nonrefund able key money and monthly rent—before application for approval, during the months while the approval and registration are being processed by the Ministry of Justice, *Nichibenren* and the relevant [local] *bengoshi* association. During this time the *gaiben* is not permitted to practice in Japan.

Id. (referring to Foreign Attorneys Law, art. 10).

[200] *Id.* It is usually the small firm attorneys who are the Japan specialists with the

firms have been doing what their staff attorneys are trained to do—render advice on U.S. law—and not helping U.S. business access Japan as the USTR hoped that they would.

Thus, the statute which the USTR hoped would open doors to the Japanese economy was actually drafted in such a way that the exact the opposite occurred. Restrictions on scope of practice and association with *bengoshi* have successfully prevented *gaiben* from offering valuable services to American clients. At the same time, the high cost of doing business in Tokyo combined with the stringent financial requirements of the F.A.L. have ensured that only large international law firms interested in servicing Japanese conglomerates, are able to open offices. Thus, the F.A.L. has established a body of U.S. attorneys in Tokyo, catering to the interests of Japanese business alone.

V. Conclusion

The 1987 Foreign Attorneys Law has opened the door to Japan's legal service industry halfway.[201] While the Foreign Attorneys Law has recently been amended, barriers remain that do not exist under the ABA's Model Rule.

When examined from the wider perspective of U.S.-Japan trade relations, the Foreign Attorneys Law has clearly opened doors. Unfortunately, the doors opened were the wrong doors. The Foreign Attorneys Law opened doors to the U.S. for the Japanese. At the height of the "bubble economy," the availability of experienced *gaiben* in Tokyo was a boon to Japanese business and *Keidanren* eager to invest the profits of "Japan, Inc." abroad. The Foreign Attorneys Law did not, however, open doors for the Americans. The web of restrictions imposed by the Foreign Attorneys Law, has kept *gaiben* from becoming trade facilitators able to open the doors to Japan for American business.

J. Ryan Dwyer III[202]

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ability to facilitate business coming into Japan. *Id.* Mr. Grondine disputes this generalization saying that it is, at least, not true of himself or his partners. Grondine Interview, *supra* note 90.

[201] *See* Cooper, *supra* note 50, at 417.

[202] Class of 1996, William S. Richardson School of Law.

Legal Mechanisms for Enforcing Labor Rights Under NAFTA

I. INTRODUCTION

President George Bush formally initiated negotiations toward a free trade agreement with Mexico on September 25, 1990.[1] Canada joined the discussions on February 5, 1991.[2] The product of these talks, the North American Free Trade Agreement (NAFTA)[3], was designed to expand the U.S.-Canada Free Trade Agreement of 1984[4] to include Mexico, thereby creating a trade market comparable to others in the world, such as the European Economic Community (EEC),[5] and the Caribbean Common Market (CARICOM).[6] The goal was the gradual reduction and elimination of trade barriers between the three nations.[7]

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[1] Michael S. Barr et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT'L L. 1, 1 (1991).

[2] *Id.* at 2. For a historical background on U.S.-Mexico trade relations, see Dedra Wilburn, *The North American Free Trade Agreement: Sending U.S. Jobs South of the Border*, 17 N.C. J. INT'L L. & COM. REG. 489 (1992).

[3] The North American Free Trade Agreement, 32 I.L.M. 296, Sept. 14, 1993 [hereinafter NAFTA].

[4] Free Trade Agreement, Dec. 22, 1987, U.S.-Can., 27 I.L.M. 281.

[5] James E. Bailey, *Free Trade and the Environment: Can NAFTA Reconcile the Irreconcilable?*, 8 AM. U. J. INT'L L. & POL'Y 839, 841 (1993). The EEC, originally founded in 1958, consists of 12 European nations. *See generally* Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.-KENT L. REV. 1427 (explaining that the EEC has 4 basic goals: to foster the free movement of capital, goods, services, and people among member states).

[6] *See generally* Tim Carrington, *Getting Together: The Proliferation of Trade Blocs Scares Some Economists, But So Far the Growth is Benign*, WALL ST. J., Sept. 24, 1992, at R23 (reporting on the creation of free trade zones throughout the world).

[7] Ruth Agather & Timothy N. Tuggey, *The Meat and Potatoes of the North American Free Trade Agreement*, 24 ST. MARY'S L.J. 829, 831 (1993).

The result was to be a huge open market of 360 million consumers with a combined annual Gross National Product of $6 trillion.[8]

Congress authorized President Bush to negotiate the agreement subject to "fast track" Congressional consideration,[9] which permitted accelerated debate of the bill but precluded any amendments.[10] Proponents of NAFTA believed that it would stimulate long-term economic development in all three countries.[11] The United States would gain investment opportunities, and become more competitive in the global economy.[12] The Bush administration predicted a gain of 200,000 jobs for U.S. workers.[13] Mexico would benefit from sustained economic development, technology transfers,[14] and industrialization.[15] Such economic growth

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[8] Barr, *supra* note 1, at 2; Bailey, *supra* note 5, at 841; Thomas J. Schoenbaum, *The North American Free Trade Agreement (NAFTA): Good for Jobs, Good for the Environment, and for America*, 23 GA. J. INT'L & COMP. L. 461, 461-62 (1993)(using figures of 380 million consumers and a GNP of $7 trillion); Susan Black, *Speaking Out on Free Trade: What a Mexican Deal Could Mean*, BOBBIN, Aug. 1991, at 76.

[9] Barr, *supra* note 1, at 2. *See also* Sidney Weintraub, *The Promise of United States-Mexican Free Trade*, 27 TEX. INT'L L. J. 551 (1992). For a critical, detailed exploration of fast track procedures, see Edmund R. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471 (1990).

[10] Barr, *supra* note 1, at 2. Fast-track voting is governed by 19 U.S.C. § 2191. *Id.* It is considered advantageous because a precise timetable is followed and Congress cannot extensively modify international agreements that have been negotiated exhaustively. *Id. See also* Weintraub, *supra* note 9, n.41. In May, 1994, Senator Richard Gephardt (D-Mo.) and Chief Deputy Whip Bill Richardson (D-N.M.) introduced legislation to modify fast-track proceedings to include labor and environmental concerns. *See Reps. Gephardt, Richardson to Unveil New Approach to Fast-Track Authority*, DAILY LABOR REPORT, May, 1994, *available in* Westlaw, BNA-DLR database.

[11] Barr, *supra* note 1, at 3; Schoenbaum, *supra* note 8, at 466-67; Executive Summary, *Report of the Administration of the NAFTA and Actions Taken in Fulfillment of the May 1, 1991 Commitments*, Sept. 18, 1992, *available in* Westlaw, NAFTA database, File No. 360154.

[12] Ursula Maria Odiaga, *North American Trade: Barriers in Free Trade Arising from Differences in National Law (ASIL/CCIL Joint Panel)*, 86 AM. SOC'Y INT'L L. PROC. 141, 142 (1992).

[13] The North American Free Trade Agreement Implementation Act, *Statement as to How the NAFTA Serves the Interest of United States Commerce*, 1993, *available in* Westlaw, NAFTA database, File No. 561219 [hereinafter *Statement*].

[14] NAFTA, *supra* note 3. The preamble states that the nations will "[f]oster creativity and innovation, and promote trade in goods and services that are subject to intellectual property rights." *Id.*

[15] Bailey, *supra* note 5, at 846 (explaining that the leaders of the three countries listed "sustainable development" as a primary objective of NAFTA).

would have the added bonus of reducing illegal Mexican immigration into the United States.[16] These goals would be accomplished over a fifteen year period through the gradual elimination of trade barriers, and through increased access to banking, communications, and finance.[17]

In addition to its trade-related objectives, NAFTA required each nation to promise to create employment, protect workers' rights, and improve working conditions.[18] Nevertheless, the text of the agreement lacked specific provisions to address labor and environmental issues.[19] These omissions did not sit well with either public-interest or labor advocates on either side of the border: they ardently demanded a new agreement.[20] In response to these concerns, the three countries negotiated two side accords, the Side Agreement on Environmental Cooperation,[21] and the North American Agreement on Labor Cooperation (Labor Agreement).[22] The Labor Agreement required each nation to enforce its domestic labor laws, and to establish a trilateral commission to encourage collaboration, resolve labor-related disputes, and facilitate information exchange.[23]

Both NAFTA and the side accords went into effect on January 1, 1994, after more than two years of negotiations marked by fierce debate.[24]

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[16] Barr, *supra* note 1, at 3.

[17] Bailey, *supra* note 5, at 843-44.

[18] Elizabeth C. Crandall, *Will NAFTA'S North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L LAW. 165, ____, WL 7 TRNATLAW 165, at *2 (1994); NAFTA, *supra* note 3. In NAFTA's preamble, the three countries pledge to: "REDUCE distortions to trade . . . CREATE new employment opportunities and improve working conditions and living standards in their respective territories . . . PROTECT, enhance and enforce basic workers' rights." *Id.* (emphasis in original).

[19] NAFTA, *supra* note 3.

[20] Crandall, *supra* note 18, at *2; Juanita Darling, *Mexico's Angst Over NAFTA*, L.A. TIMES, Oct. 17, 1993, at D1 (reporting fear among Mexican workers that NAFTA would threaten their jobs); Stanley M. Spracker & Gregory Mertz, *Labor Issues Under the NAFTA: Options in the Wake of the Agreement*, 27 INT'L LAW. 737, 744-49 (1993)(stating that NAFTA's labor protections should be improved).

[21] North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United States of America, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1480.

[22] The North American Agreement on Labor Cooperation, Sept. 13, 1993, U.S.-Mex.-Can., 32 I.L.M. 1499 [hereinafter Labor Agreement].

[23] *See generally* Labor Agreement, *supra* note 22; Crandall, *supra* note 18, at *2.

[24] Crandall, *supra* note 18, at *2.

This paper will focus on the various legal mechanisms available under NAFTA for the enforcement of labor standards in Mexico, an issue which aroused considerable controversy during NAFTA negotiations. Part II addresses the arguments for and against NAFTA involving labor issues. Part III provides both a background on Mexican labor laws, which is necessary to adequately comprehend enforcement mechanisms under NAFTA, and reviews the history of their application. Part IV deals with the status of Mexican enforcement of labor rights. Part V outlines the legal mechanisms in the Labor Agreement, analyzes their effectiveness in promoting labor rights, and focuses on their weaknesses. Part VI explores and discusses options to improve and augment Mexican labor legislation through venues in the United States, as well as in the international arena.

II. Arguments For and Against NAFTA

Unlike the Canada-United States Free Trade Agreement, the labor issues related to NAFTA generated much concern.[25] Proponents of NAFTA believed that economic stability would improve the wages and working conditions of the Mexican work force.[26] Opponents argued that linking the economies of two highly developed countries with that of a third world nation would exacerbate labor problems in both Mexico and the United States.[27]

A. Proponents of NAFTA

I think free trade is going to expand our job opportunity.[28]

For a variety of reasons, many believed that NAFTA would have little effect on U.S. labor.[29] These factors included the relatively small size of the Mexican economy,[30] as well as the low tariff barriers in

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[25] *Id.*, at *4.

[26] *Id.*

[27] *Id.* at *5.

[28] Text of Final 1992 Presidential Debate, Phila. Inq., Oct. 20, 1992, at A17 (quoting U.S. President George Bush).

[29] Schoenbaum, *supra* note 8, at 466-67 (citing several economic studies which confirm the small immediate impact of NAFTA). *See also For NAFTA*, The New Republic, Oct. 11, 1993, at 1.

[30] Schoenbaum, *supra* note 8, at 465-66; *see generally* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 Law & Pol'y Int'l Bus. 391, WL 24 LPIB 391, at *19 (1993)(explaining that Mexican per capita income is roughly one-tenth that of the United States).

existence between the United States and Mexico.[31] Seventy percent of Mexico's imports already came from the United States, so liberalizing trade would have a minimal impact on either economy.[32] Proponents in both countries argued that expanding foreign investment in Mexico would improve its economy, thereby creating jobs and increasing wages.[33] Mexican workers then would be able to purchase even more American goods.[34] As Mexico's standard of living increased, a corresponding demand for higher-priced American goods would expand employment opportunities for American workers, and curtail illegal immigration into the United States.[35] More jobs would be generated in the United States as industrial output expanded to meet the increased demand.[36] President Bush predicted that NAFTA would create as many as 320,000 new American jobs by the end of the decade.[37] American companies would become more competitive in the global marketplace due to lower production costs.[38] In addition, NAFTA also would serve as a template for further trade cooperation in the hemisphere.[39]

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[31] Schoenbaum, *supra* note 8, at 466 (explaining that about 9% of Mexican goods enter the U.S. duty free under the Generalized System of Preferences; another 45% enter under the *maquiladora* program, which taxes only the value added to the goods; the remaining imports are subject to a tariff of 3.4%; and Mexico has lowered or eliminated restrictions on most imports).

[32] Brian Adler & Beth Jarrett, *Capital v. Labor: Who Wins and Who Loses Under the Immigration Act of 1990?*, 23 U. MIAMI INTER-AM. L. REV. 789, WL 23 UMIAIALR 789, at *3 (1992).

[33] Crandall, *supra* note 18, at *4. Unfortunately, this promise has not materialized in light of the December, 1994 devaluation of the Mexican peso. *See generally* Anthony DePalma, *For Mexico, NAFTA'S Promise is Still Just a Promise*, N.Y. TIMES, Oct. 10, 1995. The result has been to tip the balance of trade from a $350 million ($2 billion pre-NAFTA) surplus in May of 1994 in favor of the U.S., to a $1.6 billion deficit with Mexico by July of 1995. *Id.*; John B. Judis, *From the Jaws of Victory: Clinton's Big Fade on Trade*, WASH. POST, July 30, 1995, at C3. Mexicans have been unable to purchase large quantities of U.S. goods due to the weakened condition of the peso. DePalma, *supra* note 33.

[34] Crandall, *supra* note 18, at *4.

[35] *Id.*; Warren Christopher, Address Before the U.S.-Mexico Binational Commission Meeting (June 21, 1993), *in* U.S. DEPT. OF STATE DISPATCH, June 28, 1993, at 457.

[36] Andrew K. Stutzman, *Our Eroding Industrial Base: U.S. Labor Laws Compared with Labor Laws of Less Developed Nations in Light of the Global Economy*, 12 DICK. J. INT'L L. 135, 166 (1993). *But see* Peter Passell, *Analysis: U.S. Decision to Bail Out Mexico Has Paid Off*, N.Y. TIMES, Oct. 12, 1995 (noting that economists now admit that NAFTA was "oversold as a jobs program").

[37] Adler, *supra* note 32, at *3; *cf. Statement*, *supra* note 13 (stating that 200,000 new jobs would be created).

[38] *See generally* Crandall, *supra* note 18.

[39] Roger W. Wallace & Max Scoular, *The North American Free Trade Agreement and*

Supporters argued that NAFTA was simply the codification of an ongoing trend,[40] and U.S. manufacturers would continue to move low-skilled jobs to Mexico, with or without NAFTA.[41] The Labor Agreement would provide an opportunity to upgrade lax labor standards in Mexico and curtail any unfair advantage a cheap work force would give American companies.[42]

B. Opponents of NAFTA

> [I]f international agreements had to be labeled as accurately as tomato paste, NAFTA would be called the Continental Agreement to Encourage and Protect U.S. Corporate Investment in Mexico.[43]

American labor advocates were concerned about NAFTA's impact on American workers in three main areas: domestic job migration, depression of wages, and reduction in labor standards.[44] Ross Perot, independent presidential candidate in the 1992 election, warned that workers would soon "hear a giant sucking sound of jobs being pulled out of this country."[45] Huge wage differences[46] between Mexican and U.S. workers

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[39] Roger W. Wallace & Max Scoular, *The North American Free Trade Agreement and United States Employment*, 24 ST. MARY'S L. J. 945, 948 (1993). On May 9, 1994, Representative Richard Gephardt (D-Mo.) introduced legislation to negotiate a free trade agreement with Chile under the "fast-track" procedures used for NAFTA. *See generally Rep. Gephardt Introduces Legislation to Negotiate Free Trade Pact with Chile*, DAILY LABOR REPORT, *available in* Westlaw, 1994 DLR 88 d12. *See also* Jill Kotvis, *Chile Starts Down the Road Toward Membership in NAFTA*, DALLAS BUS. J., Mar. 3, 1995, *available in* Westlaw, DALLASBUSJ database.

[40] Wallace, *supra* note 39 (citing Stephen Baker, *Mexico: A New Economic Era*, BUS. WK., Nov. 12, 1990, at 105).

[41] Stutzman, *supra* note 36, at 165.

[42] Schoenbaum, *supra* note 8, at 483-84 (noting that "[i]f cheap wages were the only criteria [motivating management], Haiti would be the manufacturing capital of the world.").

[43] Thomas R. Donahue, *Whoosh — Away Go Jobs*, USA TODAY, Nov. 17, 1993, at A11.

[44] Barr, *supra* note 1, at 3. Mexicans had mixed feelings about NAFTA, as well. *See generally* Jorge A. Vargas, *NAFTA, The Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT'L L.J. 1 (1994).

[45] Stutzman, *supra* note 36, at 166 (citing *Text of Final 1992 Presidential Debate*, PHILA. INQ., Oct. 20, 1992, at A17 (quoting 1992 Independent presidential candidate Ross Perot)).

[46] *Id.*; *see* discussion *infra* part IV.A.

and lax enforcement of labor standards[47] would provide incentives for manufacturers to move to Mexico and set up more *maquiladoras*,[48] assembly plants which have become infamous because of their lax working conditions.[49] Job migration was occurring already,[50] but at a natural pace that allowed for gradual adjustments.[51] Labor advocates argued that the service industry jobs replacing manufacturing jobs were not adequate alternatives, since they provided lower wages, less job security and fewer benefits.[52]

Labor leaders urged that international trade be linked to guarantees for safe workplace environments,[53] as well as decent wages.[54] Insistence on high labor standards would promote "fair trade" and discourage "social dumping," a phenomenon in which a nation violates labor rights in order to gain an advantage in international markets.[55] Fair trade links access to domestic markets with the enforcement of workers' rights, since worker exploitation does not provide a "level [economic] playing field."[56]

Social dumping violations include poor working conditions, the suppression of labor unions, and the payment of meager wages.[57] Women

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[47] Crandall, *supra* note 18, at *5; *see* discussion *infra* part IV.A-B.

[48] William Cunningham & Segundo Mercado-Lorens, *The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder*, 10 HOFSTRA LAB. L.J. 413, 427 (1993). More specifically, *maquiladoras* are assembly plants located on the U.S.-Mexico border. *Id.* Foreign companies supply parts to these factories where, in turn, they are assembled into finished products and shipped back to the first country. *Id.* Goods from these plants receive favorable tariff rates in both countries. *Id. Maquiladora* working conditions are often very poor, and employers are not required to pay even the Mexican minimum wage to employees. *Id.*; *see* discussion *infra* parts II.B, IV.A.

[49] *See* discussion *infra* part IV.A.

[50] Christopher J. Martin, *The NAFTA Debate: Are Concerns about U.S. Job Migration to Mexico Legitimate?*, 19 EMPLOYEE REL. L. J. 239, 242 (1993)(noting that as many as 1,300 U.S. companies are operating 2,200 factories in Mexico, providing over 500,000 jobs to Mexican workers).

[51] Black, *supra* note 8, at 81.

[52] Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L. J. 1757, 1760 (1993).

[53] Thomas R. Howard, *Free Trade Between the United States and Mexico: Minimizing the Adverse Effects on American Workers*, 18 WM. MITCHELL L. REV. 507, 511-12 (1992).

[54] Crandall, *supra* note 18, at *5.

[55] Howard, *supra* note 53, at 516; Barr, *supra* note 1, at 49. For an in-depth analysis of labor violations and their effect on trade, see Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 (1990).

[56] Barr, *supra* note 1, at 49 (quoting Peter Coldrick, European labor leader, Confederal Secretary of the European Trade Union Confederation, *in* EMPLOYEE REL. WEEKLY (BNA), No. 8, at 1171 (Sept. 17, 1990)).

[57] *See generally* Stutzman, *supra* note 36. *But see* Howard, *supra* note 53 (observing

and children are routinely exploited.[58] These abuses, in turn, harm workers in competing countries, through job dislocation, and the lowering of labor standards and wages in order to remain competitive.[59] Opponents of NAFTA argued that the agreement would, in essence, be a trade subsidy for a nation (Mexico) that blatantly violates the rights of laborers.[60] This would not encourage "fair trade," but would give a seal of approval to unfair labor practices throughout the world. The haste with which NAFTA was negotiated raised concerns that the interests of big business, and not those of labor and the environment, were the ones being advanced.[61]

Unions also feared that management would use the threat of relocation as a bargaining tool to drive down wages, especially in semi-skilled industrial jobs.[62] Living standards in the United States would be reduced.[63] Workers earning paltry wages in Mexico would not be able to buy the products they manufactured. The end result would be the destruction of one consumer class without the creation of a new one.[64]

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that the only long-term solution to disparate wages is to minimize the standard of living between the two countries, which can be accomplished by either lowering the U.S. standard or raising that of Mexico).

[58] Kate Lebow, *NAFTA: After the Debate, the Battle*, MIAMI HERALD, Nov. 12, 1993, at A29 (stating that "[m]ultinational corporations justify low wages for Third World female employees - an average of 73 cents per hour in Mexico - by claiming that these countries have lower costs of living and that women are not the sole breadwinners for their families. Neither is true."). *See also* Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?*, 3-SPG KAN. J.L. & PUB. POL'Y 128, 131 (1994) (noting that many women are primary wage earners: between 69% to 81% of the female workforce is single, and 40% of *maquiladora* garment workers had one child). *See* discussion *infra* part IV.A.

[59] Howard, *supra* note 53, at 512-13. For an analysis of employment dislocation under NAFTA, see generally James R. Gallop & Christopher J. Graddock, *The North American Free Trade Agreement: Economic Integration and Employment Dislocation*, 19 J. LEGIS. 265 (1993).

[60] Howard, *supra* note 53, at 517-18.

[61] Bailey, *supra* note 5, at 844-45. The lack of any labor or environmental provisions in the original 2,000 page NAFTA document served only to heighten this suspicion.

[62] Martin, *supra* note 50, at 248 (citing a Wall Street Journal poll where 25% of the 400 corporate executives surveyed stated that they were either "very likely" or "somewhat likely" to use NAFTA as a bargaining chip in their negotiations with unions).

[63] Terry Collingsworth et al., *Time for a Global New Deal: Labor and Free Trade*, 73 FOREIGN AFFAIRS 8 (Jan.-Feb., 1994).

[64] *Id.* at 10.

Labor standards in the United States would deteriorate as workers would be forced to give up hard-won gains in order to secure jobs.[65] Those unwilling or unable to accept lower wages and inferior work conditions would be "dislocated" even though employment was still available.[66] American firms would not be eager to level the playing field by adhering to high safety standards in their Mexican plants.[67] All these concerns, plus the dearth of any provisions to address labor standards in NAFTA's main text,[68] provided the impetus needed for the negotiation of the Labor Agreement.[69]

III. Labor Law in Mexico

Contrary to popular opinion, Mexican labor legislation provides a great deal of protection for workers,[70] such as the right to associate, minimum wages, and guidelines for workplace conditions.[71] These and other rights are codified in Title VI (entitled "Labor and Social Security"),[72] Article 123 of the 1917 Mexican Constitution,[73] and the 1970 Federal Labor Law (FLL).[74]

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[65] *Id.* at 8. *See generally North American Free Trade Agreement: I Will Vote Against This NAFTA*, Text of Rep. Richard Gephardt's speech, 60 Vital Speeches 22, Oct. 15, 1993.

[66] Howard, *supra* note 53, at 511-12 (explaining that Mexican workers can maintain their standard of living at lower wages than their U.S. counterparts).

[67] *Id.* at 513-14.

[68] Crandall, *supra* note 18, at *3; Collingsworth, *supra* note 63, at 9 (noting "[t]hat there was not a word about the fundamental rights of workers in the thousands of pages of rules . . . reflect[ing] the priorities of those doing the negotiating").

[69] Crandall, *supra* note 18, at *3.

[70] *Id.* at *5; Barr, *supra* note 1, at 11. For a detailed analysis of Mexican labor rights, see Ann M. Bartow, *The Rights of Workers in Mexico*, 11 Comp. Lab. L.J. 182 (1990).

[71] Barr, *supra* note 1, at 11 (referring to other provisions in the Constitution which provide for overtime pay, maternity leave, profit sharing, and the unenforceability of unconscionable work contracts).

[72] Bartow, *supra* note 70, at 182.

[73] Crandall, *supra* note 18, at *5, (citing Constitucion Politica de los Estados Unidos Mexicanos, art. 123 (Mex.), *translated in* Constitutions of the Countries of the World 88 (Albert P. Blaustein & Gisbert H. Flanz, trans., 1982)[hereinafter Constitution]). Article 123 states:

> Every person is entitled to suitable work that is socially useful. Toward this end, the creation of jobs and social organization for labor shall be promoted in conformance with the law. The Congress of the Union, without contravening the following basic principles, shall enact labor laws which shall apply to all

Despite such extensive legislation, these laws and standards are rarely enforced,[75] thereby lending credence to American organized labor's warning of job flight and "social dumping" south of the border. The Labor Agreement does not ease this fear, since it emphasizes a *domestic* interpretation of national legislation, rather than providing a new framework comprised of trilateral standards.[76]

A. Labor Provisions in Mexican Law

Unlike the United States Constitution, the Mexican Constitution (Constitution) contains a plethora of labor provisions. Included are the right to strike; the right to form unions; a prohibition against anti-union discrimination; an eight-hour work day and a six-day work week; and provisions for overtime pay and maternity leave.[77] It also prohibits discrimination based on sex or national origin.[78]

The FLL expands Constitutional protection to encompass virtually every aspect of the employer-worker relationship,[79] including strike and union activities, and the establishment of workplace conditions and minimum wages.[80] In addition, the FLL lists guidelines for the employ-

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> workers, day laborers, domestic servants, artisans and in a general way to all labor contracts . . . and to the branches of the Union, the government of the Federal District and their workers.

Id. (citing CONSTITUTION, art. 123).

[74] *Id.* (citing *Ley Federal del Trabajo* [Federal Labor Law], D.O., *translated in* COMMERCIAL LAWS OF THE WORLD; MEXICO: LABOR LAWS 1 (Foreign Tax Law Publishers, Inc. trans., 1993)[hereinafter 1970 FLL]); Zamora, *supra* note 30, at *18 (explaining that art. 123 of the Constitution provides authority for the enactment of the 1970 FLL).

[75] Zamora, *supra* note 30, at *18; Barr, *supra* note 1, at 12.

[76] Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 924-25 (1994); *The NAFTA Side Accord on Labor*, AFL-CIO TASK FORCE ON TRADE, Aug. 20, 1993, at 1.

[77] *See generally* Crandall, *supra* note 18.

[78] Bartow, *supra* note 70, at 183.

[79] Zamora, *supra* note 30, at *18.

[80] Bartow, *supra* note 70, at 183. Clauses in an employment contract that would not be legally binding under article VI of the Mexican Constitution include: those that require excessive amounts of work such that it is inhumane; those fixing wages that are not remunerative; those that require a waiting time of more than one week before payment of wages; those that provide for the payment of wages in locations other than the workplace; those creating retention of wages as fines or in exchange for goods; and those requiring indemnification of the employer for work-related injuries. *Id.* at 186.

ment of women and children, provides training protocols,[81] and creates occupational safety standards.[82] The FLL and the Mexican Social Security Law (MSSL)[83] provide even greater protection of labor rights than those guaranteed under U.S. law.[84] Mexican legislation also entitles workers to profit sharing.[85] Furthermore, they can only be dismissed for cause,[86] and are usually entitled to severance pay.[87] If there is a change of company ownership, the new employer must respect the terms of the employment contract.[88] The Constitution prohibits Congress from enacting legislation that will contravene any of these basic labor provisions.[89]

1. Minimum wage provisions

Title VI of the Constitution provides that a minimum wage must be set either geographically or by occupation.[90] It must meet the "normal material, social, and cultural needs of the head of a family and . . . provide for the mandatory education of his children."[91] A national commission comprised of workers, employers, and government representatives fixes the minimum wage.[92]

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[81] *Id.* at 184.

[82] Zamora, *supra* note 30, at *18.

[83] *Id.* (explaining that the MSSL encompasses health insurance, as well, and extends coverage to a worker's family, while the Mexican equivalent of the Social Security Administration, the *Instituto Mexicano de Seguridad Social* (IMSS), operates a 31 hospital network throughout Mexico).

[84] *Id.*; *but cf. Worker Health and Safety at Eight U.S.-Owned Maquiladora Auto Parts Plants*, 4 No. 1 MEX. TRADE & L. REP. 7, ____, WL 4 No. 1 MEXTLR 7, at *1 (1994)(stating that the protections provided by the labor laws of the United States and Mexico are "comparable")[hereinafter *Worker Health & Safety*].

[85] Zamora, *supra* note 30 at *18 (citing CONSTITUTION, art. 123(A)(IX)). *See also* Bartow, *supra* note 70, at 184 (noting that workers have a right to share in 8% of their employer's pre-tax profits).

[86] Bartow, *supra* note 70, at 187 (citing CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 123 (Mex.), *reprinted in* G.H. FLANZ & MORENO, X CONSTITUTIONS OF THE WORLD 97 (A.P. Blaustein & G.H. Flanz eds., 1988)[hereinafter CONSTITUTION]).

[87] *Id.*; Darling, *supra* note 20 at D1 (explaining that Mexico has no unemployment insurance).

[88] Bartow, *supra* note 70, at 187 (citing CONSTITUTION, art. 123, pt. B, ch. IX).

[89] *Id.* at 183 (citing CONSTITUTION, art. 123).

[90] *Id.* (citing CONSTITUTION, art. 123, pt. A, ch. VI).

[91] *Id.*

[92] *Id.* (noting that "administration of the minimum wage [is] spelled out in surprisingly detailed fashion").

In addition, Title VI (also referred to as Article 123) of the Constitution entitles workers to double-time pay for overtime, which is limited to 3 hours per day for 3 consecutive days.[93] Employers must provide a safe workplace, adequate training, disability pay, and, "in some industries, access to comfortable and hygienic living quarters along with financial assistance to enable workers to purchase these quarters."[94]

2. Union activities, collective bargaining, and the right to strike

Workers and employers have the right to form unions or trade associations under both Title VI of the Constitution and the FLL.[95] Most unions are affiliated with regional or national organizations, the largest being the Mexican Workers Confederation (*Confederacion de Trabajadores Mexicanos* (CTM)).[96] Article 365 of the FLL requires unions to register with the Ministry of Labor in order to be officially recognized.[97] No one is required either to join or refrain from joining a union.[98] While the FLL creates a variety of unions for different trades, it prohibits their interference in religious or political matters.[99] Despite this constraint, most trade unions are closely allied with Mexico's leading political party, the *Partido Revolucionario Institucional*[100] (PRI), which maintains close ties with the CTM.[101]

The FLL mandates that every employer must conclude a collective bargaining agreement if asked to do so by the union.[102] These negotiations typically include the setting of wages and fringe benefits, as well

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[93] *Id.* at 184 (citing CONSTITUTION, art. 123, pt. A, ch. XI).

[94] *Id.* at 184 (citing CONSTITUTION, art. 123, pt. A, ch. XII).

[95] *Id.* at 184-85 (citing CONSTITUTION, art. 123, pt. A, chs. XVI and XVII). *See also* Crandall, *supra* note 18, at *6-7.

[96] Crandall, *supra* note 18, at *6 (noting that 70% of all union members belong to the CTM). *See also* Bartow, *supra* note 70, at 191-92 (explaining that the CTM is analogous to the AFL-CIO, and that 30% to 70% of Mexico's 20 million workers are union members).

[97] Crandall, *supra* note 18, n.117.

[98] Bartow, *supra* note 70, at 192 (citing the Federal Labor Act, pt. I, ch. I, arts. 358 and 364, *reprinted in* 1969 INTERNATIONAL LABOUR OFFICE LEGISLATIVE SERIES [hereinafter FLL]).

[99] *Id.* (citing FLL, pt. I, ch. I, art. 378).

[100] Crandall, *supra* note 18, at *6.

[101] Bartow, *supra* note 70, at 192.

[102] *Id.* at 193-94 (citing FLL, pt. VII, ch. I, art. 387, and explaining that for the most part, in cases where there is more than one union, the union having the greatest number of workers will represent all concerned).

as the creation of grievance procedures.[103] Collective agreements that create conditions less favorable to workers than those already in existence are prohibited.[104]

Strikes and lockouts also are considered fundamental rights of labor and management, respectively.[105] However, the FLL outlines specific procedures, including attempts at conciliation, which must be followed in order for a strike to be legal.[106] In addition, the goals of a walk-out must be ruled permissible by the Conciliation and Arbitration Board (Board) for the strike to be valid.[107] Under the FLL, a strike is justified if its "causes . . . can be ascribed to the employer."[108] The Constitution further specifies that

> [s]trikes shall be lawful when they have as their purpose the attaining of an equilibrium among the various factors of production, by harmonizing the rights of labor with those of capital . . . Strikes shall be considered unlawful only when the majority of strikers engage in acts of violence against persons or property, or in the event of war, when the workers belong to establishments or services of the government.[109]

Written notice of a strike must be given to the Board 6 days prior to the suspension of work,[110] or the strike will be declared null and void.[111] If employees do not return to their jobs within 24 hours, the employer can terminate them without liability[112] and hire replacement workers.[113]

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[103] *Id.* at 194.

[104] *Id.* at 195 (citing FLL, pt. VII, ch. I, art. 394).

[105] Crandall, *supra* note 18, at *7 (citing CONSTITUTION, art. 123, which provides that "[t]he laws shall recognize strikes and lockouts as rights of workmen and employers").

[106] *Id.* (explaining that the requirements for a legal strike are so restrictive that in 1991 the government approved only 136 out of 7,000 strike petitions).

[107] Bartow, *supra* note 70, at 199 (citing FLL, pt. VIII, ch. I, art. 446).

[108] *Id.* Some permissible causes include forcing the employer into a collective bargaining agreement; demanding profit-sharing; and demanding the fulfillment of the terms of a collective bargaining agreement. *Id.*

[109] *Id.* at 185 (citing CONSTITUTION, Title VI, pt. A, chs. XVIII-XX and FLL, pt. VIII, ch. II, art. 450).

[110] *Id.* at 184-85, 200 (citing FLL, pt. VII, ch. I, arts. 452 I-III); Crandall, *supra* note 18, at 180; Charles W. Nugent, *A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA's Side Accords and Prospects for Reform*, 7 TRANSNAT'L LAW. 197, 208-09 (1994).

[111] Crandall, *supra* note 18, at *7.

[112] *Id.* (citing FLL, para. 932).

[113] Bartow, *supra* note 70, at 201 (citing FLL, pt. VII, ch. I, arts. 463 II, III).

If either the workers or management refuse to abide by the findings of the Board, the labor contract is canceled. An employer who fails to follow the Board's decision, or who dismisses a worker because of union membership, must provide 3 months of severance pay.[114] In cases of arbitrary dismissal, "a worker has the right to choose between reinstatement in his work or to appropriate indemnity."[115]

3. Working conditions

Once again, Title VI of the Constitution provides the foundation for the payment of wages and establishment of safe working conditions.[116] For example, some working conditions are considered so objectionable that any contractual provisions incorporating them are rendered void by the Constitution.[117] Examples of such clauses include: (1) "inhuman," i.e., excessive working hours; (2) substandard wages; (3) requiring employees to wait more than one week for their pay; (4) payment of wages at "place[s] of recreation"; (5) payment of wages linked to an obligation to by goods at specific stores; (6) retention of wages as fines; (7) waivers of constitutionally-granted indemnification provisions, or any other protective legislation.[118]

There are three government agencies responsible for worker health and safety. The first, the *Secretaria del Trabajo y Prevision Social* (STPS) is responsible for establishing and enforcing safety standards in all industries.[119] Guidelines are published in the General Regulation for Labor, Health and Hygiene, which is updated periodically. Unlike the United States, Mexican safety standards do not contain provisions for medical surveillance, respirators, and protective clothing.[120]

The *Instituto Mexicano de Seguridad Social* (IMSS) promotes occupational safety by gathering data on workplace injuries and illnesses.[121] All

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[114] *Id.* at 185 (citing CONSTITUTION, pt. A, chs. XI-XII).

[115] *Id.* at 187 (citing CONSTITUTION, pt. B, ch. XII).

[116] *Worker Health & Safety*, *supra* note 84, at *2.

[117] Bartow, *supra* note 70, at 185-86 (citing CONSTITUTION, pt. A, ch. XXVII).

[118] *Id.* at 186 (citing CONSTITUTION at pt. A, ch. XXVII).

[119] *Worker Health & Safety*, *supra* note 84, at *2 (explaining that the STPS is analogous to the Occupational Safety and Health Administration (OSHA) in the United States).

[120] *Id.*

[121] *Id.* at *2-3 (explaining that the IMSS fixes premiums for worker compensation insurance and is responsible for providing "health care through a nationwide system of clinics").

companies must report occupational health incidents to the IMSS, which uses these figures to evaluate annual worker compensation insurance premiums.[122]

Finally, the Secretary of Social Development (*Secretaria del Desarollo Social* (SEDESOL)) regulates the area of worker exposure to hazardous waste.[123] SEDESOL issues permits for the discharge of industrial waste into the air and water, as well as for the disposal of hazardous materials.[124] Neither IMSS nor SEDESOL have the authority to enforce health and safety regulations.[125] Job training programs are mandated constitutionally, and employers must "provide job training to all workers in order to improve productivity and standards of living."[126] The FLL makes the STPS responsible for the promotion and supervision of training programs, and requires that employers establish STPS-approved training plans which must be revised every four years.[127]

B. Labor Provisions Under the International Labor Organization

The International Labor Organization (ILO) has established uniform international labor standards for over 70 years with the goal of raising living and working conditions throughout the world.[128] These guidelines become a series of Conventions and Recommendations,[129] which echo provisions found in the International Bill of Human Rights.[130]

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[122] *Id.*

[123] *Id.* at 3.

[124] *Worker Health & Safety*, *supra* note 84, at *3.

[125] *Id.*

[126] Alicia Herrera, *Industrial Training Services*, 4 No. 6 MEX. TRADE & L. REP. 21, 21 (1994) (referring to MEX. CONSTITUTION, art. 123, pt. A, §§ XIII & XXXI).

[127] *Id.*

[128] Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT'L L. 151, ____, WL 17 YJIL 151, *1 (1992)[hereinafter *Working Women*]; *see generally* Julie Stensland, *Internationalizing the North American Agreement on Labor Cooperation*, 4 MINN. J. GLOBAL TRADE 141, 144 (1995). The ILO was established in 1919 after World War I, and incorporated into the United Nations in 1948; while it promotes labor rights, the ILO has no enforcement powers. *Id.*

[129] Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 51 (1989); *Working Women*, *supra* note 128, at 154. There are currently 173 Conventions and 179 Recommendations; together these comprise the International Labor Code. *Id.* at 154. For a history of the ILO, see generally Schlossberg, *supra* note 129.

[130] *Working Women*, *supra* note 128, at *2. The International Bill of Human Rights is made up of three instruments: The Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights. *Id.* at 154.

Conventions differ from Recommendations in that they are ratified by member states and thus have the binding force of an international treaty.[131] In contrast, Recommendations are intended to be used as "general guidelines for national policy and action."[132] Member states must comply with extensive reporting requirements.[133] There are also provisions for contentious proceedings between states: one country may charge another member with violating ILO standards if both have ratified the convention.[134] The only exception to this rule is if the "charge alleges the violation of a core human rights convention."[135]

The United States is a member of the ILO.[136] Between 1934 and 1988, the U.S. Congress ratified only 9 Conventions.[137] In contrast, Mexico, also an ILO member, has signed 73 Conventions which protect labor rights.[138] Among these are: Convention No. 87, assuring workers and employers the right to form and join organizations; Convention No. 98 recognizing the right to bargain collectively; and Convention No. 138 placing limits on child labor.[139] Thus, these Conventions have the force of law in Mexico,[140] thereby supplementing the country's domestic legislation to protect workers.

IV. Enforcement

Despite the overwhelming amount of pro-labor legislation in Mexico, the life of the typical Mexican worker is far from utopian. Lack of

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[131] Schlossberg, *supra* note 129, at 51.

[132] *Id.*

[133] *Id.* at 51-52.

[134] *Working Women*, *supra* note 128, at *2-3.

[135] *Id.* at 3.

[136] Schlossberg, *supra* note 129, at 65-66.

[137] *Id.* at 68, 71-72. Six of the nine Conventions were ratified by 1953, and deal with working conditions for seamen: (Conventions No. 53, 54, 55, 57, 58, and 74) and one concerns ILO procedure. *Id.* at 68. In 1988, Convention No. 144, Tripartite Consultation (another procedural Convention), and Convention No. 147, Merchant Shipping (Minimum Standards) were ratified. *Id.* at 71-72.

[138] Shellyn G. McCaffrey, *North American Free Trade and Labor Issues: Accomplishments and Challenges*, 10 Hofstra Lab. L.J. 449, 469-70 (1993) (citing Nestor de Buen Lozano & Carlos de Buen Unna, *A Primer on Mexican Labor Law* 4 (1991)).

[139] *Working Women*, *supra* note 128, at *3.

[140] McCaffrey, *supra* note 138, at 469.

enforcement is at the heart of the problem.[141] Some analysts believe that inadequate capital resources hamper oversight,[142] while others argue that government, U.S. companies, and trade unions conspire against labor in order to encourage foreign investment.[143] Among the reported violations are wages that fall below subsistence levels; unsafe working conditions; use of child labor; discrimination and sexual harassment of women workers; human rights abuses; and denial of the freedom of association and the right to strike.[144]

A. The Maquiladora Program

Nothing has changed.[145]

The Mexican government established the *maquiladora* program in 1965 with the goal of increasing foreign investment and creating manufacturing jobs.[146] Mexican and foreign financiers are permitted to operate assembly plants, *maquiladoras*, usually on the U.S.-Mexico border.[147] American corporations ship component parts to the *maquiladoras*, thereby taking advantage of favorable tariffs.[148] Goods are assembled in Mexico and

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[141] Zamora, *supra* note 30, at *18.

[142] Crandall, *supra* note 18, at *7; Stutzman, *supra* note 36, at 168-69 (describing a perception in Mexico that the government is choosing foreign investment over labor rights).

[143] Crandall, *supra* note 18, at *7.

[144] Zamora, supra note 30, at *18. For an analysis of comparable situations in the U.S. and Canada, see David L. Gregory, *The Right to Unionize in the United States, Canada, and Mexico: A Comparative Assessment*, 10 HOFSTRA LAB. L.J. 537 (1993).

[145] Charlotte Grimes, *Boom Tempered by Pollution, Illness*, ST. LOUIS POST-DISPATCH, Nov. 29, 1994, at A1 (quoting Estella de la Ossa, Nogales, Mexico county health worker and member of the advocacy group LIFE, Living is for Everyone, who was referring to the unremedied, dismal environmental conditions still existing in the *maquiladora* towns nearly a year after the passage of NAFTA).

[146] *Worker Health & Safety*, *supra* note 84, at *3. *See generally* Guillermo Marrero, *What Foreigners Should Know About the Mexican Market*, 699 PRACT. LAW INST., pt. 117, Sept. 1994 (detailing how to set up a *maquiladora* operation).

[147] Martin, *supra* note 50, at 242-43.

[148] Daniel I. Basurto Gonzalez & Elaine Flud Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 661 (1991); Bailey, *supra* note 5, at 868 (noting that nearly 2,000 *maquiladoras* produce 25% of Mexico's exports, and employ nearly 15% of the manufacturing labor force). Imports from *maquiladoras* into the U.S. reached $12.5 billion in 1989 (45% of U.S. imports from Mexico), most of which were cars and electronic equipment. *See also* Cunningham, *supra* note 48, at 425.

re-exported to the United States, where import duties are paid only on the value added to the item in Mexico.[149]

For many labor rights advocates, the *maquiladoras* typify the weak enforcement of Mexican labor laws.[150] For example, in 1991, the average hourly wage for *maquiladora* workers was $1.25, compared to the $2.17 for other Mexican manufacturing-sector employees.[151] That same year, the average pay for U.S. manufacturing workers was $16.17 per hour, excluding benefits.[152] Furthermore, between 1976 and 1992, the minimum wage in Mexico fell by 67%.[153] During that time the value of the peso fell from 25 pesos to 3,100 pesos to the dollar.[154] The *Banco de Mexico* estimates that minimum wage increases have lagged behind the cost of living by 43% since 1988.[155] As of January 1, 1993, 29% of the work force earned less than $4.67 per *day*.[156] The average yearly income among *maquiladora* workers was $2,471 in 1990.[157] Consequently, the AFL-CIO believes that in order for NAFTA to fulfill its promises to workers in both nations, wages in Mexico must be increased immediately.[158]

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[149] Martin, *supra* note 50, at 243.

[150] *See generally* Gonzalez, *supra* note 148.

[151] Martin, *supra* note 50, at 243.

[152] Donahue, *supra* note 43.

[153] *Minimum Wages and NAFTA*, AFL-CIO Task Force on Trade, Feb. 14, 1993, at 1-2 (citing Bank of Mexico and National Commission on Minimum Wage figures [hereinafter Wages]). Government officials enacted strict wage controls in 1986 as part of an International Monetary Fund austerity program designed to stem inflation. *Id.* By comparison, the U.S. minimum wage fell from 48% to 40% of "average hourly earnings." *Id.*

[154] *Id.* at 1, 3. This has resulted in a decrease in the purchasing power of the Mexican worker (by 72% in the Salinas administration alone), and has made Mexican goods more competitive. *Id.* The situation has worsened since the December, 1994 devaluation of the peso. *Id.* The AFL-CIO believes that this factor, combined with Mexico's poor working conditions, 20% unemployment rate, 40% poverty rate, and a gross domestic product 5% of the United States' will result in job dislocation and further labor abuses in Mexico. *Id.*

[155] *Id.*

[156] *Id.* at 3. This is a violation of article 123, § VI of the Constitution, as well as ILO Convention No. 131, article 3(a), ratified by Mexico. The provisions in both documents require the government to take into account standards and costs of living, and the "normal needs of the family." The United States is doing better, but the AFL-CIO believes the minimum wage should be $6.97 per hour, instead of $4.25 per hour, for a family of four simply to reach the poverty level. *Id.*

[157] Durand, *supra* note 58, at 128.

[158] Wages, *supra* note 153, at 5. In 1993, the AFL-CIO offered 4 different options

Women are particularly vulnerable to abuses. *Maquiladora* plants employed 500,000 workers in 1991, 75% of whom were women.[159] Since they comprise the majority of the *maquiladora* workforce, the men tend to cross the border into the U.S. to search for jobs, thereby exacerbating the illegal immigration problem.[160] Critics argue that women are hired over men because they will work for less, are considered to be more docile, resist joining unions, and do not complain about hazardous working conditions.[161] There are numerous allegations of discriminatory practices, including the dismissal of pregnant women, payment of extremely low wages, and sexual assaults.[162]

In addition, child labor laws are violated with increasing frequency,[163] and such abuses are described as "extensive" by the U.S. State Department.[164] Even though children under 14 are forbidden from working, the reality is that child labor is rampant since falsified birth certificates are easily obtainable.[165] Some estimates place the number of illegally

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for achieving this goal: 1) Increase Mexico's minimum wage by 300% just to achieve its 1976 purchasing power; 2) increase the minimum wage by 333% to meet the basic needs of a family of 5 (the average Mexican family has 6 members); 3) double the minimum wage to provide 50% of the average manufacturing wage (a conservative standard for determining minimum wage); 4) account for exchange rates in setting minimum wage. *Id.* This last recommendation was particularly prescient in light of the December, 1994 devaluation of the peso. *See also NAFTA-math*, AFL-CIO, Aug. 1994, at 13; Craig Torres, *Mexico Rescue Plan Worries Investors*, WALL ST. J., Feb. 23, 1995, at A10 (reporting that since December, 1994, the peso had been devalued by 40.7% against the dollar, while interest rates had soared to 70%).

[159] Durand, *supra* note 58, at 131.

[160] *Id.* Supporters of the *maquiladora* programs claim that women are hired because they have better hand-to-eye coordination. *Id.*

[161] *Id.*

[162] Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U.J. INT'L L. & POL'Y, 117, 123-24 (1993) [hereinafter *Guatemala*]. *See generally Working Women*, *supra* note 128.

[163] *Guatemala*, *supra* note 162, at 122. *See generally* Maureen Moran, *Ending Exploitative Child Labor Practices*, 5 PACE INT'L L. REV. 287 (1993); Andrea Giampetro-Meyer et al., *The Exploitation of Child Labor: An Intractable International Problem?*, 16 LOY. L.A. INT'L & COMP. L.J. 657 (1994).

[164] *Mexico: U.S. State Department Reports Child Labor is Extensive in Mexico*, INT'L TRADE REP., Feb. 2, 1994, *available in* Westlaw, 1994 11 ITR 188 (citing *United States Department of State 1993 Report on Human Rights*, Feb. 1, 1994).

[165] Lynn Kamm, *Desperate Lives for Border Children*, CHI. TRIB., Dec. 16, 1993, Perspective Section, at 22 (recounting how one 13-year-old girl told investigators that she was frequently burned by the lead solder she handled at a *maquiladora*). For an in-depth look at the exploitation of children in the Mexican workplace, see generally

employed children at 10 million.[165] Child workers are threatened by environmental pollution from the maquiladoras along the U.S.-Mexico border, and by hazardous working conditions, as well.[167]

Unsafe working conditions are well-documented. Government and parent company oversight of safety standards is lax, and worker training is often non-existent.[168] The environment at the Mallory Capacitors facility in Matamoros provides a stark example of poor working conditions.[169] Pregnant women reached into vats of PCBs, highly toxic chemicals used to manufacture batteries, wearing only rubber gloves.[170] More than 2,000 industrial accidents were reported in Nogales, Mexico in 1989, three times the U.S. average for comparable factories.[171]

Worker training[172] and health programs[173] are also inadequate. Although companies are required by law to provide training,[174] official statistics indicate that only 36% of companies actually do so.[175] When

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Joan M.. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57 (1994). Children are vulnerable to injury and illness on the job "due to inattention, fatigue, lack of knowledge of work processes, and the fact that most work places and equipment are designed for adults." *Id.* at 66.

[166] Jim Specht, *NAFTA Won't Stop Illegal Child Labor, Groups Claim*, Nov. 11, 1993, Gannett News Service, *available in* Westlaw, ALLNEWS database, File No. 7327031 (noting that the U.S. Department of Labor estimates that 1 million children are working illegally in Mexico).

[167] *Id. See generally* David Voigt, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, MINN. J. GLOBAL TRADE, 323 (1993).

[168] Durand, *supra* note 58, at 131 (referring to a Ford plant where workers left safety masks, unused, in their lockers).

[169] *Id.*

[170] *Id.* When the children of these women were born mentally retarded, studies linked the birth defects to the PCB exposure. *Id.*

[171] *Id.* (recounting the experiences of Maria Guadalupe Lopez, a former *maquiladora* worker turned labor reform advocate, noting that chemical leaks and explosions at the factory were common. One incident forced neighborhood residents to evacuate for eight days. Upon their return, they had to destroy domestic animals and all their personal possessions).

[172] Herrera, *supra* note 126, at 22. A 1992 study showed that 18.48% of the employed Mexican work force had some training. *Id.* Of these, 6.56% had more than 500 hours of training. *Id.* In contrast, 25.56% of the U.S. employed labor force had 880 hours of training. *Id.*

[173] *See generally Worker Health & Safety*, *supra* note 84. An investigation of one large plant revealed that 70% of 175 workers reported actual pain in their extremities, neck, and back, after less than six months of work. *Id.*

[174] Herrera, *supra* note 126, at 21.

[175] *Id.* at 23.

such training is provided, it is usually incomplete, and generally does not take into account long-term health effects of employment.[176]

The environment in which these women and children live may pose the greatest threat to their health: *maquiladoras*, rapid development along border towns, and inadequate infrastructure have resulted in the discharge of untreated sewage into rivers, streams, and the marine environment.[177] In a 1990 report, the American Medical Association described the *maquiladora* area as a "virtual cesspool and breeding ground for infectious diseases," and warned that heavy pollution posed a health risk to populations on both sides of the border.[178] Furthermore, the illegal dumping of hazardous wastes into drinking water has fueled speculation that these toxins are the cause of a rash of births in which the infants were born without brains, anencephaly, or with spina bifida, a condition in which the spinal cord is exposed.[179] Tuberculosis occurs at 10 times the U.S. rate, and hepatitis A "flourishes" at 3 times the U.S. national average.[180] A 1991 Center for Disease Control study found that almost half of the water samples taken in Mexico, near El Paso, Texas, were contaminated with fecal bacteria.[181] This was an indication of improper water treatment, which would lead to an increased risk of water-born diseases.[182]

Concern over these inferior work and environmental conditions led NAFTA critics to argue that the trade agreement would allow U.S. industry to expand the *maquiladoras*,[183] thereby taking advantage of cheap

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[176] *See generally Worker Health & Safety*, *supra* note 84. During a General Accounting Office (GAO) investigatory visit to eight U.S.-owned *maquiladora* auto parts plants, the GAO consultants determined that the following programs were needed, but were nonexistent or inadequate: ergonomics; fire protection; hearing protection; protective equipment; respiratory protection an ventilation; hazard communication and hazardous materials handling; and, effective lock-out procedures for out-of-service machinery. *Id.*

[177] *See generally* Voigt, *supra* note 167.

[178] *Id.* (citing Michael Satchell, *Poisoning the Border*, U.S. NEWS & WORLD REPORT, May 6, 1991, at 34).

[179] *See generally* Emma Perez, *State Birth Defects Lawsuit Settled; 27 Valley Families to Share $17 Million*, SAN ANTONIO EXPRESS-NEWS, Sept. 28, 1995, *available in* Westlaw, ALLNEWS database, File No. 9503894 (describing an outbreak of anencephaly and spina bifida on both sides of the border near *maquiladoras*).

[180] Steve Sternberg, *The Downside of Economic Expansion: Pollution, Disease Have Become Major Byproducts Along the U.S.-Mexico Border*, WASH. POST, Apr. 30, 1995, at A3, *available in* Westlaw, WASHPOST database, at *2 (1995).

[181] *Id.* at *3.

[182] *Id.*

[183] Bailey, *supra* note 5, at 868 (explaining that while expansion of the *maquiladoras*

labor rates and lax safety standards.[184] This would only depress wages throughout Mexico, prolong abuses of Mexican workers, hasten the loss of American jobs, and lower U.S. wages.[185] They maintained that promoters of *maquiladoras* failed to consider

> the cardboard shacks that lie just beyond the factory gates. [They] do not account for the hundreds of toxic chemical drums discarded by the factories and reused for drinking water by families who can't read the warnings printed in English. [They] ignore the 26 partial amputations of fingers in Nogales factories in 1988, the raw sewage flowing across the border from cardboard squatter camps, the thick trails of smoke made by people who burn tires to keep warm, the 13 year-old children who forsake school for the assembly line, the workers who are warehoused 140 to a room in barracks run by the factories.[186]

B. Union Activities

The CTM, Mexico's largest labor union, is closely allied with the ruling political party, the PRI.[187] Consequently, many believe that union leaders do not represent the interests of their constituents, but rather those of the PRI.[188] CTM representatives allegedly receive high government positions in return for ensuring labor support of PRI policies.[189] These activities are sanctioned by the Mexican government in order to encourage foreign investment and currency exchange, stimulate technology transfer, and as a means of employing and training workers.[190]

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would benefit Mexico's economy, environmentalists warn that the environment of the border region would continue to be degraded, resulting in tragic health consequences for those who live there).

[184] Martin, *supra* note 50, at 243.

[185] *Id.*

[186] Barr, *supra* note 1, at 17 (quoting Sandy Tolan & Jerry Kamer, *Life in the Low-Wage Boomtowns of Mexico*, UTNE READER, Nov.-Dec. 1990, at 44 (excerpted from TUCSON WKLY., Oct. 18, 1989)).

[187] Amy H. Goldin, *Collective Bargaining in Mexico: Stifled by the Lack of Democracy in Trade Unions*, 11 COMP. LAB. L.J. 203, 203-04 (1990); *See also The Rise and Fall of New Spain*, THE ECONOMIST INTELLIGENCE UNIT, Nov. 1, 1993, *available in* Westlaw, BUS-INTL database (noting that the PRI held 320 of 500 seats in the Chamber of Deputies in 1991).

[188] Goldin, *supra* note 187, at 203-204.

[189] *Id.* at 206-08.

[190] *Id.*

Thus, the government ensures low wages, docile workers, and stable working environments.[191] In 1988, union officials signed "*El Pacto*," a governmental agreement designed to promote economic stability.[192] However, this pact prohibited labor leaders from seeking wage increases of more than 10%:[193]

> [T]he CTM and other official unions have voluntarily given up their right to negotiate wage increases vigorously, defeating a central purpose of the collective bargaining process. Many labor analysts believe the El Pacto is responsible for a forty percent decline in real wages over the past decade, despite an annual economic growth rate in Mexico of approximately three percent.[194]

This state of affairs has led to increased worker discontent and the rise of independent unions, which fight more vigorously for worker rights and gain higher wage concessions.[195] Unfortunately, these groups are harassed by the state and the PRI, lack official recognition, and do not receive the financial benefits "official" unions enjoy.[196] Repression of dissident and opposition workers is commonplace.[197]

Independent union formation is discouraged through intimidation, and discharge of workers, frequently as a result of collusion between union leaders and employers.[198] There are even allegations of murder.[199] In 1992, Agapito Gonzalez Cavazos, maquiladora union leader for the past 30 years in the city of Matamoros, demanded a 20% pay hike for laborers.[200] This, of course, was a breach of "El Pacto."[201] The govern-

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[191] Nugent, *supra* note 110, at 212-13.

[192] *Id.* at 212.

[193] *Id.*

[194] *Id.* (citing Geri Smith, *Congratulations Mexico, You're Due for a Raise*, BUS. WK., Sept. 27, 1993, at 58).

[195] Crandall, *supra* note 18, at *6; Goldin, *supra* note 187, at 210-11.

[196] Goldin, *supra* note 187, at 205, 210-11.

[197] *Id.* at 213-14. In 1981, a teachers strike was ended out of fear after 4 leaders were assassinated and a host of others "disappeared." *Id.* Joaquin Hernandez Galicia, leader of Mexico's petroleum workers union, *Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana*, is known to have ordered the assassination of opposition leaders. *Id.* at 214-15.

[198] Crandall, *supra* note 18, at 178.

[199] *Id. See supra* note 197.

[200] Robert Bryce, *Mexican Unions Struggle in a Tough Post-NAFTA World*, CHRISTIAN SCIENCE MONITOR, Dec. 21, 1993, at 7.

[201] Nugent, *supra* note 110, at 212. *See* discussion *supra* part IV.B.

ment response was to arrest him on charges of tax evasion, and detain him for 8 months.[202] That same year, workers went on strike at a Volkswagen factory to protest the introduction of "Japanese labor practices."[203] Instead of negotiating, the management summarily fired all of them.[204] Another Volkswagen plant dismissed 1,200 workers and dissolved the labor union.[205] A strike at a General Motors plant was declared illegal by the Labor Secretary, who then fired 2,000 workers and cut the pay of those who remained by 45%.[206] In addition, unions allegedly turn a blind eye to safety violations, and force employees to accept minimal compensation when injured.[207]

Despite these abuses workers take jobs because Mexico suffers from at least a 25% unemployment rate and an even higher percentage of underemployment.[208] Such suppression of trade unions has led American labor leaders to warn that workers in Mexico have no unbiased voice to speak for them and fight for their rights. This, in turn, will perpetuate the low wages and dismal working conditions that will hasten job flight from the United States to Mexico. Consequently, U.S. labor advocates pushed for a labor agreement that would condition trade on respect for labor rights, including freedom of association and collective bargaining, as well as improvements in working conditions.[209] This, they hoped, would not only protect American jobs, but improve conditions for Mexican laborers, as well.

V. The Labor Agreement on Labor Cooperation

A. Purpose

Through the Labor Agreement, each nation promises to promote unilaterally defined labor standards.[210] The three parties have the duty

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[202] Bryce, *supra* note 200, at 7 (quoting Ellen Lutz, the director of California's Human Rights Watch, as saying that this intimidation and coercion of activist union leaders is "standard operating procedure").

[203] Durand, *supra* note 58, at 132.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* at 131-32.

[208] Zamora, *supra* note 30, at *18.

[209] *Id.*

[210] Hagen, *supra* note 76, at 917, 924-25 (explaining that the parties agree to promote principles in their domestic law, but no common minimum standards are established).

to cooperate, exchange information, and to establish and enforce domestic labor laws.[211] For a violation to be actionable, a nation must have "engaged in a persistent pattern of failure to effectively enforce its labor law with respect to health and safety, child labor and minimum wage."[212] The infraction must involve "mutually recognized labor laws and [be] related to trade."[213] However, as noted below, there are "escape clauses" which allow governments to escape censure for consistent violations.[214] Furthermore, rights to bargain collectively and to strike are not included in the Labor Agreement.[215]

B. Structure

The Labor Agreement creates the Commission for Labor Cooperation (Commission), which consists of two subparts: a governing body, called the Ministerial Council (Council), and a Secretariat.[216] On February 28, 1995, Canadian John S. McKennirey was named head of the Secretariat.[217] In addition, National Administrative Offices (NAOs), and an Evaluation Committee of Experts (ECEs) assist the Commission.[218]

A labor minister from each of the three nations sits on the Council,[219]

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[211] Luis Miguel Diaz, *Private Rights Under the Environment and Labor Agreements*, 2 U.S.-MEX. L.J. 11, 18 (1994).

[212] Labor Agreement, *supra* note 22, art. 29.

[213] *Id.*

[214] *See* discussion *infra* part IV.C.1.

[215] *The NAFTA Side Accord on Labor*, AFL-CIO TASK FORCE ON TRADE, Aug. 20, 1993, at 1 (stating that the Agreement is weaker than existing U.S. law, which includes the Generalized System of Preferences (GSP), the Caribbean Basin Initiative (CBI), the Overseas Private Investment Corporation (OPIC), and §301 of the 1988 Trade Act).

[216] Hagen, *supra* note 76, at 925 (providing a detailed analysis of the Commission and its activities); Crandall, *supra* note 18, at *8.

[217] *Canadian Named to Head NAFTA-Related Panel*, DAILY LABOR REPORT, Mar. 1, 1995, *available in* Westlaw, BNA-DLR database, 1995 DLR 40 d28. McKennirey was Canada's chief negotiator for the Labor Agreement. *Id.*

[218] Hagen, *supra* note 76, at 925.

[219] *Overview of NAFTA Related Organizations*, 4 No. 12 MEX. TRADE & L. REP. 6, 8 (Dec. 1994)[hereinafter *Organizations*]; Crandall, *supra* note 18, at *8; Labor Agreement, *supra* note 22, art. 8 (explaining that these members are the U.S. Secretary of Labor, the Canadian Minister of Human Resources Development, and the Mexican Secretary of Labor and Social Welfare).

which convenes at least once a year.[220] The Council appoints the director of the Secretariat and orchestrates its activities. It also establishes priorities, encourages information exchange, and collects data on enforcement of labor standards.[221]

The Secretariat is made up of a fifteen person staff, five members from each nation.[222] It prepares reports on labor laws and their enforcement, human resource development, the labor market, and any other matters requested by the Council.[223] By agreement, the Labor Secretariat will be located in Dallas, Texas.[224]

An NAO must be established in each nation to serve as a liaison between that country, other NAOs, governmental agencies, and the Commission.[225] In the United States, the NAO is housed in the Labor Department's Bureau of International Labor Affairs.[226] The U.S. Secretary of Labor appoints the head of the NAO,[227] who is currently Irasema T. Garza.[228]

Each NAO must bring labor disputes arising in another territory to the Commission, and provide the Secretariat with information needed for background reports.[229] The NAO assists the Secretary of Labor with

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[220] Crandall, *supra* note 18, at *8; Labor Agreement, *supra* note 22, art. 9, 10.

[221] Hagen, *supra* note 76, at 925 (explaining that the council can involve itself in the following areas: occupational safety and health; child labor; migrant workers; human resource development; labor statistics; work benefits; social programs; productivity studies; collective bargaining; safety standards; workers compensation; legislation related to union activities; gender discrimination; technical assistance; other matters on which the parties may agree).

[222] Labor Agreement, *supra* note 22, art. 12; *Labor Officials from NAFTA Signatories Meeting in Dallas to Lay Groundwork for New Secretariat*, DAILY LABOR REPORT, Jul. 5, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 126, at d12 [hereinafter *Labor Officials*].

[223] Labor Agreement, *supra* note 22, art. 14.

[224] *Organizations*, *supra* note 219, at 8. The head of the labor Secretariat will be Canadian, the chief of the environmental Secretariat in Montreal is Mexican, and the head of the trade Secretariat in Mexico City is American. *See generally Labor Officials*, *supra* note 222.

[225] Crandall, *supra* note 18, at 184; Labor Agreement, *supra* note 22, arts. 15, 16(1), 21.

[226] *NAFTAmath*, AFL-CIO PUBLICATION, 1, 35 (Aug. 1994) [hereinafter NAFTAmath] (citing Federal Register, Vol. 59, No. 67, Thurs., Apr. 7, 1994, at 16660 [hereinafter Federal Register]).

[227] *Id.*

[228] *Reich Announces New Head of U.S. NAO*, DAILY LABOR REPORT, Jul. 20, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 137 d26.

[229] NAFTAmath, *supra* note 226, at 35 (citing Federal Register, at 16660).

issues concerning the Labor Agreement, and maintains a public reading room, where information such as submissions and records of hearings is available to the public.[230]

While the Labor Agreement has established a framework for cooperation and exchange of ideas, there are no timetables for conducting these activities, nor are there penalties for failure to participate in these discussions.[231] In essence, the Commission itself has no power to promote labor law enforcement.[232]

C. *Dispute Resolution*

Under the complaint process of the Labor Agreement there are no private causes of action.[233] Only governments, and not private parties, have the authority to begin the complaint procedures needed to determine if a violation is serious enough to justify fines and penalties.[234] In addition, the Labor Agreement bars any nation from creating a private right of action under domestic law against another party for a violation of the agreement.[235] Consequently, each government must actively pursue disputes so that sanctions and reprimands can act as deterrents to labor abuses.[236]

1. *The complaint procedure*

Cooperation is the guiding star of the complaint process.[237] Consultations at three levels are required before formal mediation of a dispute can begin: at the NAO, the ministerial, and the diplomatic level.[238]

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[230] *Id.* at 36 (citing Federal Register, at 16661: "The Secretary shall maintain a reading room where submissions, public files, transcripts of hearings, Federal Register notices, reports, advisory committee information, and other public information shall be available for inspection during normal business hours, subject to the terms and conditions of the Freedom of Information Act, 5 U.S.C. 552.").

[231] *Id.* at 36 (citing Federal Register, at 16661).

[232] *Id.*

[233] Diaz, *supra* note 211, at 20.

[234] Crandall, *supra* note 18, at *9.

[235] *Id.*

[236] *Id.*

[237] *Id.* at 185 (referring to the Labor Agreement's requirement for cooperation to "resolve any matter").

[238] Diaz, *supra* note 211, at 18.

Any interested party[239] may submit a complaint to the NAO.[240] It will only be considered if it concerns one of three issues: occupational health and safety, child labor, and minimum wage issues.[241] The complaint must be related to trade, involve "mutually recognized laws," and display a "pattern of non-enforcement of labor law."[242] Finally, the submitter must indicate if there has been an exhaustion of local remedies, and whether the action is pending before an international tribunal.[243]

The three NAOs will investigate the submission and determine which labor law should be used to resolve the situation.[244] An NAO has 60 days in which to hear a complaint or reject it.[245] As of July 4, 1994, the U.S. NAO had received over 300 submissions, only two of which qualified for review.[246] This is probably because the Mexican government, not private corporations, must be guilty of failing to promote, enforce or comply with existing labor legislation.[247]

If a petition is accepted, ministerial consultations follow and, if these fail, a party may request the formation of an ECE.[248] The ECE may

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[239] Crandall, *supra* note 18, at *9. Interested parties include individuals, employers, or labor unions. *Id.*

[240] NAFTAmath, *supra* note 226, at 36. The submission must: be signed and dated; clearly identify the complainant; state specifically the issues being presented for consideration; and include supporting documentation. *See also* Crandall, *supra* note 18, at *9.

[241] Hagen, *supra* note 76, at 929.

[242] Labor Agreement, *supra* note 22, art. 49. The Labor Agreement provides the following definitions:

> "mutually recognized labor laws" means laws of both a requesting Party and the Party whose laws were the subject of ministerial consultations . . . that address . . . the subject matter in a manner that provides enforceable rights, protections, or standards; "pattern of practice" means a course of action or inaction beginning after the date of entry into force of the Agreement, and does not include a single instance or case . . . .

Id.

[243] NAFTAmath, *supra* note 226, at 36.

[244] *Id.*

[245] *Id.* at 35-36 (noting that grounds for rejection include lack of signature, date, or specificity as to the nature of the injury; lack of relevancy to trade; failure to exhaust local remedies; pendant litigation before an international body; or substantial similarity to a recent complaint). *Id.*

[246] *See generally Labor Officials*, *supra* note 222. The petitions involved anti-union complaints against General Electric and Honeywell subsidiaries in Mexico. *Id.* *See* discussion *infra* part V.A.

[247] *See* discussion *infra* part V.A.

[248] Labor Agreement, *supra* note 22, art. 24. The chair of the ECE is selected by

evaluate only those matters dealing with occupational health and safety or "technical labor standards,"[249] but has no authority to investigate complaints regarding the right to unionize, strike, or bargain collectively.[250] The ECE presents a final report to the council.[251] Parties then can choose to enter into further consultations.[252] If these fail, a nation may request a special session of the Council and the formation of an arbitral panel,[253] which must first attempt to resolve the conflict without the imposition of monetary sanctions.[254]

The Labor Agreement also contains a clause which allows governments to escape sanctions for their inaction.[255] A country may argue that it exercised "reasonable discretion" or allocated limited resources to areas having higher priority.[256] Critics contend that this exception is so broad that it renders the rest of the Labor Agreement meaningless.[257] Legislation that is simply inadequate does not qualify for review.[258] In sum, a lengthy, bureaucratic procedure ensures that "sanctions will rarely, if ever, be imposed."[259] The AFL-CIO estimates that the time between

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the Council in consultation with the International Labor Organization (ILO). *Id.* "ECE members shall have i) have expertise or experience in labor matters . . . . ii) be chosen strictly on the basis of objectivity, reliability and sound judgment, iii) be independent of, and not affiliated with or take instructions from, any Party of the Secretariat . . . ." *Id.*

[249] Hagen, *supra* note 76, at 928 (citing Labor Agreement, art. 49, and explaining that "technical labor standards" appears to refer to occupation injuries, illnesses and worker compensation schemes).

[250] *Id.*; Crandall, *supra* note 18, at *10. Critics of the Labor Agreement believe that this omission will only endorse the Mexican government's repression of unions and weaken labor's bargaining strength. *Id. See also* Martin, *supra* note 50, at 245.

[251] Crandall, *supra* note 18, at *10.

[252] Hagen, *supra* note 76, at 929.

[253] Michael J. McGuinness, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579, ____, WL 30 STJIL 579, at *3 (1994). The panel is formed by a two-thirds vote of the Council, and 5 experts from each country sit on the panel. *Id.*

[254] Hagen, *supra* note 76, at 930 (citing Labor Agreement, arts. 37-39).

[255] Crandall, *supra* note 18, at *11.

[256] *Id.* (citing Labor Agreement, art. 39).

[257] *Id.*

[258] Labor Agreement, *supra* note 22, art. 2.

[259] Crandall, *supra* note 18, at *12 (noting that "the claim must proceed through NAO and ministerial consultations, an ECE assessment, party consultations, a special session of the council, and an arbitral panel determination"); *The NAFTA Side Accord on Labor*, AFL-CIO TASK FORCE ON TRADE, Aug. 20, 1993, at 2 (explaining that at each step of the complaint procedure a "persistent pattern" of non-enforcement must

the appointment of an ECE (after first having gone through the NAO and the Council) and the imposition of penalties could be 1,225 days (over 3 years) or longer.[260]

2. Imposition of penalties

The Labor Agreement outlines two types of penalties for failure to implement an action plan: monetary fines and suspension of benefits.[261] Even though the Labor Agreement establishes maximum amounts for fines,[262] the arbitral tribunal can exercise tremendous discretion in determining which penalty to apply or in setting the amount of a fine.[263]

If a government refuses to pay, the complainant may increase duties, thereby suspending NAFTA benefits.[264] Once the amount of the fine has been collected, the suspended benefits must be restored.[265] There are no provisions in the Labor Agreement for compensatory or punitive damages for those whose rights have been violated, for on site investigations, or for criminal prosecution of violators.[266] Proponents of both NAFTA, and free trade regimes in general, argue that to delve too deeply into the labor matters of another state would be a violation of sovereignty.[267]

VI. Discussion

A. Effectiveness of the Labor Agreement

The Labor Agreement is a tool of diplomacy and trade, rather than

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be shown, and quoting Mexico's Commerce Secretary, Jaime Serra Puche: "The time frame of the process makes it very improbable that the stage of sanctions could be reached.").

[260] *Tell Congress No NAFTA*, AFL-CIO Task Force on Trade, 1, 3 (1993).

[261] *Id.* (citing Labor Agreement, art. 39 and annex 39).

[262] Crandall, *supra* note 18, at *11 (explaining that the maximum monetary penalty allowed for all of 1994 was $20 million. After that year, the penalty cannot exceed 0.0007% of the total trade in goods between the parties involved in the dispute).

[263] *Id.* (citing Labor Agreement, annex 39). The panel is required to consider: the pervasiveness and duration of the violations; the level of enforcement reasonable to expect from a party based on its resources; the reasons given for failing to implement the action plan; efforts made to improve the situation; and any other relevant factors. *Id.*

[264] *Id.* at *12.

[265] *Id.*

[266] *Id.*

[267] *Id.* at 192.

one designed to improve labor conditions in any meaningful way. While it contains provisions for child labor, minimum wage standards, employment discrimination, equal pay, and protection of migrant workers,[268] there are no provisions for the right to form unions and to strike. Arguably, these last two rights are the ones that ensure the receipt of all the others. Furthermore, fines are imposed only as a last resort, and at the discretion of the arbitral panel.[269] In sum, the complaint process is so convoluted that it renders enforcement meaningless.

By August 17, 1994, the United States NAO had received two actionable complaints NAFTA violations.[270] The International Brotherhood of Teamsters and the United Electrical Workers (UEW) filed the submissions on behalf of Mexican workers who alleged that they were fired for attempting to unionize,[271] and for talking to the press about safety concerns at Honeywell and General Electric factories.[272] The NAO determined that the Mexican government had lived up to its obligation to promote, enforce, and comply with labor laws in this instance.[273] Secretary of Labor Robert Reich declined to pursue the complaints.[274] The UEW subsequently filed another complaint against General Electric in November of 1994,[275] but withdrew the charges in February, 1995,

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[268] Hagen, *supra* note 76, at 928.

[269] Crandall, *supra* note 18, at *12.

[270] *NAO Decides to Review Union Charges Against Honeywell, General Electric*, DAILY LABOR REPORT, Apr. 20, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 75 d14. The complaints were filed on February 14, 1994, and a hearing was scheduled for August 31, 1994. *Id.*

[271] *Id.* The incidents allegedly took place at the Honeywell factory in Chihuahua and the General Electric plant in Juarez. *Id.* Both companies denied the allegations, and stated that the complaints were a result of union "anti-NAFTA activities." *Id.*

[272] *NAFTA Labor Protections Put to the First Test as Mexican Workers Tell U.S. about Firings*, DAILY LABOR REPORT, Sept. 13, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 175 d15.

[273] *See generally U.S. National Administrative Office's Public Report of Review on Submissions No. 940001 and No. 940002*, DAILY LABOR REPORT, Oct. 14, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 197 d23. The NAO stated that the review had not been aimed at determining whether the companies had violated the law. *Id.* The NAO also noted that "since workers for personal financial reasons accepted severance, thereby preempting Mexican authorities from establishing whether the dismissals were for cause or in retribution for union organizing, the NAO is not in a position to make a finding that the government of Mexico failed to enforce the relevant labor laws." *Id.*

[274] *Id.* at 41; *NAFTA Complaint Against SONY*, MEX. BUS. MONTHLY, Dec. 1, 1994, *available in* Westlaw, MXBUSM file [hereinafter *Complaint*].

[275] *See generally Labor Department to Review UE Charges of Violations by GE at Mexican*

stating that the U.S. NAO investigation, or lack of one, constituted a "'white wash.'"[276]

On August 16, 1994, four Mexican and U.S. labor human rights groups charged that SONY, a multi-national Japanese corporation, and the Mexican government were violating and failing to enforce Mexican labor laws, respectively.[277] They claimed that SONY fired union activists, harassed pro-union workers, and enacted a mandatory six-day work week.[278] Other allegations included the government's failure to enforce labor laws and denial of the union's registration petition.[279] This was not only the first complaint to be filed cooperatively by Mexican and U.S. groups, but also the first to allege misconduct by a government, as well as by a corporation.[280] NAO hearings were scheduled for February 13, 1995 in San Antonio.[281] The NAO's finding that the Mexican government had mishandled the case led to a series of high-level discussions to deal effectively with the registration of independent unions.[282] Mexico identified a list of "administrative problems" the unions had to remedy before their petition would be considered.[283] Workers claimed that they met these conditions and reapplied, yet they were denied a second time on July 7, 1995.[284] The leaders of the movement were fired.[285]

Despite the filing of these three grievances, and particularly in light of their lack of success, increased enforcement of existing labor laws is

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Plant, DAILY LABOR REPORT, Nov. 10, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 216 d8.

[276] *See generally NAFTA: Electrical Workers Drops Petition; Lambastes NAO for "White Wash" Probe*, DAILY LABOR REPORT, Feb. 2, 1995, *available in* Westlaw, BNA-DLR database, 1995 DLR 22 d14.

[277] *Four Groups Charge SONY, Mexican Government with Labor Law Violations under NAFTA Accord*, DAILY LABOR REPORT, Aug. 17, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 157 d3. SONY denied the charges, and neither the Labor Department nor the Mexican government had commented on the complaints at the time of publication.

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *NAFTA: Workers at SONY Plants in Mexico to Testify at NAO Hearing in San Antonio*, DAILY LABOR REPORT, Feb. 13, 1995, *available in* Westlaw, BNA-DLR database, 1995 DLR 29 d16.

[282] *See generally NAFTA: Bid by Workers at Sony Maquiladora to Register Union Rejected for Second Time*, BNA INTERNATIONAL BUSINESS & FINANCE DAILY, Aug. 9, 1995.

[283] *Id.*

[284] *Id.*

[285] *Id.*

not promising since the Labor Agreement's complaint procedure is rife with opportunities to allow politics, and not human rights, to dictate policy. Proponents argue that labor rights violations took place before NAFTA, and that the Labor Agreement is a "first step" toward the reformation of labor standards, since it provides a forum for discussing these issues.[286] Should this prove to be an optimistic picture, several other options, both in the United States and in the international community, exist for asserting worker rights.

B. Enforcement by the United States

The enforcement of labor rights in foreign countries can be fostered by the United States through the use of unilateral and bilateral trade tools, litigation, and cooperative union activity.

1. Unilateral trade tools

Unilateral trade restrictions have three goals: the protection of U.S. businesses from unfair competition, and the promotion of human rights and political stability.[287] Labor provisions in trade agreements reflect the idea that market superiority may not be due to higher productivity, but to repression of workers.[288]

The 1988 United States Trade Act (USTA) allows the United States to enter into a trade pact only if it meets the "applicable trade objectives" of the U.S., which include worker rights.[289] Mandatory review of compliance with these rights is required under the Generalized System of Preferences (GSP), § 301 of the 1974 USTA, the Caribbean Basin Initiative (CBI), and the Overseas Private Investment Corporation (OPIC).[290] Section 503(a) of the GSP enumerates these rights as: 1)the right to associate, 2) the right to organize and bargain collectively, 3) a ban on the use of forced labor, 4) a minimum age requirement for the

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[286] Crandall, *supra* note 18, at *13.

[287] Barr, *supra* note 1, at 27-28.

[288] *Id.* at 28.

[289] *Id.* at 28-29 (citing 19 U.S.C. § 2902(b), § 2902(c), and § 2901(b)).

[290] *Id.* at 28 (citing GSP, 19 U.S.C. §§ 2461-2466 (1988); § 301 of the USTA, 19 U.S.C. §§ 2411-2420 (1988); CBI, 19 U.S.C.A. §§ 2701-2706; and OPIC, 22 U.S.C. § 2191 (1988)).

employment of children, and 5) acceptable conditions with respect to wages, hours worked, and occupational safety and health.[291] Collectively, these are known as "internationally recognized worker rights" (IRWR) in U.S. trade documents.[292] The United States Trade Representative must review compliance with these rights before entering into a trade agreement with another nation.[293]

2. The GSP and CBI

The GSP sets favorable import duty rates for developing countries, essentially giving their goods tax-free access to the U.S. economy.[294] Reciprocal concessions are not required, since the goal of the program is to nurture economic growth in these nations and to further U.S. security and foreign policy interests.[295] No country may benefit from the GSP "if such a country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country."[296] In theory, the GSP provides strong trade incentive to protect internationally recognized rights. However, in practice, the GSP determinations are politically driven.[297] For example, one of the greatest beneficiaries of the GSP has been Mexico.[298] Additionally, a petitioning nation may still receive preferential trade status by simply stating that it is "taking steps" to improve conditions.[299] Despite these obstacles, some groups believe that the GSP could be a major tool to champion labor rights.[300]

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[291] Karen Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173, ____, WL 17 YJIL 173, at *3 (1992) (citing 19 U.S.C. §§ 2462(a)(4)(1988)); Barr, *supra* note 1, at 29.

[292] Travis, *supra* note 291, at *3.

[293] Barr, *supra* note 1, at 28.

[294] *Id.* at 29-30.

[295] *Id.* at 29.

[296] *Id.* at 30 (citing 19 U.S.C. § 2462(b)(7)). Protected rights under the GSP include: freedom of association, right to bargain collectively, prohibitions against forced labor, minimum employment age for children, and basic work conditions with respect to wages, hours and safety. *Id.* at 31.

[297] *Id.* at 38-39.

[298] Leslie Alan Glick, *Recent Legislative Developments Affecting U.S.-Mexico Trade and Investment*, 2 U.S.-MEX. L.J. 37, 39 (1994)(noting that 53.8% of all Mexican products were duty-free under the GSP prior to the ratification of NAFTA).

[299] Travis, *supra* note 291, at *5 (detailing a law suit filed by human rights groups and labor unions against the U.S. government after it granted favorable trade status to the Dominican Republic, despite numerous violations of Internationally Recognized Worker Rights).

[300] *Id.* at *6.

The CBI program allows Caribbean and Latin American countries to export certain products duty free into the United States.[301] The President determines whether a nation is "taking steps" to ensure worker rights.[302] CBI status is subject to review but, once again, removal from the program is discretionary.[303] Political pressure may be effective in influencing the review process. The Labor Agreement, the CBI, and the GSP are similar in that all three contain "escape" clauses for governments that are not fully providing IRWR.

3. Other programs

OPIC is a federally chartered corporation designed to provide insurance and assistance for American companies overseas, in order to stimulate U.S. investments in developing nations.[304] It has worker rights provisions comparable to those of the GSP. OPIC is prohibited from assisting investment projects in those nations that have violated these rights, as reflected in the GSP annual report to Congress.[305] For the most part, OPIC has followed GSP guidelines; therefore, pressure on the GSP Subcommittee may influence OPIC.[306]

Section 301 of the 1974 USTA[307] was enacted to conform trade laws to the Generalized System on Tariffs and Trade (GATT),[308] with the goal of phasing out unfair trade practices by other nations.[309] Two classes

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[301] Barr, *supra* note 1, at 32.

[302] *Id.* at 32-33.

[303] *Id.* at 34.

[304] *Id.* at 35; Travis, *supra* note 291, at *6 (stating that § 5 of the OPIC Act provides that the "[c]orporation may insure, reinsure, guarantee, or finance a project only if the country" is implementing internationally-recognized workers rights). *See also* James A. Zimmerman, *The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace*, 14 HASTINGS INT'L & COMP. L. REV. 603 (1991) (providing a historical overview and analysis of recent OPIC amendments).

[305] Barr, *supra* note 1, at 35-36.

[306] *Id.* at 36.

[307] Howard, *supra* note 53, at 521 (citing the Omnibus Trade and Competitiveness Act of 1988 (OTCA), 19 U.S.C. § 2411 (1988), amending Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1984)).

[308] General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187. GATT regulates 80% of world trade, "[m]ultilateralism and nondiscrimination in trade [being] two of [its] fundamental tenets." Howard, *supra* note 53, at 525.

[309] Barr, *supra* note 1, at 36-37.

of unfair trade practices are defined under § 301: one merits a discretionary response, and the other requires mandatory retaliation by the United States Trade Representative (USTR).[310] Denial of IRWR is subject to a discretionary retaliation.[311]

Any "interested person" may request the USTR to examine allegations of unfair trade practices under § 301.[312] The USTR retains the discretion whether to investigate or not, but must give an explanation to the petitioner if the request is denied.[313] Mandatory retaliation measures are applied if negotiations fail.[314] Section 301 applies to trade with Canada, despite the U.S.-Canada Free Trade Agreement, and may also apply to NAFTA.[315]

4. Limitations of these trade tools

Although labor rights provisions form integral parts of U.S. trade law, they have rarely been invoked,[316] since laws such as § 301 were designed to be used primarily as negotiating tools.[317] Administrative non-enforcement[318] and a presumption of compliance in favor of beneficiary countries further hampers the efforts of human rights activists.[319] For

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[310] *Id.*

[311] *Id.*

[312] *Id.* at 37 (noting that no one has done so to date).

[313] *Id.*

[314] *Id.* at 38.

[315] *Id.*

[316] *Id.* at 38-39. The § 301 process has never been used as a sanction against unfair labor practices, nor has any nation, including Nicaragua and Chile, been denied CBI participation. *Id.* In addition, out of 82 petitions filed with the GSP through 1990, only 4 countries have been sanctioned, and three of the four have been reinstated: Chile, Paraguay, and the Central African Republic. *Id.*

[317] *See generally* Howard, supra note 53.

[318] *Id.* at 523-24 (explaining that § 301 grants broad discretionary power to the executive branch, these decisions are not judicially reviewable, and violators may "escape or be subject to sanctions, depending solely on political implications").

[319] Barr, *supra* note 1, at 40. Non enforcement occurs for 3 primary reasons. *Id.* First, the definitions of "violations" are vague, thereby allowing the government to find compliance in most cases. *Id.* Second, all U.S. trade tools, including NAFTA, the GSP, CBI, and OPIC, contain provisions that exempt a country from sanctions as long as it is "taking steps" to remedy violations. *Id.* Finally, since labor standards must be tailored to a nation's level of development, evaluation is inaccurate. *Id.*

example, in 1986-1987, during the height of some of the worst human rights violations in Guatemala,[320] the USTR found "no actionable basis" to remove Guatemala from the GSP.[321]

In addition to charges of being too easily swayed by politics, unilateral trade tools face criticism because they are inconsistent with the GATT.[322] They violate its tenets of multilateralism and nondiscrimination, which require universal, rather than unilateral, application of trade sanctions.[323] Both Mexico and the United States are members of GATT; thus they are required to tailor their trade policies to its goals and guidelines.[324] GATT, however, does not consider worker rights to be essential to trade discussions and treaties.[325] This tension between trade and labor standards was highlighted during the April, 1994 Uruguay Round of GATT, when industrialized and developing countries gathered to sign the agreement that would replace GATT with the World Trade Organization in 1995.[326] At the last moment, the signatories agreed to delay further talks on labor norms.[327]

5. Bilateral trade tools

Proponents of NAFTA and other multi-lateral trade tools argue that such legislation is less political and offers more hope for the enforcing of labor rights: it encourages cooperation while respecting sovereignty, since both parties have agreed to the conditions of the treaty.[328] They argue that independent committees are less politically motivated.[329] However, NAFTA advocates fail to take into account the lengthy complaint process inherent in such systems, and ignore the reality that the head of these committees are often government appointees.

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[320] *Guatemala*, *supra* note 162, at 135, 137 (explaining that suppression of organized labor had been a consistent agenda in Guatemala for over 40 years, and that in the early 1970s and 1980s, over 100,000 individuals are estimated to have "disappeared"). In 1980, 17 union leaders were kidnapped by the police and were never heard from again. *Id.* at 137.

[321] *Id.* at 140 (explaining that the U.S. government felt Guatemala was "taking steps" to improve the situation).

[322] Howard, *supra* note 53, at 525.

[323] *Id.*

[324] *See generally* Amato, *supra* note 55.

[325] *See generally* Howard, *supra* note 53.

[326] *World After GATT*, EIU CROSSBORDER MONITOR, Apr. 20, 1994, *available in* Westlaw, BUS-INTL-C database.

[327] *Id.*

[328] Howard, supra note 53, at 526-27.

[329] *Id.* at 526.

6. Litigation

One of the more promising avenues for asserting international labor rights claims is in U.S. courts.[330] These causes of action are based, not on human rights notions, but on principles of tort, contract, and administrative law.[331] Three recent examples of such actions are found in *Labor Union of Pico Korea v. Pico Products, Inc., Pico Korea, Ltd.* (*Pico Korea*),[332] *Dow Chemical v. Alfaro* (*Dow Chemical*),[333] and the Guatemalan Inexport case (Inexport).[334]

In *Pico Korea*, the Korean subsidiary of a New York company laid off 300 workers, most of whom were women, at one of its factories.[335] The employees filed suit in federal court, and based their claim on three theories: 1) a violation of the labor contract, with jurisdiction granted to federal court under § 301 of the Labor Management Relations Act; 2) tortious interference with the labor contract; 3) violation of the Worker Adjustment and Retraining Notification Act.[336] Although the district court found that the claims were valid, the defendants won because of a provision in New York statute that absolves parent companies from the actions of subsidiaries.[337] Nevertheless, the case is considered to herald "potential for the enforcement of foreign . . . labor rights in U.S. courts."[338]

Foreign workers are also filing tort claims against their U.S. employers

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[330] *See generally Guatemala, supra* note 162 (detailing litigation of Guatemalan claims in U.S. courts in order to enforce judgments against a U.S. parent corporation); *see generally Working Women, supra* note 128 (detailing suits against the United States Trade Representative for failing to impose trade sanctions against the Dominican Republic).

[331] *Working Women, supra* note 128, at *10.

[332] No. 90-CV-774 (N.D.N.Y. filed July 12, 1990), 968 F.2d 191, *cert. den.*, 113 S.Ct. 493 (1992).

[333] 786 S.W.2d 674 (Tex. 1990), *cert. den.*, 498 U.S. 1024 (1991).

[334] *Guatemala, supra* note 162, at 146-48.

[335] *Working Women, supra* note 128, at *10. The dismissals occurred in February 1989. *Id.* The plaintiffs were owed back wages, and claimed that the shutdown violated the advance notice provisions of their collective bargaining agreements and Korean law. *Id.*

[336] *Id.*

[337] *Id.* For examples of cross-border disputes and choice-of-law issues that might arise under NAFTA, see Ernest Sander, *Cross-Border Legal Disputes Stuck in No-Man's Land Business*, L.A. TIMES, Feb. 19, 1995, Metro Section.

[338] *Working Women, supra* note 128, at *10.

in U.S. courts.[339] In 1990, the Texas Supreme Court ruled in *Dow Chemical* that such suits may be tried on the merits, rejecting Dow Chemical's argument of *forum non conveniens*.[340] Injured foreign employees of U.S. multinational corporations now may seek recourse in Texas courts.[341]

In 1989, the U.S. owner of a Guatemalan plant, Inexport, fired labor leaders and over 100 supporters after they formed a union.[342] Armed guards patrolled the factory and protesters were assaulted and fired upon.[343] A Guatemalan court ruled in favor of the workers, held that Inexport had violated both Guatemalan and international labor codes, and ordered the payment of back wages.[344] The owners failed to comply with the order and the court did not enforce it.[345]

Assisted by lawyers and labor advocates in the United States, the plaintiffs traced sales and distributions of Inexport to a forum in the United States that would have jurisdiction.[346] This they found in Miami, where they could seek enforcement of their favorable Guatemalan judgment under principles of comity rather than under international labor standards.[347] A U.S. court could conceivably order award of back pay from Inexport assets in the United States.[348] As a result of this creative legal activism, the Guatemalan Labor Ministry re-opened negotiations between labor and management, the result being the reinstatement of fired workers, the award of back pay, and the official recognition of the union.[349]

There is also potential for Mexican awards to be enforced in U.S. courts. In Texas, for example, the Uniform Enforcement of Foreign Judgments Act and the Recognition Act "allows a foreign country money judgment to be enforceable to the same extent as the judgment of a sister state."[350] In *Hunt v. B.P Exploration Co. (Libya) Ltd.*,[351] a

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[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Guatemala*, *supra* note 162, at 146.

[343] *Id.*

[344] *Id.* at 146-47.

[345] *Id.* at 147.

[346] *Id.*

[347] *Id.* at 147-48.

[348] *Id.* at 148.

[349] *Id.*

[350] Gonzalez, *supra* note 148, at 680 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 1986)).

[351] 580 F.Supp. 304, 310 (N.D. Tex. 1984).

federal court enforced an English judgment against a plaintiff who had failed to establish both a lack of reciprocity between England and Texas, and to rebut the prima facie case against him.[352] The court stated that the Texas laws were actually a codification of a United States Supreme Court decision, *Hilton v. Guyot*.[353] However, foreign decisions would not be enforced if they offend public policy.[354]

These cases illustrate possibilities for the enforcement of international worker rights in the domestic courts of the United States.[355] The growing number of labor rights disputes throughout the world signals a need for a variety of arenas for their resolution.[356]

7. Union solidarity action[357]

> [W]orkers, forgetting about barriers, borders and flags, can act together towards common goals to defend their rights.[358]

Increased cooperation between U.S. unions and workers in other countries has also been productive. For example, the United Auto

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[352] Gonzalez, *supra* note 48, at 682.

[353] 159 U.S. 113, 123 (1895). The Supreme Court provided the following standard:

> When an action is brought in a court of this country by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown impeaching the judgment, as by showing that it was affected by fraud or prejudice or that, by the principles of international law, and by the comity or our own country, it should not be given full credit and effect.

Id.

[354] Gonzalez, *supra* note 148, at 682 (citing Overseas Inns S.A.P.A. v. United States, 685 F.Supp. 968, 972 (N.D. Tex. 1988)).

[355] *Guatemala*, *supra* note 162, at 148-49.

[356] *Id.* at 122-25 (explaining that these disputes involve the use of child labor and forced labor in the United States, Europe, Pakistan, India, Bangladesh, China, Haiti, and the Dominican Republic; discrimination against women and minorities; and low minimum wage, excessive working hours, and lax safety standards (for example, in Korea and Mexico)).

[357] *Working Women*, *supra* note 128, at *10-11.

[358] *Labor*, MEX. BUS. MONTHLY, Aug. 1, 1994, *available in* Westlaw, MXBUSM database (comments of *Frente Autentico del Trabajo* unionist Alfredo Dominguez).

Workers monitored the trial of South African auto union leader Moses Mayekiso when he was charged with treason.[359] The South African government came under international pressure to ensure that the trial was fair, eventually resulting in Mayekiso's acquittal.[360] When Coca-Cola tried to close a bottling plant in Guatemala City in 1985, an international campaign ensued to stop the shut-down.[361] A settlement agreement was reached which included reopening the plant and reinstating the employees.[362]

Increased collaboration between unions in the U.S. and those in Mexico is occurring since the passage of NAFTA.[363] Self-preservation appears to be the impetus behind this closer affiliation.[364] In January of 1994, one of these new alliances negotiated the re-hiring of six of eleven workers who had been fired from a General Electric plant after attempting to form a union.[365] In August, the AFL-CIO applied for a permit to open an office in Mexico City.[366]

Union leaders seek a "level playing field" with Mexican workers.[367] Assisting union activity in Mexico will help create this "level playing field," thereby fostering "fair trade" which will mitigate disproportionate job migration and ensure the enforcement of labor standards.

C. International Options for Enforcement

Litigation of human rights and worker rights issues in international

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[359] *Working Women*, *supra* note 128, at *10.

[360] *Id.* at *10-11.

[361] *Id.* at *11. The strike was coordinated by the International Union of Food and Allied Worker's Associations. *Id.*

[362] *Id.*

[363] *U.S. and Mexican Labor Sectors Undergoing Transition after Implementation of North American Free Trade Agreement*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Feb. 16, 1994 (describing an alliance between one of Mexico's largest unions, the Teamsters, and United Electrical Workers Union)[hereinafter *Transition*].

[364] *Steelworkers to Establish Committee to Monitor North American Free Trade Pact*, DAILY LABOR REPORT, Sept. 1, 1994, *available in* Westlaw, BNA-DLR database, 1994 DLR 168 d4 (quoting United Steel Workers President George Becker as saying "[w]e have to protect ourselves in each of our countries").

[365] *Transition*, *supra* note 363.

[366] *U.S. Labor Union A.F.L.-C.I.O. Asks Labor Secretariat for Permit to Establish Office in Mexico City*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Sept. 21, 1994 (noting that the Teamsters have been airing complaints against Honeywell's and General Electric's anti-union activities in Mexico).

[367] Stephen Franklin & John McLean, *Foes Battle to Mold, if not Kill, Free-Trade Pact*, CHICAGO TRIBUNE, Feb. 22, 1993, Business Section, at 3.

courts provides yet another option for attempting to enforce such claims.[368] Some of these bodies include the International Court of Justice (ICJ),[369] the Inter-American Court of Human Rights (IACHR),[370] and the Inter-American Commission on Human Rights (Commission).[371] While the decisions of these bodies are neither binding nor easy to enforce, trade sanctions can be imposed on offending states by the General Assembly of the Organization of American States (OAS).[372] In addition, many nations are uncomfortable with the resulting publicity these cases generate since they are concerned with their image, and dislike being tried in the court of public opinion. While such methods are often slow and tedious, in some cases constant pressure and international disapproval have resulted in significant domestic changes.[373] If either domestic or trilateral remedies for labor abuses fail under NAFTA's legal mechanisms, these international bodies may provide alternatives for the adjudication of claims.

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[368] *See generally* James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793 (1994).

[369] The ICJ was established by the Charter of the United Nations and functions as its judicial organ. *See* Charter of the United Nations, June 26, 1945, Ch. XIV, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153. Under the ICJ statute, only states may be "parties in cases before the Court." Statute of the International Court of Justice, June 26, 1945, art. 34, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. States may come before the Court seeking the interpretation of a treaty, such as NAFTA, or answers to any questions of international law. *Id.* at art. 36(2).

[370] Smith, *supra* note 368, at 810-12 (citing the Charter of the Organization of American States (OAS), Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3; American Convention on Human Rights Nov. 22, 1969, OAS T.S. No. 36, at 1, OAS Off. Rec. OEA/Ser.L./V/II.23 doc.21 rev. 6 (1979)). The IACHR is the judicial arm of the OAS, whose membership includes the three NAFTA countries. *Id.* The IACHR interprets the American Convention on Human Rights and the Charter of the OAS, its jurisdiction is voluntary, and it lacks enforcement powers for its decisions. *Id.* Of interest is that unlike the ICJ, not only states but individuals may bring claims before the IACHR. *Id.*

[371] *Id.* at 810-11. The Inter-American Commission on Human Rights has the authority to implement OAS mandates through the OAS Charter and the American Declaration on the Rights and Duties of Man, which is binding upon all member states, and through the American Convention on Human Rights, which is binding only upon those states which have ratified it. *Id.* The United States has not done so. *Id.*

[372] *Id.* at 811.

[373] South Africa's abolition of apartheid, for example. *See generally* Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399 (1993).

D. Other Options: Voluntary Codes of Conduct and the Lessons of the European Community

1. Voluntary codes of conduct

Private agreements and voluntary codes of conduct may provide recourse for individuals with labor rights claims under traditional contract law. These codes can bring large multinational corporations (MNCs) in conformance with the policies of the countries in which they operate.[374] These could include abiding by the host country's labor laws. Government agencies and private employers will sometimes promulgate and enforce agreements that guarantee labor protections.[375] For example, negotiations between airline corporations, labor unions, and government agencies have resulted in the setting of standards for airline employees.[376] Private citrus growers, commissions of several Caribbean islands, and the Department of Labor have negotiated on behalf of migrant sugar workers.[377]

Even though such codes have questionable legal enforceability, they are "general moral statement[s] by MNCs . . . [they] manifest a corporate intent to engage in ethical behavior and to obey the law."[378] Consequently, failure to abide by its own code could result in both negative public opinion and official response.[379]

Perhaps the two most well-known agreements are those of Levi-Strauss & Co. (Levi-Strauss)[380] and Reverend Leon Sullivan (Sullivan Agreements).[381] In 1977, Reverend Sullivan, who was also a member of the Board of Directors of General Motors, promulgated a set of guidelines for American businesses operating in South Africa.[382] Their purpose was

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[374] *See generally* Jorge F. Perez-Lopez, *Promoting International Respect for Workers Rights Through Business Codes of Conduct*, 17 FORDHAM INT'L L.J. 1 (1993).

[375] *Working Women*, *supra* note 128, at *9.

[376] *Id.*

[377] *Id.*

[378] Baker, *supra* note 373, at 415.

[379] *Id.* at 416, 421.

[380] Perez-Lopez, *supra* note 374, at 23.

[381] Baker, *supra* note 373, at 418.

[382] Perez-Lopez, *supra* note 374, at 5.

to bring outside pressure to bear on the government's policy of apartheid.[383] The Sullivan Principles led to the enactment of similar codes by companies dealing in South Africa.[384]

In response to 1992 revelations that one of its suppliers in Saipan used Chinese slave labor, Levi-Strauss developed a "Business Partner Terms of Engagement."[385] These guidelines dealt with the environment, health and safety issues, ethical standards, and other practices.[386] Other companies, such as Sears, Roebuck and Co. and Phillips-Van Heusen have followed suit.[387]

The Maquiladora Standards of Conducted (Standards) were issued in 1991 by the Coalition for Justice in the Maquiladoras.[388] The group drew its standards from the ILO, as well as Mexican and U.S. law.[389] The goal of these guidelines is to raise the standard of living, as well as the working and environmental conditions of workers on both sides of the border.[390] The Standards include provisions for: labeling and handling of toxic wastes; ergonomics; training; adequate ventilation; health and safety inspections; reasonable working conditions, and fair pay.[391] There are also provisions dealing with sexual harassment, child labor, and the right to unionize.[392]

While the primary responsibility for upholding the rights of labor lies with each nation, codes of conduct can yield beneficial results for workers.[393] The U.S. and Mexican governments could require MNCs to negotiate such codes in return for the privilege of operating within Mexico: "If both countries are truly concerned about economic and human development, they should not hesitate to mandate responsible multinational behavior."[394]

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[383] *Id.*

[384] *Id.* at 44.

[385] *Id.* at 24.

[386] *Id.* The terms of the agreement apply globally to all contractors who supply materials and labor to Levi-Strauss. *Id.* Some of the provisions encompass: environmental and ethical commitments; provisions for worker health, safety, freedom of association and fair wages; bans against child labor, slave labor, discrimination, and corporal punishment. *Id.* at 25-26.

[387] *Id.* at 26.

[388] *Id.* at 19. The Coalition for Justice in the Maquiladoras is an alliance of U.S. and Mexican church, human rights, labor rights, and environmental groups. *Id.*

[389] *Id.*

[390] *Id.*

[391] *Id.* at 19-21.

[392] *Id.*

[393] *Id.* at 47.

[394] Durand, *supra* note 58, at 136.

2. *Lessons from the European Community*

Unlike NAFTA, the European Community's Treaty[395] is not simply a free trade agreement, but rather a fusion of the economy of nations to form a single market with "'no barriers to the movement of goods, services, capital, and labor' between member states."[396] Forty years of negotiations[397] created a "Community Law" which is binding upon all parties.[398] A common currency is to be in use by the end of the century.[399]

The EEC treaty can preempt a national law if the statute improperly affects the common market.[400] Since protective environmental and labor provisions are goals of the EEC, the European Court of Justice can order member nations to conform with them if they have failed to do so.[401] For example, in 1983, Great Britain was forced to enact legislation to provide equal pay for men and women.[402]

NAFTA does not establish comparable institutions, nor does it impinge upon state sovereignty to the extent that the EC agreements do.[403] Since there are neither uniform rules nor a common court of compulsory jurisdiction, similar results cannot be expected from NAFTA. Perhaps a step toward providing increased protection for workers would be to agree to a common set of minimum labor standards between Canada, the U.S. and Mexico.[404] This could lessen trade distortions and facilitate a more accurate assessment of the marketplace.[405]

VII. CONCLUSION

The legal mechanisms for the enforcement of labor rights under

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[395] McCaffrey, *supra* note 138, at 472 (citing Treaty on the European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992)).

[396] *Id.* at 473 (citing U.S. Dept. of State, Bureau of Public Affairs, *The European Community's Program for a Single Market in 1992* (1988) (Western Europe Regional Brief)).

[397] McCaffrey, *supra* note 138, at 473.

[398] McGuinness, *supra* note 253, at *5. The Treaty created the European Court of Justice, which presides over disputes in the EC; its decisions are binding upon members. *Id.*

[399] McCaffrey, *supra* note 138, at 473.

[400] McGuinness, *supra* note 253, at *6.

[401] *See generally id.*

[402] *See generally id.*

[403] *Id.*

[404] *Id.*

[405] *Id.* at *6-7.

NAFTA, as well as those under traditional United States trade law, are tedious, time-consuming, and inherently political. Their effectiveness will, in large part, be determined by the pressure brought to bear upon government and corporations by the general public, union leaders, and human and labor rights advocates.

The most promising tools for the assertion of basic worker rights appear to be litigation in U.S. courts as well as union cooperation between organizations in Canada, the United States, and Mexico. Litigation can increase the cost of doing business for huge multi-national corporations (MNC) who choose to exploit their employees. If these MNCs do not remedy inhumane working conditions and meager wages out of a sense of ethical obligation, they may decide their bottom line dictates that they do so.

Union cooperation, publicity, and the organization of international product boycotts have been and may continue to be effective in encouraging companies and nations to actually enforce the rights they have enacted into law. If labor standards were uniformly enforced throughout the world, no company would gain an unfair competitive edge over another. The result would be free, and fair, trade.

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Rosenberger v. Rector & Visitors of University of Virginia and the Equal Access Rights of Religious People

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I. INTRODUCTION

In *Rosenberger v. Rector & Visitors of University of Virginia*[1] the Supreme Court decided that a state university could not deny funding to a student magazine on the basis of its religious viewpoint when it gave funds to a wide variety of other student activities. In 1990, Ronald Rosenberger and other students at the University of Virginia attempted to publish Wide Awake magazine, a student journal offering a Christian perspective on issues of critical concern at the University campus.[2] The University had funded 118 student groups, including those representing controversial and diverse viewpoints such as the Lesbian and Gay Student Union, the Federalist Society, and the Student Alliance for Virginia's Environment.[3] However, when Rosenberger applied for student activity funding from the University, his request was denied

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[1] 115 S. Ct. 2510 (1995).

[2] *Id.* at 2515; Brief for the Petitioners at 5, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329).

[3] Brief for the Petitioners at 4, *Rosenberger* (No. 94-329).

because University regulations prohibited funding of religious activities.[4]

The issues addressed in Rosenberger are volatile and lie at the intersection of vital constitutional principles:[5] the Free Speech Clause's[6] prohibition of viewpoint and content-based discrimination,[7] the Establishment Clause's[8] almost ironclad prohibition of direct financial aid to core religious activity,[9] and the government's interest in preserving nonpublic forums or limited resources for intended uses under forum and subsidy doctrine.[10]

The University argued that it could not give money to Wide Awake because it would violate the Establishment Clause.[11] It also argued that if it wished to preserve its activities fund for only educational purposes while excluding the category of religious proselytization, it was perfectly free to do so under the Court's prior forum[12] and subsidy[13] cases. Rosenberger and the students, on the other hand, argued that they

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[4] *Rosenberger*, 115 S. Ct. at 2515.

[5] *Id.* at 2525 (O'Connor, J., concurring) ("This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 4-5 (1987) (discussing three conflicting claims in equal access controversy: that "[t]he free speech or free exercise clause requires schools to treat religious groups just as they treat other groups," that "[t]he establishment clause requires schools to forbid religious groups from meeting on campus, even if other groups are allowed to meet," and arguing that "[n]one of these clauses controls, and the political branches decide whether to allow religious groups to meet on campus.").

[6] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

[7] Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147-48 (1993).

[8] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[9] *See* cases and discussion *infra* part III.B.

[10] *See* cases and discussion *infra* part III.C.

[11] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 281 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995). The University had argued this at all levels up to the Supreme Court. However, at the Supreme Court level, it abandoned this argument in favor of the argument that government has the discretion to discriminate on the basis of speech content. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2520-21 (1995).

[12] Brief for the Respondents at 29-34, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329).

[13] *Id.* at 12-22.

were being discriminated against on the basis of their religious viewpoint, especially because the University had funded a wide variety of other ideological and controversial groups,[14] some with viewpoints "antagonistic to or inconsistent with"[15] religious beliefs, and some that were in fact arguably religious.[16] Rosenberger's claim was thus a claim for "equal access" to the University funding program.

Rosenberger stands as fourth after a line of three cases involving very similar claims and factual situations—*Widmar v. Vincent*,[17] *Board of Education of Westside Community Schools v. Mergens*,[18] and *Lamb's Chapel v. Center Moriches Union Free School District*.[19] In each case, the government had allowed a broad range of "secular" groups access to a forum for expressive activity while excluding a religious group. In each case, the Court held that the government had to provide "equal access" to the religious groups: denying access would discriminate against the religious group's speech content[20] or viewpoint[21]; and the Establishment Clause presented no bar to allowing access to the religious groups on a nondiscriminatory basis.[22]

Rosenberger goes beyond the prior equal access cases in two significant ways. First, while the prior three cases involve access to government property, specifically school facilities, for expressive activity, *Rosenberger* involves access to a funding program.[23] *Rosenberger* is thus in significant tension with prior cases which state in unequivocal terms that direct government monetary support to core religious activity such as proselytization and teaching is forbidden. Second, *Rosenberger*'s expansive conception of religion as a viewpoint provides greater protection against government claims of discretion to exclude religion as a subject matter from nonpublic forums.[24]

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[14] Brief for the Petitioners at 15-22, *Rosenberger* (No. 94-329).

[15] *Id.* at 4-5, 13-14.

[16] *Id.* at 19. The Jewish Law Students Association received funding as a "cultural organization," *id.*, and the Muslim Students Association received funding in the year before and the year after. Brief for the Respondents at 6 n.2, 8-9, *Rosenberger* (No. 94-329). See *infra* note 41 for further discussion of religiously-oriented groups that received funding.

[17] 454 U.S. 263 (1981).

[18] 496 U.S. 226 (1990).

[19] 113 S. Ct. 2141 (1993).

[20] *Widmar*, 454 U.S. at 269-70 (1981).

[21] *Lamb's Chapel*, 113 S. Ct. at 2147-48 (1993).

[22] *See* discussion *infra* part III.A.

[23] *See infra* note 178 and accompanying text.

[24] *See* discussion *infra* part V.A.

This casenote examines *Rosenberger* as the fourth religious equal access case. Part II describes the facts of *Rosenberger*. Part III lays out the basic principles of religious equal access theory as set forth in *Widmar*, *Mergens*, and *Lamb's Chapel*. The section also explores the two basic defenses against equal access: the Establishment Clause's prohibition of direct monetary aid to religious activity and the government's claim of discretion to preserve forums and funding programs for limited purposes. Part IV sets forth the *Rosenberger* decision and Part V analyzes the reasoning and impacts of *Rosenberger*.

II. FACTS

Rosenberger v. Rector & Visitors of University of Virginia[25] involves the "Student Activities Fund" ("SAF") at the University of Virginia, a fund collected from mandatory student fees of $14.00 per semester to provide financial assistance to "the wide variety of student organizations, activities, and publications" at the University.[26]

Only a "Contracted Independent Organization" ("CIO") may apply for SAF monies.[27] While CIOs have automatic "access to University facilities, including meeting rooms and computer terminals,"[28] applications for SAF grants are reviewed by the Student Council for compliance with SAF guidelines. Only groups "consistent with the educational purpose of the University" are eligible,[29] and therefore certain types of organizations and activities are excluded from funding, even though they are CIOs. Among the excluded are "religious activities . . . political activities" and "social entertainment."[30]

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[25] 115 S. Ct. 2510 (1995).

[26] Rosenberger v. Rector & Visitors of University of Virginia, 18 F.3d 269, 270 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

[27] *Rosenberger*, 18 F.3d at 270; *Rosenberger*, 115 S. Ct. at 2514. "Religious organizations" are not allowed to be CIOs. A religious organization is defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Id.* at 2515 (citation omitted). However, the University did not contend that Wide Awake Publications was a religious organization. *Id.*

[28] *Rosenberger*, 115 S. Ct. at 2514 (citation omitted).

[29] *Id.* (citation omitted).

[30] *Id.* (citation omitted). Other excluded activities are "philanthropic contributions and activities, . . . activities that would jeopardize the University's tax exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses." *Id.*

Although "political activities" are excluded, the term actually only encompasses "electioneering and lobbying."[31] The Guidelines state that "restrictions on funding political activities are not intended to preclude funding of any . . . student organization which . . . espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted."[32] On the other hand, a "religious activity" is defined as "any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"[33] Thus, arguably, "[t]he 'religious' exclusion is the only explicitly viewpoint-based ground for exclusion from the program."[34]

No SAF monies are given directly to student groups. The funds pay third-party contractors who provide services for the student groups.[35] The University also requires each CIO to sign a contract disclaiming University support and control of the CIO.[36]

In the 1990-1991 academic year, there were 343 CIOs at the University of Virginia. Of these, "135 applied for, and 118 received," SAF money.[37] Of the 118, fifteen student publications received funding.[38] The recipients of SAF money represented a "wide range of differing perspectives on issues of concern to the student body,"[39] and included "issue-oriented and potentially controversial groups, such as the Gandhi Peace Center, the Federalist Society, Students for Animal Rights [and] the Lesbian and Gay Student Union . . .",[40] as well as arguably religious groups, such as the Jewish Law Students Associa-

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[31] *Id.*

[32] *Rosenberger*, 115 S. Ct. at 2514-15.

[33] *Id.* at 2515.

[34] Brief for the Petitioners at 4, *Rosenberger* (No. 94-329).

[35] *Rosenberger*, 115 S. Ct. at 2514-15.

[36] *Id.* at 2526-27. The University's agreement with the CIOs provided that "the CIO is not part of [the University], but rather exists and operates independently of the University. . . . The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities." The agreement also required that the CIOs include disclaimers in "every letter, contract, publication, or other written materials." *Id.*

[37] Brief for the Petitioners at 4, *Rosenberger* (No. 94-329).

[38] *Rosenberger*, 115 S. Ct. at 2515.

[39] Brief for the Petitioners at 4-5, *Rosenberger* (No. 94-329).

[40] *Id.* at 4. The fifteen funded publications included, "The Declaration, Dialogue Magazine, the Journal of Law and Politics, Loki Science Magazine, Oculus, Seasons, Thoughtlines, the University Journal, the Virginia Advocate, the Virginia Environmental Law Journal, the Virginia Literary Review, and the Yellow Journal." *Id.* at 5.

tion.[41] The "ideological viewpoints" funded by the SAF included "viewpoints . . . inconsistent with or antagonistic to various religious beliefs."[42]

In that academic year, Ralph Rosenberger and other students at the University of Virginia founded Wide Awake Productions for the purpose of publishing a magazine that "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia."[43] Rosenberger decided to publish the student magazine when he "realized that none of the fifteen student-run publications at the University provided a forum for Christian expression."[44]

The first three issues of WIDE AWAKE: A CHRISTIAN PERSPECTIVE AT THE UNIVERSITY OF VIRGINIA ("Wide Awake" or "Wide Awake magazine") addressed issues of critical public concern such as racism (Christian solutions for racism), crisis pregnancy, eating disorders, and homosexuality ("Homosexuals: Can They Change . . . And Should

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[41] *Id.* at 5, 19. These were funded as "cultural organizations." The Muslim Students Association received SAF money in the preceding year, Brief for the Respondents at 6, n.2, *Rosenberger* (No. 94-329), and the year following, *id.* at 8-9, when it published a magazine, Al-Salam, to "promote a better understanding of Islam to the University Community." Brief for the Petitioners at 19, *Rosenberger* (No. 94-329). Two other arguably religious organizations receiving funding were the C.S. Lewis Society, which "promote[d] discussion of literary, moral, and philosophical topics, including the works of the Oxford Christians," Brief for the Respondents at 5, *Rosenberger* (No. 94-329), and the Black Voices, a gospel singing group. *Id.* In addition, religious topics were discussed by various groups within the forum. One magazine, Thoughtlines, had an entire issue devoted to the topic of "Faith and Reason," Reply Brief for the Petitioners at 7, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329), and the humor magazine Yellow Journal "targeted Christianity as a subject of satire." *Rosenberger*, 115 S. Ct. at 2527 (O'Connor, J., concurring) (citation omitted).

[42] Brief for the Petitioners at 5, *Rosenberger* (No. 94-329).

[43] *Rosenberger*, 115 S. Ct. at 2515 (1995) (citation omitted). The stated purposes of Wide Awake Publications were "'[t]o publish a magazine of philosophical and religious expression,' '[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,' and '[t]o provide a unifying focus for Christians of multicultural backgrounds.'" *Id.* (citation omitted). In addition, the editors of the paper in the first issues of the magazine stated that the magazine's purpose was to "challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* (citation omitted).

[44] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 272 (4th Cir. 1994) (citation omitted), *rev'd*, 115 S. Ct. 2510 (1995).

They?"[45]), "all written from an avowedly Christian stance."[46] There were also articles about the philosophy of C.S. Lewis, stress, prayer, and the experiences of Christian missionaries in Eastern Europe, as well as book and music reviews.[47]

Wide Awake Productions applied for and received status as a CIO, apparently not deemed by the University to be an ineligible "religious organization."[48] Pursuant to regulations that allowed funding for "student news, information, opinion, entertainment, or academic communications media groups,"[49] Rosenberger applied for SAF funding in the amount of $5,862.00 to cover printing costs.[50] However, when the student council committee reviewed the magazine, it denied Rosenberger's request, determining that publication of the magazine constituted a "religious activity."[51] Pursuant to University procedures, Rosenberger appealed the decision up to the Associate Dean of Students, who affirmed the decisions of the Student Council.[52]

On July 11, 1991, having exhausted internal remedies, Rosenberger and other students filed a lawsuit in federal district court alleging that the University guidelines excluding "religious activities" from SAF funding violated their First and Fourteenth Amendment rights of Freedom of Speech and Press, Free Exercise of Religion, and Equal Protection. State constitutional law claims were also included.[53]

Both the district court and the appellate court ruled in favor of the University. Their respective approaches represent the two defenses against religious equal access claims. The district court, applying the three-tiered public forum analysis, found that the SAF was a nonpublic

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[45] Brief for the Petitioners at 7, *Rosenberger* (No. 94-329) (citation omitted).

[46] *Rosenberger*, 18 F.3d at 272; Brief for the Petitioners at 7, *Rosenberger* (No. 94-329).

[47] *Rosenberger*, 18 F.3d at 272; Brief for the Petitioners at 7, *Rosenberger* (No. 94-329).

[48] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2515 (1995). "Religious organizations" were prohibited from being CIOs. *Id.* at 2515. See *supra* note 27 for the University's definition of religious organization. The fact that the University did not consider Wide Awake Productions to be a prohibited "religious organization" was an important consideration for Justice Kennedy who wrote the majority opinion in *Rosenberger*. *Id.*

[49] *Id.* at 2514 (citation omitted).

[50] *Id.* at 2515.

[51] *Id.*

[52] *Id.*

[53] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 274-75 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

forum,[54] that the regulation forbidding aid to religious activities was "reasonable" because the University's fear of violating the Establishment Clause was "reasonable."[55] The court rejected any claim of viewpoint discrimination.[56]

The Court of Appeals for the Fourth Circuit took a very different approach. Bypassing forum analysis,[57] it nevertheless found that the University had discriminated against religious speech on the basis of content and perhaps viewpoint.[58] However, because the Establishment

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[54] Rosenberger v. Rector & Visitors of Univ. of Va., 795 F. Supp. 175, 180 (W.D. Va. 1992), *aff'd*, 18 F.3d 369 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510. The SAF is clearly not a traditional public forum, and the SAF is not a designated public forum which is created only when the government "intentionally open[s] a nontraditional forum for public discourse." *Id.* at 179-80 (citation omitted). The University did not open the SAF for public discourse because it had consistently excluded certain groups, including religious and political groups, from access. *Id.* at 179-81. The court distinguished *Widmar* apparently on grounds that the University facilities in *Widmar* was a limited public forum, a "far cry" from the SAF. *Id.* at 181. See *infra* notes 248-58 and accompanying text for discussion of public forums.

[55] *Id.* at 181. The court did not discuss the Establishment Clause beyond this. The import of the district court's decision seems to be that in a nonpublic forum, exclusions of religious views as a category are perfectly legitimate, and may be promulgated based on a mere fear of violating the Establishment Clause. *Id.* Content-based restrictions in nonpublic forums need only be reasonable and not viewpoint discriminatory. *Id.*

[56] *Id.* at 181-82. The court stated that if exclusion of religion as a subject matter could be characterized as viewpoint discrimination, then "every decision by the University results in viewpoint discrimination." *Id.* Such a view "may be true in the abstract, but this court, and the University, must live in the real world." *Id.* The court found no Free Exercise burden and no discriminatory intent necessary to sustain an Equal Protection claim. *Id.* at 182-83.

[57] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 287 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995). The court stated that, "[P]ublic forum cases have taken 'forum' in a fairly literalistic way involving physical space. . . ." In contrast, the SAF was a funding program. The court instead applied precedent analyzing "content-based discrimination relating to government-generated benefits or burdens." *Id.*

[58] *Id.* at 281. The court reasoned that once SAF "funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner. . . ." *Id.* at 280-81. The court seemed to say that the University, by making eligibility for SAF monies contingent upon foregoing religious expression (while the same funds were generally available to non-religious groups), erected an unconstitutional condition to the receipt of government benefits. *Id.* at 281. The court had no problem finding that the "discussions of religion" engaged in by Wide Awake magazine were "a form of speech protected by the First Amendment," *id.* at 280, and that the University's

Clause forbade the government to give funds to religious activity, the University had a compelling state interest to discriminate on the basis of Wide Awake's religious speech.[59] The Supreme Court's decision reversing the lower courts was handed down in June of 1995.

III. History

Rosenberger's claims did not appear in a vacuum; they build on the doctrinal groundwork laid by the prior religious equal access cases.[60] They also follow a trend among commentators, advocates, and legislators that calls for equality of First Amendment protection for religious persons[61] in a legal and political environment that has, in the name of

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exclusion of "religious activity" would also encompass such speech. *Id.* ("The word 'activity' is defined as 'an occupation, pursuit, or recreation in which a person is active.'" (quoting Webster's Third New International Dictionary 22 (1976)).

[59] *Id.* at 281-86. The court found that direct monetary support for religious activity would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values" resulting in an excessive entanglement of "the University of Virginia with the propagation of the Christian religion. . . ." *Id.* at 286. One of the Supreme Court's concerns was avoiding government entanglement in religious-political strife. Direct monetary subsidies are related to entanglement in that religious and political strife has been "'generated in large part' by competing efforts [by religious sects] to gain or maintain the support of government." *Id.* (quoting Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1, 8-9 (1947)).

The regulation satisfied the narrow tailoring requirement in that the court could find no other way to avoid violating the Establishment Clause than by excluding all "religious activities" from SAF funding. *Id.* at 286-87.

Like the district court, the Fourth Circuit found no prima facie Equal Protection violation because there was no showing of discriminatory intent. *Id.* at 288. The court held that the state law claims were abandoned as they were not raised on appeal. *Id.* at 276. It did not discuss the Free Exercise claim, but gave no reason for its omission.

[60] *See* discussion and analysis of these cases *infra* part III.A.

[61] *See, e.g.*, Jay Alan Sekulow, *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 Wm. & Mary Bill Rts. J. 351 (1995); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992) [hereinafter *Religious Freedom*]; Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1 (1987); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311 (1986). *Cf.* Ira C. Lupu, *The Lingering Death of Separationism*, 62 Geo. Wash. L. Rev. 230, 246 (1993) ("The apparent successor to separationism is some version of religious neutrality, or equal religious liberty.")

Legislatively, the most recent activity involves a Religious Equality Amendment to

separation of church and state, arguably discriminated against religious speech[62] resulting in at least a perceived message of state hostility to religion.[63]

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the Constitution, proposed by University of Chicago law professor Michael McConnell (who also represented Ronald Rosenberger and the other students before the Supreme Court) and supported by several religious liberties organizations such as the Christian Legal Society and the American Center for Law and Justice. The amendment would protect private religious expression from perceived discrimination and unequal treatment. Jeff Hooten, *Religious Equality: Putting it in Writing*, FOCUS ON THE FAMILY CITIZEN (Focus on the Family, Colorado Springs, Co.), June 19, 1995, at 1-3. Excerpts from the recommended wording proposed by a working committee on the amendment at one point reads as follows:

> In order to secure the unalienable right of the people to acknowledge God according to the dictates of conscience;
>
> *Section I.* Neither the United States nor any State shall abridge the freedom of any person or group, including students in public schools, to engage in prayer or other religious expression in circumstances in which expression of a non-religious character would be permitted, nor deny benefits to or otherwise discriminate against any person or group on account of the religious character of their speech, ideas, motivations, or identity.
>
> . . . .
>
> *Section III.* The exercise, by the people, of any freedoms under the First Amendment or under this Amendment shall not constitute an establishment of religion.

James C. Dobson, Letter, Focus on the Family (Focus on the Family, Colorado Springs, Co.), May 1995, at 7.

Attorneys for the American Center for Law and Justice ("ACLJ"), a public interest religious liberty organization, have published a set of proposed guidelines for student religious speech rights in public schools based on equal access principles. *See* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017 (1995) [hereinafter, *Proposed Guidelines*]. The chief counsel of the ACLJ, Jay Sekulow, argued *Mergens* and *Lamb's Chapel*, two of the three religious equal access cases. *See* Mark O'Keefe, *Holy Warriors: The American Center for Law and Justice Crusades for the Christian Right in Court*, STUDENT LAWYER, Dec. 1993, at 12 (profile of the ACLJ).

Commentators' arguments for equal treatment of religion have attempted to articulate a comprehensive theory that embraces both the Establishment Clause and Free Exercise Clause. *See, e.g., Religious Freedom, supra.* This paper is limited to discussion of the free speech right of equal access to government forums.

[62] The equal access cases that are the subject of this article are paradigm examples of discrimination against individual religious speech. The Equal Access Act was enacted as a result of "perceived widespread discrimination against religious speech in public schools." Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 239 (1990). Testimony at the hearings for the Equal Access Act revealed numerous examples of such discrimination, including the banning of religious clubs and "student

This section examines the doctrinal groundwork for religious equal access claims laid by *Widmar*, *Mergens*, and *Lamb's Chapel*. It first sets

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newspaper articles on religious topics," and reports that school officials "have . . . prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal bibles on school property." S. REP. No. 357, 98th Cong., 2d Sess. ____, 1984. See *infra* notes 110-13 and accompanying text for more excerpts from the testimony given in the hearings for the Equal Access Act.

Other cases decided by or currently pending in federal courts provide more examples. For example, in St. Louis, a 10-year old elementary school student was put on detention several times for "trying to bow his head and pray silently before meals." Pamela Coyle, *The Prayer Pendulum*, ABA J., Jan. 1995, at 62, 66. A high school teacher refused to accept a student's research paper on the topic, "The Life of Jesus Christ," while allowing other papers on topics such as "Spiritualism," "Magic Through History," and "Reincarnation." Settle v. Dickson County Sch. Bd., 53 F.3d 152, 153, 159 (6th Cir. 1995). The reason the teacher gave for excluding the student's topic was, among other things, that, "We are taught, the law says we are not to deal with religious issues in the classroom." Brief for Appellant at 4, *Settle* (No. 93-6207) (copy on file with author). In another case, school administrators in Corpus Christi, Texas ordered students to refrain from gathering around the school flagpole to pray because their meetings were "illegal." Coyle, *supra*, at 62, 66 (citing Cameo Bishop v. Corpus Christi Independent School District, No. C-93-260).

In response to this perceived widespread discrimination, several public interest law firms have been formed with an emphasis on defending religious liberty. With ACLU-like tactics they have taken several cases to court and are making their mark on the legal landscape. *See* Mark Curriden, *Defenders of the Faith*, ABA J., Dec. 1994, at 86. Opposing groups such as the Americans United for Separation of Church and State say that the anecdotes of discrimination are exaggerated and involve "isolated incidents." O'Keefe, *supra* note 61, at 19. One student intern at the ACLJ responds, "I might have thought that until I saw the stacks and stacks of letters [the ACLJ] get[s]. . . . These are not isolated cases. It's really shocking to me." *Id.*

Of course, some of the legal issues in some of the cases mentioned above are more complex and the picture across the landscape of America is not completely uniform. There are apparently places where religious speech is not discriminated against but favored in a way that seems violative of the Establishment Clause. For example, in one school district various religious activities were practiced such as "morning Bible readings over school public address systems, classroom prayers led by teachers, a period of silent prayer ended by 'Amen' over school public address systems and distribution of 'Gideon' Bibles to fifth and sixth grade students." Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1039 (1982), *cert. denied*, 459 U.S. 1155 (1983). And courts have not necessarily treated only religious speech disfavorably, they have restricted non-religious speech as well. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding school's decision to remove

forth the basic principles of religious equal access and analyzes the

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from student newspaper articles about teen pregnancy and divorce because the identities of the people in the articles were not sufficiently hidden).

[63] *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1993) (the political and legal culture's understanding of religion as a matter for private belief has "trivialized" religious devotion and excluded religious participation in the public square); Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163 (1993) (liberal and post-modern legal theory is hostile to religious freedom); Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992). Professor Gedicks argues that the liberal distinction between public and private life has resulted in a marginalization of religion, a hostility toward religion in public life: "Liberalism privileges secular ways of knowing and marginalizes religious ones by manipulating the boundary between public and private life. Liberalism politically privileges secularism over religion by naming public life (the realm of secularism) rational and orderly and private life (the realm of religion) irrational and chaotic." *Id.* at 695-96.

Professor McConnell argues:

> The [Warren and Burger] Court's conception of the First Amendment more closely resembled freedom *from* religion (except in its most private manifestations) than freedom *of* religion. The animating principle was not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life touched by government. This approach successfully warded off the dangers of majoritarian religion, but it exacerbated the equal and opposite danger of majoritarian indifference or intolerance toward religion.

Religious Freedom, *supra* note 61, at 116 (emphasis in original).

For arguments that the political and legal culture is not hostile toward religion, see Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992). Professor Sullivan points out that there are many examples of the vigorous participation of religion in public debate, such as the political activism and influence of the Rev. Jerry Falwell and Archbishop John Cardinal O'Connor. Such political involvement is "fully protected" by the First Amendment. *Id.* at 195-96. However, she argues that the baseline of the religion clauses of the First Amendment is the "establishment of a secular public moral order" established as a compromise to end religious strife, "the war of all sects against all." *Id.* at 198-99. Religious and secular ideas are treated asymmetrically in the political sphere. For example, the government is not free to support particular religious messages—it may not begin the school day with prayer or permanently erect a cross on the city hall building. *Id.* at 207. However, the government is quite free to convey particular political messages; it is free to endorse messages such as "'Just say no to drugs,' 'End racism,' and 'Have babies, not abortions.'" *Id. See also* Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 Nw.U.L. REV. 173, 185-86 (1986) [hereinafter, *When Separate is Equal*]. The "asymmetrical" treatment of religious ideas and secular ideas in the public sphere is not discriminatory, but merely reflects the "unique demands of the Establishment Clause." Sullivan, *supra*, at 211-13. As Professor Sullivan

three cases. Then it explores the two arguments against religious equal access claims that are significant in *Rosenberger*: that the Establishment Clause forbids government to support core religious activity with money; and that the government within its discretion may choose to exclude religious speech as a subject matter from a nonpublic forum.

A. Basic Principles of Equal Access: Widmar, Mergens and Lamb's Chapel

Religious equal access theory rests on two foundational Constitutional principles:[64] the first is that individual religious speech is entitled to the same stringent First Amendment protection that individual non-religious speech receives;[65] government may not discriminate against

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continues:

> Does this asymmetry give secular liberalism the upper hand, or in other words, "discriminate" against religion? It does so no more than the baseline set by the Religion Clauses requires. The Religion Clauses enable government to pursue and endorse a culture of liberal democracy that will predictably clash over many issues with religious subcultures. The public classroom, for example, may inculcate commitments to gender equality that are incompatible with notions of the natural subordination of women to men drawn by some from the Bible. Protection for religious subcultures lies in exit rights vigorously protected under the Free Exercise Clause: the solution for those whose religion clashes with a Dick and Jane who appear nothing like Adam and Eve is to leave the public school.

Id. at 213-14.

Regardless of whether or not the political and legal culture is "hostile" to religion, it is a fact that many religious believers *feel* hostility. The testimony of the students for the Equal Access Act illustrates this perception. *See infra* notes 110-13. The perception of hostility is also seen by the burgeoning of religious liberty law firms (five of which were created in the past four years) which have arisen to defend religious liberty claims, Curriden *supra* note 62, at 87, and the forceful terms used by advocates to describe the treatment of religious speakers. *See* John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPP. L. REV. 229 (1989) (arguing that individual religious student speech is treated differentially from secular student speech, resulting in a system of "religious apartheid" which segregates religious citizens for unequal treatment); KEITH A. FOURNIER, RELIGIOUS CLEANSING IN THE AMERICAN REPUBLIC (1993) (comparing discriminatory treatment against religion to ethnic cleansing). However one might feel about such arguably sensational terms, when students are told that they cannot quietly read the Bible during "reading time," *id.*, at 11-12, or voluntarily pray together around a flagpole because it is "illegal," Coyle, *supra* note 62, at 66, one can understand how religious people at least perceive a message of state hostility.

[64] *Proposed Guidelines*, *supra* note 61, at 1018 (Sekulow sets forth these as three principles).

[65] *Id.*

the content or viewpoint of religious speech anymore than it may discriminate against "secular" speech.[66] The second principle is that the Establishment Clause "by its very terms prohibits only *state*, not private, action."[67] Thus, it is violated only when the *state* acts to favor, endorse, or coercively support religion.[68] The state does not violate the Establishment Clause when it allows individual speakers to speak religiously even on government property.[69]

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[66] *Id.*; Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

[67] *Proposed Guidelines*, *supra* note 61, at 1018 (emphasis added).

[68] According to various formulations of the Establishment Clause, government is forbidden to coerce citizens to participate in religious activity, Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 260 (1990) (Kennedy, J., concurring and dissenting in part), to endorse religion, Lynch v. Donnelly, 465 U.S. 668, 691 (1984) ("The proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion.") (O'Connor, J., concurring), or to favor one religion over others or religion over non-religion, Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1, 15 (1947) (holding that government may not "aid one religion, aid all religions, or prefer one religion over another"). The Court has stated that the "three evils" that the Establishment Clause was designed to avoid were government "sponsorship, financial support, and active involvement of the sovereign in religious activity." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1969)).

The vision of the Establishment Clause that guided the Court for thirty years, from 1947 to 1980, was separationism, Lupu, *supra* note 61, at 233, which takes its name from the metaphor of "separation of church and state" first given judicial approval by Justice Black in *Everson*. *Everson*, 330 U.S. at 18. Professor Lupu states that "two linchpin propositions constituted the major components" of separationism: "First, serious religion was not the business of government and its institutions; religion should be private rather than public," and "[s]econd, separationism required the state to tolerate but not assist" religion. Lupu, *supra* note 61, at 230-31. The separationist vision is embodied in the *Lemon* test, which analyzes the constitutionality of governmental actions under three prongs: whether the government action has a "secular legislative purpose," whether it has the "primary effect" of advancing or inhibiting religion, and whether it "foster[s] an 'excessive government entanglement with religion.' " *Lemon*, 403 U.S. at 612-13 (citations omitted).

Both *Lemon* and the strict separationist regime it served seem to be ebbing away. *See* Lupu, *supra* note 61; *Religious Freedom*, *supra* note 61. In fact, equal access—"religious neutrality, or equal religious liberty"—is one of the visions that seeks to replace separationism. Lupu, *supra* note 61, at 246. For a comprehensive critique of the old separationist jurisprudence, as well as the alternative endorsement, coercion, and non-preferentialist approaches that have been advocated by various justices sitting on the Court, see *Religious Freedom*, *supra* note 61, at 115-68.

[69] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990).

Therefore, when the government opens a forum for expressive activity, it must allow religious groups the same access it gives to non-religious groups;[70] excluding religious groups solely because they are religious, would discriminate on the basis of the content[71] or viewpoint[72] of their religious message in violation of the Free Speech Clause of the First Amendment. Allowing religious groups such "equal access" does not violate the Establishment Clause because the government is merely allowing private speech access to a forum; it is not itself conveying a religious message.[73] As the Supreme Court stated in *Mergens*, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[74] Thus, the government supports the exchange of ideas, not the particular messages of the groups, including religious groups, within the forum.[75] This is especially true if it permits access to a broad spectrum of speakers representing divergent and controversial views.[76]

Excluding religious speakers from access to such forums on the basis of the Establishment Clause would convey a message of government hostility, not neutrality, toward religion.[77] It would result in the doctrinal position that the Establishment Clause requires the speech discrimination that the Free Speech Clause forbids,[78] "setting the First Amendment on an internal collision course,"[79] and relegating individual religious speech to second-class status.[80]

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[70] Laycock, *supra* note 5, at 1-57.

[71] Widmar v. Vincent, 454 U.S. 263 (1981).

[72] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

[73] Laycock, *supra* note 5, at 11.

[74] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990).

[75] *Widmar*, 454 U.S. at 272 n.10.

[76] *Id.* at 274-75.

[77] *Mergens*, 496 U.S. at 248 (1990); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-5, 1175-76 (2d ed. 1988).

[78] Brief for the Petitioners at 24, *Rosenberger* (No. 94-329).

[79] Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb's Chapel*, 24 N.M. L. REV. 1, 2 (1994).

[80] JOHN W. WHITEHEAD, THE RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION 133 (1991); *Proposed Guidelines*, *supra* note 61, at 1071. Sometimes it seems that religious speech is treated as a separate proscribable speech category. Capitol Square Review and Advisory Board v. Pinette, 115 S. Ct. 2440, 2449 (1995) (plurality) (decrying treatment of private religious speech like less-protected speech categories such as

1. Widmar: the paradigm case

The paradigm case—and the opening chapter in the equal access "revolution"[81]—is *Widmar v. Vincent*,[82] decided in 1981. The setting and facts are very similar to that of *Rosenberger*. An evangelical Christian student group, Cornerstone, sought to use rooms for meetings at the University of Missouri, Kansas.[83] However, a regulation prohibited the use of University buildings "for purposes of religious worship or religious teaching,"[84] and consequently, Cornerstone's request was denied, despite the fact that over 100 student organizations had access to University facilities.[85]

A seven member majority[86] held that the students' free speech rights were violated, stating that once the University creates a forum for speech by opening its facilities to student groups, it cannot exclude groups from the forum on the basis of speech content, including religious speech content.[87]

The University argued that it had a compelling state interest in "maintaining strict separation of church and state:"[88] allowing religious worship and instruction to occur on government owned and maintained University buildings would violate the Establishment Clause.[89]

"sexually explicit displays and commercial speech"). *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 284-87 (1981) (White, J., dissenting) (arguing that religious worship, even though it involves speech, is treated differently from other protected speech).

[81] Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 247 (1994).

[82] 454 U.S. 263 (1981).

[83] *Id.* at 265, 265 n.2 (1981).

[84] *Id.* at 265.

[85] *Id.*

[86] *Id.* at 263.

[87] *Id.* at 267-70. The Court indicated that while a University possessed "many of the characteristics of a public forum," it differs significantly from traditional "public forums such as streets or parks" in that the University could "impose reasonable regulations compatible" with its educational mission, including giving preferential access for students over nonstudents. *Id.* at 267 n.5. See *infra* notes 248-58 and accompanying text for discussion of public forum doctrine.

[88] *Id.* at 275.

[89] Chess v. Widmar, 480 F. Supp. 907, 915-16 (W.D. Mo., 1979), *rev'd sub nom.* Widmar v. Vincent, 454 U.S. 263 (1981). The University had argued and the district court had held that permitting religious worship and teaching in federally-subsidized, "university-owned buildings would have the primary effect of advancing religion," based on Tilton v. Richardson, 403 U.S. 672, 683 (1971) (plurality opinion) (federal money grants for construction of buildings would impermissibly advance religion if used for buildings where religious worship or instruction took place).

The Supreme Court, while acknowledging that complying with the Establishment Clause could "be characterized as compelling,"[90] nevertheless held that a University "equal access policy" would not violate the Establishment Clause under the three-prong *Lemon* test.[91] The *Lemon* test requires that a government regulation, to be valid, must first have a "secular legislative purpose;" second "its principal or primary effect must be one that neither advances nor inhibits religion . . ." and "finally the [policy] must not foster 'an excessive government entanglement with religion.'"[92]

The University's *purpose* in opening its facilities to student groups was to "provide a forum in which students can exchange ideas," and thus was undoubtedly secular.[93] As for the "entanglement" prong, a policy of excluding religious speech would be *more* of an entanglement than permitting it because the University would have the impossibly knotty task of separating religious from non-religious speech.[94]

As for the "primary effects" prong, the Court held that there was no advancement of religion because the governmental benefits to religion were only "incidental." The Court decided this in light of two factors. First, opening a forum for speech does not give the "imprimatur of state approval" to religious groups within the forum any more than it would to other groups such as the "Young Socialist Alliance," which no one would mistake as having the University's official sponsorship.[95] Secondly, the broad spectrum of both religious and non-religious groups all receiving the same benefits is "an important index of secular effect."[96] The Christian fellowship would merely receive general benefits available to all students, in much the same way that churches enjoy the benefits of police and fire department protection and sidewalk maintenance that are generally available to all

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[90] *Widmar*, 454 U.S. at 271.

[91] *Id.* at 270-75.

[92] *Id.* at 271 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

[93] *Id.* at 272 n.10. Creation of a forum for private expression does not mean that "the University . . . thereby endorse[s] or promote[s] any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association." *Id.* Because the forum was generally available to students groups, one could not say that the forum was created to support Cornerstone's religious meetings. *Id.* (citation omitted).

[94] *Id.* at 272 n.11.

[95] *Id.* at 272-74.

[96] *Id.* at 274.

citizens.[97] The analysis might be different, however, if *only* Cornerstone, or mainly religious groups, received University benefits.[98]

2. *Mergens and the Equal Access Act: the crucial difference between government and private speech endorsing religion*

The second iteration of equal access principles came eight years after *Widmar*. *Board of Education of Westside Community Schools v. Mergens*[99] involved an almost identical situation to *Widmar*, only at the high school level. A Nebraska high school had denied Bridget Mergens' request to form a Christian club where some 30 student clubs were already meeting. Unlike *Widmar* which held that the university students had a First Amendment right of equal access, Mergens' claims were upheld based on a statutorily created right of equal access, the Equal Access Act of 1984.[100]

After *Widmar*, lower courts were unsure whether the *Widmar* equal access reasoning applied to high schools and junior high schools, and in fact, most courts held that it did not.[101] The distinction was in the different character of public secondary and elementary schools[102] which had compulsory attendance requirements[103] and a stronger values-

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[97] *Id.*

[98] *Id.* ("At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'" (citations omitted)).

[99] 496 U.S. 226 (1990).

[100] *Id.* at 247 (1990). 20 U.S.C. §§ 4071-4074 (1984).

[101] Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 559 (3d Cir. 1984), *vacated on other grounds*, 469 U.S. 1206 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ. of Guilderland Central Sch. Dist., 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). *But see* Nartowicz v. Clayton County Sch. Dist., 786 F.2d 646, 648 (8th Cir. 1984).

[102] *See generally When Separate is Equal*, *supra* note 63. Professor Ruti Teitel argues that public secondary and elementary schools are "government-sponsored fora," *id.* at 176 n.7 (discussing Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Activities in Public Schools: A Proposal for a Unitary First Amendment Forum Analysis Test*, 21 HASTINGS CONST. L.Q. 529 (1986)), and thus, allowing religious student clubs to meet involves a strong "state action" component. *Id.* at 177.

[103] *When Separate is Equal*, *supra* note 63, at 177; *Bender*, 741 F.2d at 552.

inculcating mission than universities.[104] High school students are younger and more impressionable than university students,[105] and would perceive that the government is putting its imprimatur of official sponsorship on these meetings, perhaps mistakenly perceiving that the religious club is part of the school's mission to inculcate values.[106]

Such reasoning resulted in the persistent denial of student requests to form Bible and prayer clubs in high schools and junior high schools where a broad range of other student clubs existed.[107] It also resulted in giving the Establishment Clause an almost unassailable pre-eminence over all other constitutional rights that students might have had. As Judge Garth of the Second Circuit stated in a case where a school had denied the request of students to meet in an empty classroom before class hours to pray: whatever free speech and associational rights religious students might otherwise have in public schools are "severely circumscribed by the Establishment Clause."[108]

Whatever the intent of school administrators,[109] many religious students perceived a message of state hostility toward religion. In the hearings for the Equal Access Act, students testified that they felt

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[104] This was argued by Justice Marshall in his *Mergens* concurrence. Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 263-69 (1990) (Marshall, J., concurring). *See also Bender*, 741 F.2d at 547-48.

[105] Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (stating younger and more impressionable high school students might be unable to perceive government neutrality towards religious speech it allows in the forum as University students can).

[106] *Mergens*, 496 U.S. at 265-70. Furthermore, Professor Teitel argues that by providing a captive audience for "student evangelists" under an "approving aegis" where school attendance is mandatory, "government benefits [are] provided to evangelical proselytizers." *When Separate is Equal*, *supra* note 63, at 177-78.

[107] *See* cases *supra* note 101.

[108] Brandon v. Board of Educ. of Guilderland Central Sch. Dist., 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). *See also Bender*, 741 F.2d 538. The Third Circuit in *Bender* found that a student club period was a forum analogous to the forum in *Widmar*. Even though the forum was narrower in scope than the University forum, the school had still discriminated against the speech content of the Christian students wishing to form a club. Nevertheless, the court held that the Establishment Clause *compelled* the school to discriminate against the Christian club by denying permission for it to meet. *Id.* at 550.

[109] Instead of being overtly hostile, many school officials were simply confused about what the law required of them. A result of this confusion was that "school authorities, wishing to avoid legal controversy . . . often dramatically restricted student rights." S. REP. No. 357, 98th Cong., 2d Sess. ____, 1984 WL 37406, at *10 (1984), *available in* WESTLAW, LH DATABASE.

unequally treated.[110] They did not understand why they could "picket . . . demonstrate . . . curse," but could not meet to pray and talk about God;[111] why schools accommodated student smokers by providing special rooms for them[112] but asserted that permitting Bible clubs to meet in school rooms was against the law.[113]

In response to such a perception of "widespread discrimination against religious speech in public schools,"[114] Congress enacted the Equal Access Act[115] ("EAA" or "the Act"), which extends the reasoning of *Widmar* to public high schools.[116] The EAA provides that public secondary schools[117] cannot "deny equal access" to religious students wishing to hold meetings on campus, as long as the school

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[110] *Equal Access: First Amendment Question, Hearing Before the Senate Committee on the Judiciary*, 98th Cong., 2d Sess. 37 (1983) (statement of Bonnie Bailey) *quoted in* JOHN W. WHITEHEAD, THE RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION 133, 116 (1991).

[111] S. REP. No. 357, 98th Cong., 2d Sess. ____, 1984 WL 37406, at *8 (1984), *available in* WESTLAW, LH DATABASE.

[112] *Id.* at *14.

[113] *Id.* at *8. As exemplified by the experience of Sarah Scanlon, who testified before the Senate Committee: "The principal of the school that [Sarah] attended explained that her religious activity, if organized, was illegal, but that, if the activity remained informal, 'He would look the other way.'" *Id.*

Another student testified:

> A few years ago, I visited Poland with my family. We stayed with a family that have [sic] five children in school. I observed how restricted they were to express themselves politically and religiously, and I was thankful that I lived in the United States and that I had the freedom to express myself and share political and religious beliefs with others.
>
> Now, just a few years later, I see the same restrictions put on me and my fellow classmates that are on the students in Poland, and I find that very disturbing.

Equal Access: First Amendment Question, Hearing Before the Senate Committee on the Judiciary, 98th Cong., 2d Sess. 82 (1983) (statement of Judy Jankowski) *quoted in* JOHN W. WHITEHEAD, THE RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION 116 (1991).

[114] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 239 (1990) (citations to legislative history omitted).

[115] 20 U.S.C. §§ 4071-4074 (1984). The EAA was enacted with input from "numerous scholars such as Professor Laurence Tribe," as well as "representatives of most of the major civil liberties groups in the United States." James J. Knicely, *Free Speech and Nonestablishment in the Public Schools*, 22 J. L. & EDUC. 73, 74 (1993).

[116] *Mergens*, 496 U.S. at 235.

[117] Another requirement is that the school receive federal funding. 20 U.S.C. § 4071(a) (1984).

maintains a "limited open forum" by allowing other noncurriculum related student groups on campus.[118]

The *Mergens* case was based on Bridget Mergens' claim that Westside high school had violated the EAA by denying her request to form a Bible Club. In defending the case, the school had claimed that the EAA was a violation of the Establishment Clause because the EAA required schools to have religious student clubs on campus;[119] such clubs "held under school aegis" where school attendance is mandatory would cause secondary school students to perceive a message of official support for the religious meetings.[120] A plurality of the Court upheld the Act against Establishment Clause challenge, providing another affirmance of religious equal access principles from the Court.[121]

Stating that "the logic of Widmar applies with equal force to the Equal Access Act,"[122] Justice O'Connor applied the *Lemon* test and her own endorsement reasoning, which asks whether a reasonable observer—in this case, the reasonable student[123]—would believe that the government is endorsing religion.[124]

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[118] 20 U.S.C. § 4071 (1984). The pertinent parts of the Act are as follows:

20 U.S.C. § 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

A limited open forum is defined in 20 U.S.C. § 4071(b):

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

One of the problems with the Act was that "noncurriculum related" was nowhere defined, Laycock, *supra* note 5, at 39-45, resulting in confusion about the Act's applicability. Frank R. Jimenez, Note, *Beyond Mergens: Ensuring Equality of Student Religious Speech Under the Equal Access Act*, 100 YALE L. J. 2149, 2157 (1991). The definition of noncurriculum related was one of the main issues in *Mergens*. 496 U.S. 226, 231-47 (1990).

[119] The school had also claimed that there was no limited open forum under the terms of the Act. *Id.* at 233 (1990).

[120] *Id.* at 249-50.

[121] *Id.* at 247-58.

[122] *Id.* at 248.

[123] *Id.* at 250.

[124] *Religious Freedom*, *supra* note 61, at 151.

Westside's "principal contention" was that the EAA violated the second prong of *Lemon*, by having the "primary effect" of advancing religion.[125] Justice O'Connor's reply restates the equal access principles of *Widmar*. First, students would not perceive an official endorsement of religion if the school merely allowed religious clubs on campus because a "school does not endorse or support [private] student speech that it merely permits on a nondiscriminatory basis. . . . [S]chools do not endorse everything they fail to censor."[126] "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[127] Justice O'Connor also affirmed that "[s]econdary school students are mature enough" to understand this concept.[128]

Secondly, as in *Widmar*,[129] the "broad spectrum" of student organizations would "counteract any possible message of official endorsement of or preference for religion."[130] A school could also clarify its position with a statement disclaiming official sponsorship of religious clubs.[131]

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[125] *Mergens*, 496 U.S. at 249. The school had also claimed that the purpose and entanglement prongs of *Lemon* were violated. *Id.* at 248-49, 252. In response, Justice O'Connor maintained that the EAA had a secular purpose in that it was enacted "to prevent discrimination against religious and other types of speech." *Id.* at 249. On its face, the EAA protects both religious and secular speech, *id.*, prohibiting discrimination against "religious, political, philosophical, or other" speech-content, 20 U.S.C. § 4071(a) (1980), and therefore the Congressional purpose in enacting the EAA was secular, even if some legislators had a motive of protecting religious groups. *Mergens*, 496 U.S. at 249. As for the "entanglement" prong, teacher involvement in religious clubs is limited to custodial, nonparticipatory functions, and would not impermissibly entangle schools in religious activity. *Id.* at 252-53.

[126] *Id.* at 250.

[127] *Id.*

[128] *Id.*

[129] Widmar v. Vincent, 454 U.S. 263, 274-75 (1981).

[130] *Mergens*, 496 U.S. at 252 ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.").

[131] *Id.* at 251 (such a disclaimer would be sufficient for students to "understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."). Justice O'Connor also stated that the terms of the Act itself limited official involvement with religious clubs. *Id.* Teachers and other school employees could be "present at religious meetings only in a nonparticipatory capacity," 20 U.S.C. § 4071(c)(3) (1984), and religious meetings could only be held during "noninstructional time." 20 U.S.C. § 4071(b) (1984). Other provisions of the Act designed to address Establishment Clause concerns are an explicit statement that

Mergens and the EAA are important because they state that even in a setting where Establishment Clause concerns of endorsement are arguably stronger, *individual* students retain rights of free expression, and that allowing individual student speech on campus is not the same thing as government speech supporting religion.[132] Professor Ruti Teitel has argued that public schools are "government-sponsored fora"[133] due to the strong "state action component" involved,[134] and thus a strong prophylactic distance from religion is required. The prophylactic distance is so strong that the *mere risk* of students perceiving government sponsorship of religion justifies silencing private religious speech and excluding student Bible clubs, even though such religious clubs would be treated unequally from the other clubs allowed into the forum.[135]

But surely individual students, including religious students, do not, as the Court stated in *Tinker v. Des Moines Independent Community School District*,[136] "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," even if schools are government-sponsored fora. *Tinker* upheld the right of high school and junior high school students to protest the Vietnam War by wearing black arm bands on school property. While such controversial political speech of individual students is constitutionally protected, under Teitel's formulation, individual *religious* students receives less protection due to fears

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there would be "no sponsorship of the meeting by the school," 20 U.S.C. § 4071(c)(2) (1984), and that the school could not "expend public funds beyond the incidental cost of providing the space for student-initiated meetings." 20 U.S.C. § 4071(d)(3) (1984).

[132] *Proposed Guidelines*, *supra* note 61, at 1064 (citing Laycock, *supra* note 5, at 14).

[133] *When Separate is Equal*, *supra* note 63, at 176 n.7.

[134] *Id.* at 177.

[135] *Id.* at 184 (1986). Professor Teitel argues:

> The danger of such sponsorship [of religion] on school premises actually requires "discriminatory" treatment of certain religious speech. This treatment is necessary to avoid confusion between religious speech by students and government. The risk of such confusion requires government to treat student religious and secular speech dissimilarly in the public schools. . . .
>
> A prophylactic distance inheres in the distinction between government religious and secular speech. A special judicial presumption against government support of private religious speech minimizes confusion between religious speech by government, which is barred, and such by a private party, which is permitted. A smaller margin of error will be allowed for government support of private religious views than for similar government support of private political or other secular views.

Id.

[136] 393 U.S. 503, 506 (1969).

of violating the Establishment Clause. Some school administrators seem to have taken this concept to the extreme, censoring students who say grace before meals in school cafeterias,[137] or confiscating Bibles quietly read on school buses.[138]

Equal access theory corrects such prophylactic "overenforcement"[139] of the Establishment Clause by properly focusing not on the "*location* of the speech"—i.e., is the speech activity at school or on private property—but on the "*identity* of the speaker"—i.e., is the government or a private person speaking?[140] As Justice O'Connor states: "[T]here

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[137] Coyle, *supra* note 62, at 66 (discussing Raymond Raines v. Board of Educ. of the City of St. Louis, 4:94-cv-755 CEJ (E.D. Mo. 1994) where a 10-year old elementary school student was put on detention several times for "trying to bow his head and pray silently before meals.").

[138] Richard F. Duncan, *Religious Civil Rights in Public High Schools: the Supreme Court Speaks on Equal Access*, 24 IND. L. REV. 111, 113 (1990) (citing ACTION: A MONTHLY PUBLICATION OF THE RUTHERFORD INSTITUTE 5 (Oct. 1989)). Or consider other examples: "In Arkansas, a fifth grader was ordered by a teacher to turn his T-shirt inside-out to hide the Bible verse on it. . . . Another student in Florida had her Bible confiscated by a teacher who saw her reading it during recess." Curriden, *supra* note 62, at 87. In Wisconsin, a teacher refused to allow a third-grader to display her Valentine's heart along with her classmates' hearts because she had written "I love Jesus" and "Jesus is what love is all about" on the heart. Duncan, *supra*, at 113 (citing ACTION: A MONTHLY PUBLICATION OF THE RUTHERFORD INSTITUTE 4 (May 1990)). In another case, "a nineteen-year-old public high school senior in New York was told by school officials that he could not perform a rap song in the school's variety show unless he agreed to censor all references in the song to Jesus Christ and Christianity." *Id.* (quoting ACTION: A MONTHLY PUBLICATION OF THE RUTHERFORD INSTITUTE 2 (April 1990)).

[139] Lupu, *supra* note 61, at 246.

[140] Laycock, *supra* note 5, at 9. Professor Laycock argues:

> The resulting attacks on equal access mistakenly have focused on the location of the speech. That religious speech occurs on public property is incidental and almost entirely irrelevant. Government speech in support of religion is forbidden even if it occurs on private property; private speech in support of religion is protected even if it occurs on public property. What matters is not the location of the speech, but the identity of the speaker.
>
> It is relevant that the speech occurs in a public school, as distinguished from other public property. But again, there is no magic transformation arising simply from the location of the speech. The school environment is relevant because of the risk that the school may make private speech its own by endorsing or sponsoring it. The central problem is to separate the students' religious speech from the school's religious speech, protecting the former and forbidding the latter.

Id. Religious equal access is a challenge to strict separationism's conception of public

is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[141]

This distinction between government and private speech has not only become a valuable principle for protecting student-initiated religious expression in general on public school campuses,[142] it is what sets

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schools as the exclusive domain of the secular. Lupu, *supra* note 61, at 249-50:

> [T]he claims of equality or state neutrality upon which the equal-access decisions (and statutes) depend are in significant tension with separationism. First, separationism has a doctrine of secular privilege at its heart; the public arena is for secular argument only. The case for equal access for religious argument and practice challenges the hegemony of secular ideology in the public square. Second, the case for equal access turns on the distinction between official and private speech, and it asserts that the latter can be advanced on public property without its attribution to the state. The separationist premise of thoroughly privatized religion is symbolically threatened even if sectarian forces merely occupy public space, particularly in the heretofore sacrosanct premises of public elementary and secondary schools."

Id. (footnotes omitted).

[141] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990).

[142] *See Proposed Guidelines*, *supra* note 61 (relying on distinction between private and school-sponsored speech, proposes guidelines for protecting student religious expression in various contexts, such as in distributing literature, for classroom assignments, at graduation exercises, and for prayer and Bible club meetings); Christina Engstrom Martin, Comment, *Student-Initiated Religious Expression After Mergens and Weisman*, 61 U. CHI. L. REV. 1565 (1994) (arguing that free speech guarantee generally protects student-initiated speech in public schools and exploring range of situations involving student-initiated speech).

Recently, a broad range of 34 religious and civil liberties organizations—including the Christian Legal Society, American Civil Liberties Union, the National Association for Evangelicals, the American Jewish Congress, and People for the American Way—signed a joint document, *Religion in the Public Schools: A Joint Statement of Current Law*. The document attempts to provide guidelines for schools, protecting individual religious student expression such as the "See You at the Pole" student prayer gatherings, praying or discussing religious matters, literature distribution, and other forms of private speech. *Unlikely Allies Affirm Students' Religious Rights: Joint Statement Clears Up Current Law*, THE DEFENDER: DOING JUSTICE WITH THE LOVE OF GOD (Christian Legal Society, Annandale, Va.), June 1995, at 1-2.

President Clinton affirmed the interpretation of the law set forth in these guidelines by distributing them at a speech on July 12, 1995 at James Madison High School in Virginia. *President Clinton Promotes Religious Liberty in the Schools*, THE DEFENDER: DOING JUSTICE WITH THE LOVE OF GOD (Christian Legal Society, Annandale, Va.), Aug. 1995, at 3. In his speech, President Clinton cited "many examples of discrimination against religious students, ranging from Bible Club denials to the censorship of student

Mergens apart from the "school prayer" cases.[143] For whether involving starting the school day with an officially written prayer,[144] or with a recitation of the Lord's prayer and a Bible reading,[145] or having a graduation prayer by an officially selected clergyman,[146] these cases all involve "state-sponsored and controlled religious exercise."[147] *Mergens*, on the other hand, involves individual students wishing to express themselves religiously in Bible and prayer clubs which, "[u]nlike the prayers in the school prayer cases, [are] not state-directed or state-composed and can *in no way* be said to threaten *state* compulsion of religious observance."[148] Again, in Justice O'Connor's words, a "school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[149]

At this point it should be noted that the claim of equal access is not a claim of entitlement to access.[150] A school has the prerogative to close its doors to all student meetings, and students have no "right" to demand that it open its classrooms for student meetings.[151] However, if a school does choose to open its doors, it may not exclude religious clubs when it provides access to other clubs.[152] Equal access theory thus protects the rights of individual students against discriminatory exclusion on the basis of their religious speech. As Professor Laycock states, while the government "may not take a position on questions of

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publications," and declared that, "Nothing in the First Amendment . . . converts our schools into religious free zones." Jay Alan Sekulow, *Welcome Back Students*, LAW AND JUSTICE (American Center for Law and Justice, Virginia Beach, Va.), Vol. 4, No. 2, at 1-2.

[143] *Proposed Guidelines*, *supra* note 61, at 1056-59.

[144] Engel v. Vitale, 370 U.S. 421 (1962).

[145] School Dist. of Abington Tp. v. Schempp, 374 U.S. 203 (1963).

[146] Lee v. Weisman, 112 S. Ct. 2649 (1992) (graduation ceremony by a rabbi who was selected and invited by the school unconstitutional). *See also* Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (striking statute that required public schools to display the Ten Commandments in classrooms).

[147] *Proposed Guidelines*, *supra* note 61, at 1058.

[148] *Id.*

[149] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990).

[150] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 995-96 (1990).

[151] *Proposed Guidelines*, *supra* note 61, at 1083. *See also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (holding school district under no obligation to allow groups to have access to facilities).

[152] *Proposed Guidelines*, *supra* note 61, at 1083.

religion in its own speech . . . it must treat religious speech by private speakers exactly like secular speech by private speakers."[153]

To not treat private secular and religious student speech equally would, as Justice O'Connor stated, "demonstrate not neutrality but hostility toward religion."[154] The stories of students across the nation confirm the truth of this analysis.[155]

3. *Lamb's Chapel: protecting religious viewpoints*

Lamb's Chapel,[156] decided in 1993, developed and strengthened the free speech rights of religious people, stating that religious *viewpoints* are entitled to protection against government claims of discretion to limit discussion in nonpublic forums to only non-religious topics.[157]

In *Lamb's Chapel*, an evangelical Christian church requested permission to use school facilities to show a film series that featured a Christian psychologist, Dr. James Dobson, who addressed issues related to child-raising and family values in modern society.[158] Under School District

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[153] Laycock, *supra* note 5, at 3.

[154] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 248 (1990) (discussing *Widmar*, the Court quoted McDaniel v. Paty: "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities" (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Justice O'Connor's words echo those of Professor Laurence Tribe on the equal access issue:

> A message of *exclusion* . . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups. . . . [W]hen the state makes a facility available to *non*religious groups, it must give religious groups no less opportunity. To do otherwise would *demonstrate not neutrality but hostility toward religion*.

TRIBE, *supra* note 77, at § 14-5, 1175-76 (final emphasis added).

[155] See *supra* notes 63, 110-14 and accompanying text for examples of speech discrimination.

[156] Lamb's Chapel v. Center Moriches Union Free Sch. Dist, 113 S. Ct. 2141 (1993).

[157] *Id.*

[158] *Id.* at 2144-45. The film series, "Turn Your Heart Toward Home," consisted of "six discussion provoking films" addressing topics such as "Power in Parenting: the Young Child," "Power in Parenting: the Adolescent," "The Family Under Fire," and "Overcoming a Painful Childhood." *Id.* at 2144 n.3. The series featured Dr. James Dobson, who was a "licensed psychologist, former associate clinical professor of pediatrics at the University of Southern California," and an author and radio commentator. *Id.*

rules, the school premises were made available for "social, civic, or recreational uses,"[159] but access for "religious purposes" was prohibited.[160] As in the previous equal access cases, in spite of a wide range of other community groups using the school facilities,[161] the School District denied the requests of the Lamb's Chapel church, stating that the "film does appear to be church related."[162]

Justice White, for a unanimous court, held that the school district's regulation prohibiting use for religious purposes, as applied to the Lamb's Chapel church, had discriminated against the church's religious viewpoint[163] on the subject of "family issues and child-rearing,"[164] a topic "otherwise includible"[165] in the forum. A "secular" speaker on the same topic would have been given access—indeed, the district had admitted at oral argument that it would have allowed access to atheistic and communist groups addressing the same topic.[166] Thus, Lamb's Chapel was denied access "solely because the film dealt with the subject from a religious standpoint."[167]

As in *Widmar*[168] and *Mergens*,[169] the School District attempted to justify its exclusion of religious speech as necessary to avoid violating

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[159] *Id.* at 2144.

[160] *Id.*

[161] *Id.* at 2146. Included were drama groups, the Boy and Girl Scouts, a community auction, and a four-night lecture series by Jerry Huck, a psychotherapist sponsored by the "Mind Center," who discussed "Psychology and the Unknown," covering topics such as "parapsychology, transpersonal psychology, physics and metaphysics." Also included were musical concerts by religious groups: the Salvation Army Youth Band, Hampton Council of Churches' Billy Taylor Concert, and the Southern Harmonize Gospel Singers. *Id.* at 2146 n.5.

[162] *Id.* at 2145. The District also apparently viewed Lamb's Chapel as a "radical" proselytizing church. *Id.* at 2148 (at least this was argued to the Supreme Court in the District's brief. *Id.* (quoting Brief for Respondent Center Moriches Union Free School District et al. at 4-5, 11-12, 24, *Lamb's Chapel* (No. 91-2024))).

[163] *Id.* at 2147-48.

[164] *Id.* at 2147.

[165] *Id.* (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

[166] Transcript of Oral Argument at 47, 57-58, Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993) (quoted in Rosenberger v. Rector and Visitors of Univ. of Va., 115 S. Ct. 2510, 2550 n.13 (1995) (Souter, J., dissenting)).

[167] *Lamb's Chapel*, 113 S. Ct. at 2147.

[168] 454 U.S. 263 (1981).

[169] 496 U.S. 226 (1990).

the Establishment Clause.[170] And as in those cases, the Court had little trouble finding that there was no violation. The reasoning is familiar: because the film was not sponsored by the school, and "a wide variety of private organizations" used the property, there was "no realistic danger that the community would think that the District was endorsing religion."[171] The "benefit to religion" was only "incidental."[172] Justice White applied the *Lemon* test, but did not really discuss it beyond listing the three prongs.[173] In fact his whole discussion of the Establishment Clause issue takes only one paragraph.[174]

The finding of viewpoint discrimination even in a nonpublic forum is significant, and will be discussed in Part III.C. The Establishment Clause discussion is also important, not because of any new ground it breaks, but for the very fact of its brevity. The Court's cursory treatment of this issue shows how well-established the notion that providing equal access for religious groups does not violate the Establishment Clause has become. Furthermore, the concurring opinions in both *Lamb's Chapel*[175] and *Mergens*[176] would have upheld the right of religious groups to equal access under a coercion test. The opinions taken together show that under any of the major Establishment Clause tests—the *Lemon* test, the endorsement test,[177] or the coercion test—the right of equal access for religious speakers, at least with respect to government facilities, is well-established in the Court's mind.

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[170] *Lamb's Chapel*, 113 S. Ct. at 2148.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* Justice Kennedy and Justice Scalia, joined by Justice Thomas, wrote concurring opinions to voice their objection to the majority's use of the "endorsement" test and the *Lemon* test. *Id.* at 2149-50.

[175] *Id.* at 2149-51 (Scalia, J., concurring); *Id.* at 2149 (Kennedy, J., concurring).

[176] 496 U.S. 226, 260 (1990). In *Mergens*, Justice Kennedy, joined by Justice Scalia, wrote separately using a "coercion" test. Justice Kennedy's test asks 1) whether the government "give[s] direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so,'" *id.* at 260 (citations omitted), and 2) whether the government "coerce[s] any student to participate in a religious activity." *Id.* at 260.

[177] The endorsement test, together with the *Lemon* test, was applied by Justice O'Connor in *Mergens*. *Id.* at 248-50.

B. The Establishment Clause's Prohibition of Direct Financial Aid to Religion

1. The "no-aid" rule

Widmar, *Mergens*, and *Lamb's Chapel* establish the principle that a policy of equal access—at least to government facilities—does not violate the Establishment Clause. The key difference in *Rosenberger* is that it involves access not to facilities but to *funds*. That distinction, to some, makes all the difference. Funds, as the Fourth Circuit stated, are a "beast of an entirely different color,"[178] for providing direct financial assistance to a religious activity such as Wide Awake magazine seems to implicate core Establishment Clause concerns.[179]

The Court in several cases (mostly involving religious schools) has "categorically condemned state programs directly aiding religious activity."[180] All kinds of government financial aid programs—from programs providing salary supplements for religious school teachers,[181] to programs providing maps and lab equipment,[182] or building maintenance and repair,[183] to religious schools—have been invalidated as the impermissible support by government of religious "indoctrination" and

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[178] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 286 (4th Cir. 1994), *aff'd*, 115 S. Ct. 2510 (1995).

[179] Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1, 15-16 (1947). Justice Black, in this case that first articulated the strict "no-financial-aid" rule stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can. . . . pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Id.

[180] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2539 (1995) (Souter, J., dissenting); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985); Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid")).

[181] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[182] Meek v. Pittenger, 421 U.S. 349 (1975).

[183] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

worship.[184] The bar against direct government aid and financial assistance to religion seems almost ironclad. As the Court has stated: "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith."[185]

Although the Court has allowed aid to some religious organizations, such aid was permissible only if the religious and secular functions of that organization could be clearly separated.[186] If the institution was "pervasively sectarian"—if the secular and religious aspects were "inextricably intertwined"[187]—aid was forbidden.[188] Thus, Catholic parochial schools were often denied various forms of aid because their entire mission, as seen in their curriculum, atmosphere, and faculty

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[184] Professor McConnell observes that the suspicion toward religion that the Court displayed was evidenced by such words as "indoctrination" to describe the teaching mission of religious schools, "suggest[ing] that the Justices . . . believe that religious convictions are reached not through thoughtful consideration and experience, but through conformity and indoctrination." *Religious Freedom*, *supra* note 61, at 122. In contrast, the Court cast the secular values-inculcating mission of the public schools in favorable language, speaking of the "'inculcat[ion of] fundamental values' by public schools [that is] 'necessary to the maintenance of a democratic political system.'" *Id.* at 123 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

[185] School Dist. v. Ball, 473 U.S. 373, 385 (1985), *quoted in* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2539 (1995).

[186] Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 755 (1976) (plurality opinion) ("no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones"); *Meek*, 421 U.S. at 364-65 (invalidating provision of maps, charts, and lab equipment to parochial schools because "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed" by the parochial schools); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 479-82 (1973) (aid to "secular functions is not identifiable and separable from aid to sectarian activities"); Board of Educ. of Cent. School Dist. No. 1 v. Allen, 392 U.S. 236, 244-49 (1968) (upholding loan of books to parochial schools based on recognition that religious schools offer both "religious instruction and secular education," and rejecting argument that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."). *See also* John W. Whitehead, *Accommodation and Equal Treatment of Religion: Federal Funding of Religiously-Affiliated Child Care Facilities*, 26 HARV. J. ON LEGIS. 573, 585-86 (1989).

[187] *Meek*, 421 U.S. at 366 (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring)).

[188] Hunt v. McNair, 413 U.S. 734 (1973). *See also* Bowen v. Kendrick, 487 U.S. 589, 609-10 (1988); *Roemer*, 426 U.S. at 755; *Meek*, 422 U.S. at 362-66 (invalidating aid to religious school because of "predominantly religious character of the schools").

(consisting in large part of nuns belonging to various religious orders), was dedicated to the teaching and inculcation of religious doctrine and belief.[189]

The mere risk that government money would support religious indoctrination and teaching was enough to invalidate a program. In Lemon v. Kurtzman, the Court invalidated a program providing salary supplements for parochial school teachers, even though such teachers testified that they "did not inject religion into their secular classes."[190] The Court stated:

> [A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.[191]

Thus, the mere "potential for impermissible fostering of religion" was enough to invalidate the program.[192]

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[189] Lemon v. Kurtzman, 403 U.S. 602, 615-16 (1971); *Meek*, 421 U.S. at 365-66 (1975) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). The Court in *Meek* determined that, "The very purpose of many of [the parochial] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to inculcation of religious values and belief." *Id.* at 366.

In *Lemon* the Court noted the following factors in determining that the Catholic parochial schools were pervasively sectarian in character: that crucifixes, religious paintings, and other religious symbols were on the buildings and in the hallways, that 30 minutes a day was devoted to religious instruction, that religious extracurricular activities were offered, and that "two-thirds of the teachers . . . are nuns of various religious orders." *Lemon*, 403 U.S. at 615. The Court agreed with the lower court's finding that "the parochial schools constituted 'an integral part of the religious mission of the Catholic Church,'" and that "[t]he various characteristics of the schools make them 'a powerful vehicle for transmitting the Catholic faith to the next generation.'" *Id.* at 616.

[190] *Id.* at 618 (1971).

[191] *Id.* at 618-19 (1972).

[192] *Id.* at 619-20 (1971). Following *Lemon* as a precedent, the Court invalidated a program providing parochial schools with instructional materials such as tape recorders, globes, and science kits, *Meek*, 421 U.S. at 365-66 (the same prophylactic contact needed to monitor teachers would be present with these materials: the risk of fostering religion by religiously-dedicated teachers would be great and would require too much government monitoring, thus impermissibly entangling the state with religion); Wolman v. Walter, 433 U.S. 229, 248-51 (1977) (following *Meek* for similar benefits such as tape recorders, maps, globes, science kits). The Court also invalidated a program

If the Court did allow aid to a religious institution (finding the religious and secular functions separable), it made scrupulously sure that the program restricted aid only to the secular aspects of the organization.[193] Thus, the Court invalidated a program granting money to private schools for the maintenance and repair of facilities because the statute did not restrict funds to only "secular" uses. There was too great a danger that janitors paid with state funds might work on a school chapel, or classrooms in which religion was taught.[194]

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reimbursing nonpublic school teachers for costs incurred to administer regular tests to measure student achievement. Tests prepared by teachers posed the risk that "teachers under the authority of religious institutions," would draft tests "unconsciously or otherwise, to inculcate" religious values. Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472, 480 (1973).

Interestingly, the provision of textbooks to religious schools was upheld. Mueller v. Allen, 463 U.S. 388 (1983). *See infra* part III.B.2 for discussion of "neutrality" principle under which aid to religious institutions in various contexts was upheld. The Court distinguished textbooks from globes and science kits by saying that textbooks could be scrutinized for religious content relatively easily: a one-time inspection would do; whereas it would be too difficulty to daily monitor the classrooms where teaching nuns might work religious dogmas into their lessons and use maps, globes and science kits to teach about religion. *Lemon*, 403 U.S. at 617. This distinction does not seem to hold water. For if nuns can impermissibly use globes to teach theology, they can do the same for textbooks, highlighting various aspects that bring out a religious understanding of the events taught. *See* Board of Education of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 254-266 (1968) (Douglas, J., dissenting) (arguing that textbook loans should be invalidated because parochial schools can choose textbooks that are slanted toward their particular religious perspective).

Unlike parochial schools, some religious colleges were not deemed to be pervasively sectarian because they were independent from the church, with religious indoctrination only a "secondary objective," and they subscribed to principles of academic freedom. Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 756-59 (1976) (plurality opinion). *See also* Hunt v. McNair, 413 U.S. 734, 743-44 (1973) (deeming certain religious colleges not to be predominantly religious).

[193] *Roemer*, 426 U.S. at 755 ("If secular activities [of a religious institution] can be separated out, they alone may be funded."); *Nyquist*, 413 U.S. at 774, 783, 794 (invalidating grants for maintenance and renovation, tuition grants, *id.* at 783, and tax deductions, *id.* at 794, because there was no statutory provision restricting the aid to only secular functions of religious schools); Tilton v. Richardson, 403 U.S. 672, 682-83 (1971) (invalidating portion of federal aid program for college buildings that restricted religious use for only 20 years: although the college buildings funded were not involved presently in religious activity, after the twenty years, a religious college could convert a building constructed with federal funds to a religious use and federal money would have been used to advance religion).

[194] *Nyquist*, 413 U.S. at 774.

The rule was clear: the government was absolutely forbidden to directly aid institutions or activity that were "pervasively sectarian."[195] The government could not be involved in supporting core religious activities such as religious teaching, preaching, and worship.[196]

Under these rules, Wide Awake magazine's receipt of SAF monies from the University of Virginia would seem to be a clear violation of the Establishment Clause, for the magazine does seem to involve core religious activity, with articles that exhort, teach, and proselytize, calling its readers to religious conversion and to follow Christian teachings.[197] Like the Catholic parochial schools, the religious and secular aspects of Wide Awake seem to be "inextricably intertwined"[198]; as Justice Souter noted: "Even featured essays on facially secular topics" such as racism and eating disorders "become platforms from which to call readers to fulfill the tenets of Christianity in their lives."[199]

2. *The neutrality principle*

The Court has, however, articulated another doctrine that looks curiously close to the equal access principles laid down in *Widmar*, *Mergens*, and *Lamb's Chapel*. Stated simply, this "neutrality" principle provides that when "public benefits" are made "generally available to a wide array of beneficiaries on an equal basis, without regard to

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[195] Bowen v. Kendrick, 487 U.S. 589, 609-10 (1988). Although religious organizations *per se* could receive funding, the Court remanded the case to ensure that no money supported "pervasively sectarian" religious organizations or "specifically religious activit[ies] in an otherwise secular setting." *Id.* at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973).

[196] School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985) (teaching and indoctrination into religious belief), *quoted in* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (Souter, J., dissenting); *Nyquist*, 413 U.S. at 774 (worship and preaching). Justice Souter characterizes religious teaching, exhortation, and evangelism as "core religious activities." *Rosenberger*, 115 S. Ct. at 2533-36, 2540 n.4 (Souter, J., dissenting).

[197] *Rosenberger*, 115 S. Ct. at 2534-35 (Souter, J., dissenting).

[198] Meek v. Pittenger, 421 U.S. 349, 366 (1975) (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971).

[199] *Rosenberger*, 115 S. Ct. at 2535. The Fourth Circuit noted upon examination of the magazine's contents, "[W]e are compelled to mark Wide Awake's unflagging invocation of religious, specifically Christian, themes. The journal's pages are pervasively devoted to providing a 'Christian perspective' in printer's ink at the University of Virginia." Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 273 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

religion," the Establishment Clause is not violated when religious groups receive such benefits.[200]

Several forms of aid to religious institutions have been upheld under this rule, including the reimbursement of transportation costs to children attending parochial schools,[201] textbooks,[202] speech and hearing services provided by state employees at religious schools,[203] and money grants to religious family planning and pregnancy services.[204] The Court has looked at the following factors: that the program was part of a general welfare program distributed "to all citizens without regard for their religious affiliation;"[205] that benefits were distributed to a "wide spectrum of organizations;"[206] that the recipients of the aid were private citizens rather than religious institutions;[207] and that the nature

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[200] Reply Brief for the Petitioners at 12, *Rosenberger* (No. 94-329).

[201] Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1 (1947). *Everson*, the case which first set forth the neutrality principle, was also the very case that enunciated the strict "no-aid" rule. *Id.* at 15-16. In *Everson*, the Court upheld a New Jersey program that reimbursed parents of school children for bus transportation costs. Some of the benefitted students attended Catholic parochial schools. *Id.* at 3-4. The Court held that even though religious students and religious schools would undoubtedly benefit from such a program, they were merely a part of a general welfare program extended to all citizens without regard to religious belief. *Id.* at 16-17. Religious institutions benefitted from other public programs such as "police and fire protection, connections for sewage disposal, [and] public highways and sidewalks." *Id.* at 17-18. To cut off religious institutions from such general welfare benefits would not be neutral toward religious believers as the Establishment Clause requires, but in fact would "require the state to be their adversary." *Id.* at 18.

[202] Mueller v. Allen, 463 U.S. 388 (1983); Wolman v. Walter, 433 U.S. 229, 236-38 (1977); Meek v. Pittenger, 422 U.S. 349, 359-62 (1975); Board of Educ. of Central Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968).

[203] *Wolman*, 433 U.S. at 241-44.

[204] Bowen v. Kendrick, 487 U.S. 589 (1988). *See also* Mueller v. Allen, 463 U.S. 388 (1983) (tax deductions for tuition for children attending nonpublic, including religious, schools); Hunt v. McNair, 413 U.S. 734 (1973) (upholding revenue bonds to building program at a Baptist college); Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion) (grants for construction at religious universities available to all universities); Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970) (tax deduction for church property).

[205] *Meek*, 422 U.S. at 360; *Board of Education of Central School Dist. No. 1*, 392 U.S. at 242-44; *Everson*, 330 U.S. at 16-17 (1947).

[206] *Bowen*, 487 U.S. at 608 (1988); *Mueller*, 463 U.S. at 397 (1983); Walz v. Tax Comm'n N.Y., 397 U.S. 664, 672-73 (1970) (property tax exemption granted to broad-class of organizations, including "hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups").

[207] *Mueller*, 463 U.S. at 388 (tax deductions to parents for tuition, textbooks and

of the benefit was "secular," as in secular textbooks rather than religious ones.[208]

Although the SAF at the University of Virginia would seem to meet these requirements, the neutrality principle still stops short of permitting "pervasively sectarian" organizations and activities to receive aid.[209] Thus, programs which neutrally distributed secular benefits such as maps, lab equipment, and charts to religious and non-religious schools alike were held unconstitutional because recipients included parochial schools where "a substantial portion of [the] functions are subsumed in the religious mission."[210]

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transportation); *Board of Education of Cent. Sch. Dist. No. 1*, 392 U.S. at 243-44 (books lent to school children, providing financial benefit to parents and their children, not to parochial schools). Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 483 (1986), represents another line of cases where government aid to religious individuals was upheld. In *Witters*, the Court upheld a government scholarship to a blind student who chose to attend a Christian college to "become a pastor, missionary, or youth director." The Court reasoned that the money was neutrally available and that the student attended the religious school as a genuine result of his own private choice. *Id.* at 485-89. Such a benefit to religion was no different from a State "issu[ing] a paycheck to one of its employees, who . . . then donates all or part of that paycheck to a religious institution. . . ." *Id.* at 486-87 (1986).

Similarly, in Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993), the Court upheld the government provision of an interpreter for a deaf student who attended a religious school on grounds that the benefits "were neutrally available to a broad class of citizens defined without reference to religion" and that the choice of the sectarian school was a result of the private choice of the student. *Id.* at 2467-68. *See also* Mueller v. Allen, 463 U.S. at 399 (tax deductions provided to parents who send children to religious schools permissible because choice to attend religious school was the parents').

[208] *Meek*, 422 U.S. at 361-62; *Board of Educ. of Cent. Sch. Dist. No. 1* , 392 U.S. at 243-45.

[209] *Bowen*, 487 U.S. at 608-10 (1988) (even though federal funding program made money available to a "wide spectrum of organizations" on a neutral basis without regard to the sectarian nature of the grantees, aid still could not go to "pervasively sectarian" religious institutions).

[210] *Meek*, 422 U.S. at, 365-66 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). The Court in *Meek* also noted that 75% of the nonpublic schools receiving the aid were religiously-affiliated. *Id.* at 364. Similarly, in *Lemon*, 96% of the aided nonpublic schools were religious. *Id.* at 364 n.15 (discussing Lemon v. Kurtzman, 403 U.S. 602, 610 (1971). This might provide a basis for arguing that these programs were invalidated because they involve a kind of "religious gerrymander" and the cases were decided as they were because "the legislature knew, everyone knew, this Court knew, [the law] was being enacted in response to the needs of a particular . . . religious denomination." United States Supreme Court Official Transcript at 12, Rosenberger

3. The inequality of the rule against direct aid

The rule against direct financial aid to religion has come under much criticism as resulting in the unequal treatment of religious institutions among social, charitable and community organizations.[211] This is especially true when the government is the pervasive social force that it is today,[212] actively financing a broad range of private nonprofit institutions such as schools, soup kitchens, day care centers, health clinics, and the arts and humanities.[213] The neutrality principle is not really neutral when it excludes only deeply religious schools and soup kitchens from funding available to a wide range of similar secular groups; it is "manifestly unequal."[214]

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v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329). Thus, pervasively religious institutions still might be able to partake in a neutrally available benefit program, as long as the spectrum of recipients was broad and varied enough. However, the Court's holding in *Bowen* where "pervasively religious" institutions that engaged in religious teaching would still be ineligible for federal funding distributed on a neutral basis to "a fairly wide spectrum of organizations," *Bowen*, 487 U.S. at 608-10, would seem to foreclose such an effort.

[211] *See, e.g.*, *Religious Freedom*, *supra* note 61, at 183-87; Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645 (1992).

[212] Chopko, *supra* note 211, at 184. The government of this century is described as the "welfare-regulatory state," where government involvement in private life is pervasive: "The modern welfare-regulatory state wields three forms of power that potentially threaten religious pluralism: the power to regulate religious institutions and conduct, the power to discriminate in distributing state resources, and control over institutions of culture and education." *Religious Freedom*, *supra* note 61, at 175.

[213] Michael W. McConnell, *Political and Religious Disestablishment*, 406 B.Y.U. L. REV. 405, 421 (1986) (discussing in-depth the various issues related to government funding of religious entities); *Religious Freedom*, *supra* note 61, at 183-84.

[214] Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 618 (1995); *Religious Freedom*, *supra* note 61, at 184. Professor McConnell argues that while the separationist notion of a secular government would not affect religious liberty if government were more limited, it has had more and more of a "hostile" impact toward religion as government influence has expanded:

> It should be remembered that when the First Amendment was proposed and ratified, the government had little or no involvement in education, social welfare, or the formation and transmission of culture. These functions were predominantly left to the private sphere, and within the private sphere religious institutions played a leading role. As the government has assumed wider and wider responsibility for the funding and regulation of these functions, the idea of a "secular state" has become more and more ominous. When the state is the dominant influence in the culture, a "secular state" becomes equivalent to a secular

Professor McConnell has argued that this unequal treatment of religious institutions is best remedied by a principle of "equal access" to government benefits where even "pervasively sectarian" organizations may receive government aid.[215] At first it seems shocking to suggest that pervasively religious organizations and activities may receive financial aid, for it seems to go to the heart of the Establishment Clause and the controversies in the colonies about tax assessments for the support of churches that form its historical underpinnings.[216] Was not the main lesson learned from these controversies that the Establishment Clause means, if nothing else, that "tax money may not be used for religious purposes,"[217] that not even "three-pence" may be

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> culture. Religious influences are confined to those segments of society in which the government is not involved, which is to say that religion is confined to the margins of public life—to those areas not important enough to have received the helping or controlling hand of government.

Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 177-78 (1993). Professor McConnell proposes a "useful thought experiment":

> [I]magine what a "neutral" policy toward religion would look like in a socialist state, where the government owned *all* the land and *all* the means of mass communication. In such a world, the government would be constitutionally *required* to erect and maintain churches, synagogues, temples, mosques; to hire priests, ministers, imans, and rabbis; to disseminate religious tracts and transmit religious programming; and to display religious symbols on public land at appropriate occasions. If it did not, there would be no opportunity for the practice of religion as traditionally understood. Indeed, a "neutral" state would attempt to replicate the mix of religious elements that one would expect to find if the institutions of culture were decentralized and private—much as the government must do today in the prisons and the military. No one would contend, in a socialist context, that a policy of total secularization would be neutral.

Religious Freedom, *supra* note 61, at 189-90 (footnote omitted).

[215] *Religious Freedom*, *supra* note 61, at 183-87.

[216] *See* Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1, 8-16 (1947) (Establishment Clause is understood best in light of the Virginia tax assessment controversies). This historical interpretation of the Establishment Clause was the "official" history adopted by the Court for some thirty years "until challenged by scholars and Justices in the early 1980s." Lupu, *supra* note 61, at 233-34.

[217] Brief for the Petitioners at 36, *Rosenberger* (No. 94-329); *see also Religious Freedom*, *supra* note 61, at 185 ("[T]he central animating idea of modern Establishment Clause analysis [is] that taxpayers have a constitutional right to insist that none of their taxes be used for religious purposes."); *Everson*, 330 U.S. at 15-16 ("The 'establishment of religion' clause of the First Amendment means at least this:" that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.").

"exacted from any citizen" for the purpose of supporting religion?[218]

It may not be so. The historical analysis relied upon in the landmark *Everson* case has come under attack.[219] Scholars point out that the very framers of the Establishment Clause approved of several forms of aid to core religious activities such as the funding of missionaries to proselytize Native American tribes and the approval of government-paid legislative chaplains.[220] Arlin Adams and Charles Emmerich argue

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[218] *Everson*, 330 U.S. at 40 (Rutledge, J., dissenting).

[219] The most recent historical attack is Justice Thomas' concurring opinion in *Rosenberger*. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2528-33 (1995) (Thomas, J., concurring).

In the 1980s, various scholars and then-Justice Rehnquist proposed that the original intent of the Establishment Clause was not to ban all monetary aid to religion, but to forbid the establishment of an officially supported national church and financial aid that discriminated against certain religious denominations. "Non-preferential" government aid—aid that equally benefitted all religions—was permissible. Lupu, *supra* note 61, at 237-38 (1993) (discussing Wallace v. Jaffree, 472 U.S. 38 (1985) (Rehnquist, J., dissenting)). Scholars who promoted this position were Robert Cord and Michael Malbin. *See* TRIBE, *supra* note 77, at § 14-3, 1161 n.25 (citing ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); MICHAEL MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1981)).

The non-preferentialist thesis has apparently been refuted. *Religious Freedom*, *supra* note 61, at 146. *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) (refuting claims of scholars that Establishment Clause permitted non-preferential financial aid to religion).

Nevertheless, other arguments, such as the one presented by Professor McConnell discussed in this section, still challenge the historical lesson drawn from the assessment controversies that the government may never give tax money to religious activity. *Religious Freedom supra* note 61, at 183-87. *See also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1637-41 (1989); Michael W. McConnell, *Coercion: the Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1987).

[220] Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1615-16 (1989). The very men who signed the Constitution proclaimed days of prayer and thanksgiving, approved legislative chaplains, and "entered into treaties with various Indian tribes authorizing the use of federal funds for religious purposes." *Id.* As Adams and Emmerich so astutely observe; "These practices are a source of embarrassment to separationists, who are required to advance the untenable thesis that, shortly after enacting an establishment clause intended broadly to proscribe federal aid to religion and religious involvement in society, the Founders, for whatever reasons, violated it in countless ways." *Id.* at 1640-41. The legislative chaplains were appointed by Congress "just days before arriving at the final wording of the Bill of Rights." *Id.* at 1641 n.350. *See also Rosenberger*, 115 S. Ct. at 2531, 2531 n.3 (Thomas, J., concurring) (providing further examples of early federal aid to religion).

that the Establishment Clause was never intended "to broadly proscribe aid to religion *per se*" but only to "forbid discriminatory aid among religions and those forms of nondiscriminatory aid to religion that exert a coercive influence on religious choice."[221]

Professor McConnell argues that the problem with tax assessments was not that the tax money was used for religious purposes but that the taxes were levied for the "sole purpose of fostering religion."[222] Indeed, at that time, government did not give aid to many other institutions. Charitable and educational work was left to the churches, and government played a generally limited role.[223] Thus, "secular institutions, activities, and ideologies received no comparable form of assistance."[224]

The situation in the twentieth century is much changed. Government plays an expansive role and provides financial assistance to a wide range of causes.[225] Applying the lesson of the tax assessment controversies and deciding the issue of whether the Establishment Clause allows financial aid to religion must be done in light of the changed roles government.[226] When the government provides aid to a broad

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[221] Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1641 (1989).

[222] Brief for the Petitioners at 37, *Rosenberger* (No. 94-329).

[223] Chopko, *supra* note 211, at 646-49. *See also* Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 177 (1993).

[224] *Religious Freedom*, *supra* note 61, at 183.

[225] *Id.* The shift occurred over the 150 years following the founding of the nation. During that time, "the government began to assist in a wide range of charitable and educational activities, formerly left to private (frequently religious) endeavor." *Id.* Professor McConnell continues:

> Frequently, the government chose to enter these fields not by setting up its own agencies, but by making financial contributions to private institutions that supplied services to the public. Common examples included higher education, hospitals, and orphanages. An advantage of private administration over public was that it preserved diversity, since different institutions would bring a different perspective and approach to the activity.

Id. See also Chopko, *supra* note 211, at 649 (setting forth the same historical background).

[226] *Religious Freedom*, *supra* note 61, at 183-84. Professor McConnell argues:

> When government funding of religiously-affiliated social and educational services became a constitutional issue in the late 1940s, the Court properly looked back at the religious assessment controversy. But it missed the point. The Court did not notice that the assessments against which the advocates of disestablishment inveighed were discriminatory in favor of religion. Instead, the Court concluded

range of services, aiding religious organizations among them does not favor religion over non-religion; it is neutral toward religion.[227] As Professor McConnell argues:

> When the government provides no financial support to the nonprofit sector *except for churches*, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does *not* aid religion. It aids higher education, health care, or child care; it is neutral to religion. Indeed, to deny equal support to a college, hospital, or orphanage on the ground that it conveys religious ideas is to penalize it for being religious. It is a penalty whether the government excludes the religious institution from the program altogether . . . or requires the institution to secularize a portion of its program . . . .[228]

This inequality that "pervasively religious" institutions experience would be cured by a principle of equal access to government funding.[229]

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that taxpayers have a constitutionally protected immunity against the use of their tax dollars for religious purposes. . . .

The Court's analysis failed to recognize the effect of the change in governmental roles.

Id. (footnote omitted).

[227] *Id.* at 184.

[228] *Id.* at 184 (footnotes omitted). McConnell cites as examples of institutions that were deemed sufficiently secular to receive funding the religious colleges involved in Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion); Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 755 (1976) (plurality opinion) and Hunt v. McNair, 413 U.S. 734 (1973)). This "secularizing" process was seen at the University of Virginia where two funded groups were faced with the choice of "secularizing" and receiving funding or having a strong religious element and foregoing funding. One group chose to water down its message, another chose to forego funding. Reply Brief for the Petitioners at 18-19, *Rosenberger* (No. 94-329). *See* discussion *infra* note 491.

[229] *See Religious Freedom*, *supra* note 61, at 183-87; Chopko, *supra* note 211, at 665-70. Chopko argues that not only does "fairness" require the government to allow religious institutions to participate equally in governmental funding programs, *id.* at 668, but that allowing predominantly religious organizations to participate would better serve the interests of the government in that it promotes diversity:

> Governmental programs tend to deliver services in one way and only one way. Although some organizations, mostly public service organizations, have become accustomed to looking like one another in delivery of services, religious organizations, as well as private nonreligious organizations, should resist the temptation of looking like the government simply because a governmental program is involved. Government should, for the good of the governed, strive to encourage a variety of approaches to the provision of similar services.

Under this principle, if the funding program is one to fund the exchange of ideas—akin to a forum[230]—religious groups have a right to participate on an equal basis with other groups.[231]

Religious groups would not have an "unlimited constitutional right" to claim access to funds;[232] if "grantees are paid to convey a particular message to the public"—as in *Bowen v. Kendrick* involving a funding program to health services to convey the government's message of abstinence and family planning—"religious speech restrictions are permissible and may even be required."[233]

However, if "participants have the right to engage in controversial political or ideological secular speech" and are free to convey their own messages, then religious groups may not be denied.[234] The program would be akin to a forum for the exchange of ideas.[235] An example of such a program would be the National Endowment for the Arts where artists are free and encouraged to "convey controversial messages about politics and culture without censorship."[236] Denying religious artists the right to convey personal religious messages would be discriminatory against religion in violation of both the Free Speech Clause and the neutrality toward religion that the Establishment Clause seeks to uphold.[237]

Allowing religious artists to receive funding would not violate the Establishment Clause because the government would not be supporting

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> The American people are not uniform. They are richly diverse, complicated, different groups of people. Community services available to them in education, charity, health, or any other aspect of social service, may properly reflect this rich diversity. By forcing one to strip out the differences among the different programs, we have lost the ability to appeal to different clientele.

Id. at 669 (footnotes omitted).

[230] Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L. J. 2009, 2030 (1994).

[231] *Religious Freedom*, *supra* note 61, at 186-87.

[232] *See id.* at 186 (arguing that religious participants in federal funding programs would not have an "unlimited constitutional right to engage in religious speech in the context of the program.").

[233] *Id.* at 186-87.

[234] *Id.* at 186.

[235] Wiggin, *supra* note 230, at 2030. *See infra* part V.B.3 for a discussion of funding programs as forums.

[236] *Religious Freedom*, *supra* note 61, at 187.

[237] *Id.* at 187.

the particular expressions that are funded but the exchange of diverse artistic ideas.[238] As in the equal access cases, the "crucial difference" is whether the government or the private artist is speaking in support of religion.[239]

The *Rosenberger* fact pattern matches these requirements exactly. The nature of the SAF is like a forum for speech, not a subsidy for the communication of the government's messages.[240] Its purpose is to support various and diverse expressions of student thought and creativity.[241] The funded expressions are diverse, representing a wide range of divergent viewpoints—from Students for Animal Rights to the Virginia Advocate (a periodical promoting Republican views)[242] to the Gandhi Peace Center[243]—that no one would mistake as all having the government's imprimatur of approval.

Rosenberger thus would have been the ideal case to articulate a principle of equal access to government funding and rectify the unequal treatment that deeply religious schools, drug rehab centers, and soup kitchens receive as a result of the strict rule against financial aid to religion. As shall be seen, however, the Court, while arriving at the intuitively correct result for the Wide Awake students, failed to articulate such a principle.

C. *The Argument for Government Discretion: Discriminating on the Basis of Speech-Content in Nonpublic Forums*

The second argument against providing religious speakers with equal access is found in subsidy and forum doctrine. While ordinarily, content-based regulations of speech are subject to the highest scrutiny,[244]

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[238] An "added advantage" to such a program would that it would "preserve[] diversity," allowing for a variety of approaches to the activity, whether it is art, charitable work, or education. *Id.* at 183.

[239] *Id.* at 187; Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990).

[240] *See* discussion *infra* part V.B.3

[241] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2522 (1995).

[242] United States Supreme Court Official Transcript at 8, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329).

[243] Brief for the Petitioners at 4, *Rosenberger* (No. 94-329).

[244] Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978) [hereinafter, *Subject-Matter Restrictions*]. Restrictions on speech such as "obscenity, false statements of fact, or fighting words" are also content-based in nature but the Court has found this kind of speech "to be of such low value in terms of the historical, philosophical, and political purposes of the amendment as to be entitled to less than full constitutional protection." *Id.*

the Court has stated that they are appropriate in these two areas. Under subsidy doctrine, the government may choose to fund certain messages but not others.[245] This doctrine will be discussed in the *Rosenberger* context in part III.C.4. Under forum doctrine, when the government resource or property at issue is classified as a "nonpublic forum," the government may limit discussion within the forum to certain subject matters and speakers to preserve the forum for its intended purposes.[246] Thus, excluding religious speech, while not necessarily compelled by the Establishment Clause, is permissible as long as the exclusion is reasonable and not viewpoint discriminatory.[247]

1. The nonpublic forum and the exclusion of religious viewpoints in the guise of subject matter

In order to understand this second argument, it is necessary to briefly examine forum doctrine. Forum doctrine attempts to balance "the individual's right to speak while on public property against the state's interest in restricting the property for specific uses."[248] The three equal access cases involve forums of one kind of another, for all involve government property—specifically, school rooms—and the claims of individuals to speak religiously within these forums. The strength of the speech claim depends on the nature of the property in question, that is, whether the property is a "traditional public forum," a "forum by designation," or a "nonpublic forum."[249]

Traditional public forums, or "quintessential public forums," are places such as parks and streets where free expression, debate, and assembly have traditionally occurred.[250] The state may not restrict speech based on content[251] unless the exclusion is "necessary to serve

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[245] Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (upholding selective funding of health clinics that did not counsel or provide for abortions). *See also* TRIBE, *supra* note 77, at § 11-5, 781-84 (discussing the subsidy doctrine).

[246] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[247] *Id.*

[248] WHITEHEAD, *supra* note 80, at 67.

[249] *Perry*, 460 U.S. at 45-46; WHITEHEAD, *supra* note 80, at 68.

[250] *Perry*, 460 U.S. at 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). Traditional public forums are "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.*

[251] Content-based regulations "limit communication because of the message conveyed." Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189, 189 (1984).

a compelling state interest and . . . narrowly drawn to achieve that end."[252]

Designated public forums have the same wide open character as traditional public forums, the only difference being that they are created by an intentional act of government and as such may be closed by the government.[253] A "subset" of this category is a "limited public forum,"[254] which is a forum designated for "use by certain speakers, or for the discussion of certain subjects."[255] The University classrooms in *Widmar* involved a limited public forum for a certain class of speakers—students at the University of Missouri, Kansas.[256]

The final category, the nonpublic forum, allows the state the greatest discretion in restricting access. Content-based exclusions are allowed as long as the exclusions are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[257] The nonpublic forum thus allows the state to "'preserve the property under its control for the use to which it is lawfully dedicated.'"[258]

The nonpublic forum is where the controversy lies. In the nonpublic forum, distinctions based on *content*—including subject matter or speaker

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[252] *Perry*, 460 U.S. at 45. Reasonable time, place and manner regulations are valid as long as they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

[253] *Id.*; WHITEHEAD, *supra* note 80, at 68. As in the traditional public forum, content-based exclusions "must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46.

[254] Jason C. Kravitz, *Repelling a Constitutional Battering-Ram: The Fight to Keep Nonstudent Religious Worship Services Out of Public Schools*, 19 VT. L. REV. 643 (1995).

[255] Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985). The term limited public forum is actually not that well-defined and has been used as a synonym for the designated public forum, for nonpublic forums, and in the sense that this article is adopting. Kravitz, *supra* note 254, at *5 (setting forth various uses of the term "limited public forum" by various courts and categorizing it as a subcategory of designated public forum).

[256] *Perry*, 460 U.S. at 46 n.7 (classifying *Widmar* as a designated public forum "created for a limited purpose [for] use by certain groups."). The "limited open forum" in the Equal Access Act is a statutory forum and was explicitly distinguished from the limited public forum in *Mergens*. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 242 (1990).

[257] *Perry*, 460 U.S. at 46.

[258] *Id.* (quoting United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981)).

identity[259]—are permissible, although those based on *viewpoint* are not.[260] For example, the Court has upheld content-based exclusions of political speech as a subject matter from nonpublic forums. In *Lehman v. City of Shaker Heights*,[261] a plurality held that the advertising panels within city buses were a nonpublic forum and that the category of political advertising could be excluded, even though commercial and public service advertisements were permitted.[262] In *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*,[263] a system that provided federal employees with a list of charitable organizations for contributions was held to be a nonpublic forum. The Court held that excluding political lobbying and advocacy organizations from the list was reasonable and not facially viewpoint discriminatory.[264]

Thus, if the government may prohibit political speech as a category from certain nonpublic forums, it may also prohibit religious speech

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[259] There is some confusion and ambiguity in the term nonpublic forum. In *Cornelius*, subject matter and speaker identity exclusions are permissible in nonpublic forums. *Cornelius*, 473 U.S. at 806. However, in *Perry*, subject matter and speaker restrictions are classified under the limited public forum category. *Perry*, 460 U.S. at 46, n.7.

The Circuit Court in *Lamb's Chapel* understood a limited public forum as nonpublic as to unspecified uses and "public" as to included uses. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 386 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993). Jason Kravitz explains this conception of the limited public forum, "[R]estrictions on speech of the type permitted in a limited public forum should be strictly scrutinized, whereas restrictions on speech of the type excluded from the same forum receive lesser scrutiny." Kravitz, *supra* note 254, at *5.

Under either the limited public or nonpublic forum category, exclusions based on subject matter and speaker identity are judged by the same standard, that they be reasonable and viewpoint neutral. *Cornelius*, 473 U.S. at 806 (nonpublic forum); *Lamb's Chapel*, 959 F.2d at 387 (limited public forum that is nonpublic as to unspecified uses). Therefore, to avoid confusion, this paper will use the term nonpublic forum to encompass both understandings.

[260] *Perry*, 460 U.S. at 46.

[261] 418 U.S. 298 (1974) (plurality opinion).

[262] *Id.* at 299-304. The Court ruled that the restriction was reasonable for the purpose of preserving the environment of its city buses by keeping captive riders free from the "blare" of political propaganda, avoiding the appearance of political favoritism, and saving revenue from commercial advertising. *Id.*

[263] 473 U.S. 788 (1985).

[264] *Id. See also* Greer v. Spock, 424 U.S. 828, 831 (1976) (upholding ban of partisan political speech such as "(d)emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" from military base; the base had invited other civilian speakers who addressed topics such as business management and drug abuse.).

as a category from nonpublic forums—as long as the exclusion is reasonable and not viewpoint discriminatory.[265]

The danger is that the line between viewpoint and subject matter is not that clear.[266] Even in *Lehman* and *Cornelius*, vigorous dissents argued that the governmental bodies in question were actually engaging in invidious viewpoint discrimination against politically-oriented viewpoints.[267] Forum doctrine has been criticized as an approach that

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[265] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993); Rosenberger v. Rector & Visitors of Univ. of Va., 795 F. Supp. 175, 180 (W.D. Va. 1992), *aff'd*, 18 F.3d 369 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510.

[266] The distinction between subject-matter and viewpoint-based restrictions is a key distinction in *Rosenberger*. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2516-17 (1995). Both subject-matter and viewpoint-based restrictions are forms of content-regulation, that is, they "limit communication because of the message conveyed," as opposed to content-neutral restrictions which "limit communication without regard to the message conveyed." *Subject-Matter Restrictions*, *supra* note 244, at 81, 83; *Rosenberger*, 115 S. Ct. at 2516.

Subject-matter regulations prohibit an "entire subject" of speech, such as "public affairs, sex or partisan politics," *Subject-Matter Restrictions*, *supra* note 244, at 83, while viewpoint-based restrictions aim at particular views or positions taken on various debatable issues. TRIBE, *supra* note 77, at § 14-5, 1169-70. Thus, a statute that forbids flying a "red flag in symbolic opposition to organized government" aims at certain views and is thus forbidden. *Id.* at § 12-3, 799 (discussing Stromberg v. California, 283 U.S. 359 (1931)). *See also Subject-Matter Restrictions*, *supra* note 244, at 83; First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978) (government may not "give one side of a debatable public question an advantage in expressing its views to the people"), *quoted in* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2549 (1995) (Souter, J., dissenting).

Viewpoint discrimination "lies at the heart of . . . first amendment" concerns, TRIBE, *supra* note 77, at § 12-3, 800 (2d ed. 1988) (quoting Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975)). It is "'is censorship in its purest form,'" *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)) and is thus "subjected to the highest level of scrutiny," TRIBE, *supra* note 77, at § 12-3, 800 (2d ed. 1988).

Subject-matter discrimination occupies a more questionable status, occupying a place somewhere "between viewpoint-based and content-neutral restrictions." Stone, *supra* note 251, at 241. In certain contexts, subject-matter restrictions can implicate viewpoint discrimination. *Subject-Matter Restrictions*, *supra* note 244, at 109-12; TRIBE, *supra* note 77, at § 12-3, 800 n. 23 (2d ed. 1988).

[267] Lehman v. City of Shaker Heights, 418 U.S. 298, 308-18 (1974) (Brennan, J., dissenting); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 832-33 (1985) (Blackmun, J., dissenting). See *infra* note 503 and accompanying text for discussion of dissenting opinions.

protects "governmental discretion at the expense of individual speech,"[268] and this area provides the perfect example, for government by defining a nonpublic forum "in terms of *speakers* or *topics*," can "exclud[e] *views* that [it] finds offensive or undesirable."[269]

The lower court holdings in *Lamb's Chapel* illustrate the danger. Finding that the school district had opened its facilities for ten specific uses—including social and civic meetings, library purposes, and political meetings—while specifically excluding religious purposes,[270] the Second Circuit held that the forum was "nonpublic" with regard to the excluded religious uses.[271] Thus, the church's "Turn Your Heart Toward Home" film series was denied access because it was deemed to be a religious use, a category of uses excluded from the forum.[272]

However, as Professor Lupu has pointed out, the "categories of permitted and forbidden uses were overlapping rather than mutually exclusive."[273] By excluding the film series under the subject matter of religious uses, the school district inadvertently, or perhaps intentionally,[274] excluded the particular evangelical Christian viewpoint of the

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[268] Salomone, *supra* note 79, at 11-13. Professor Laycock argues that forum doctrine allows government to censor speech in the nonpublic and limited public forums in a "self-justifying" manner. Laycock, *supra* note 5, at 46-47. The government can close a limited public forum "without any reason whatever, or even because of hostility to speech." *Id.* at 46. The government can show an intent to limit a forum by merely showing a policy of exclusion in the past, and "government can allow some speakers into a nonpublic forum while excluding others." *Id.* at 46-47. As Laycock continues:

> Thus, outside the traditional public forum, the only real protection is that exclusion of speech must be reasonable and not motivated by hostility to the views expressed. And the Court's application of that test has been deferential.
>
> It makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will.

Id. at 47 (footnotes omitted). Public forum doctrine has come under much criticism for these and similar reasons. *See* Salomone, *supra* note 79, at 11 n.47-48 (listing numerous scholarly articles and Court opinions criticizing forum doctrine).

[269] Salomone, *supra* note 79, at 15. *Cornelius*, 473 U.S. at 811 (a regulation in a nonpublic forum may not be a "facade for viewpoint-based discrimination").

[270] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 386-87 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

[271] *Id.* at 386.

[272] *Id.* at 384.

[273] Lupu, *supra* note 61, at 257.

[274] The school district had allowed other arguably religious uses such as a gospel music concert, a Salvation Army band concert, and a lecture series addressing "parapsychology, transpersonal psychology, physics and metaphysics." *Lamb's Chapel*, 959 F.2d at 388. On the other hand, Lamb's Chapel was characterized as a "radical"

Lamb's Chapel film series on the subject matter of family and child-raising, a topic otherwise includible under the specified uses of the forum.[275] The Court thus found that the school district had engaged in viewpoint discrimination, regardless of whether the forum was nonpublic or not.[276]

Viewpoint discrimination is the most egregious form of content-based discrimination and goes to the heart of First Amendment concerns.[277] When government favors some views over others, it violates fundamental First Amendment values by distorting public debate, and skewing the debate toward the favored views.[278] To suppress certain views would "mutilate[] 'the thinking process of the community'" and hinder

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church. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2148 (1993).

[275] *Lamb's Chapel*, 113 S. Ct. at 2148. Indeed, although not specifically mentioned in the Court opinion, the school district had allowed "the identical subject matter, family issues, child abuse, marital conflict" in the forum. "Family Counseling Services" used the facilities for family counseling. United States Supreme Court Official Transcript at 18-19, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024).

[276] *Lamb's Chapel*, 113 S. Ct. at 2146-48. Assuming for purposes of decision that the courts below were correct in applying the "nonpublic forum" test that subject matter exclusions need only be "reasonable and viewpoint neutral," *id.* at 2147, the School District "flunk[ed]" even this test. *Id.* at 2148 (quoting May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1114 (1986)). The church had argued that the School District had created a limited public forum by "open[ing] its property for . . . a wide variety of communicative purposes," thus subjecting any subject-matter or speaker exclusions to the "same constitutional limitations as those in traditional public fora"—i.e., to strict scrutiny. *Id.* at 2146. The Court stated that "[t]he argument has considerable force," noting that the school district was "heavily used by a wide variety of private organizations, including some that presented a 'close question" . . . as to whether the District had in fact already opened its property for religious uses." *Id.* at 2146. See *supra* note 161 for some of the community and arguably religious groups that were allowed to use District facilities. In any event, the Court said, "We need not rule on this issue, however, for even if the courts below were correct in this respect [that the District was a non-public rather than limited public forum]—and we shall assume for present purposes that they were—the judgment below must be reversed." *Id.* at 2147.

[277] TRIBE, *supra* note 77, at § 12-3, 800. Viewpoint discrimination "'is censorship in its purest form,'" *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)). *See also* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2516 (1995) ("[v]iewpoint discrimination is . . . an egregious form of content discrimination.").

[278] Stone, *supra* note 251, at 198.

the search for truth.[279] As the Court has stated, "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."[280]

The discriminatory nature of the school district's policy is revealed more clearly in its admissions at oral argument. Upon questioning, the district conceded that it would allow access to atheist or communist groups "to address the subject of family values," even if the groups had clearly anti-religious perspectives on the subject.[281] Allowing anti-religious groups to express their views on the family while excluding religious viewpoints is not a policy that respects the "equality of status in the field of ideas." It skews public debate in favor of secular perspectives, ultimately not only discriminating against religious groups, but adversely affecting society as a whole in its search for truth.[282]

Thus, *Lamb's Chapel* held that religion is not just a separate subject matter, but it can also provide a perspective or viewpoint on "secular" subject matter that is within a forum, nonpublic or otherwise.[283] *Lamb's*

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[279] Stone, *supra* note 251, at 198; *Subject-Matter Restrictions*, *supra* note 244, at 101.

[280] Police Dep't of Chicago v. Mosley, 409 U.S. 92, 96 (1972), *quoted in* Lehman v, City of Shaker Heights, 418 U.S. 298, 316 (1974).

[281] Transcript of Oral Argument at 47, 57-58, Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993), *quoted in* Rosenberger v. Rector and Visitors of Univ. of Va., 115 S. Ct. 2510, 2550 n.13 (1995) (Souter, J., dissenting).

[282] *See* Lupu, *supra* note 61, at 258-59. Professor Lupu observes:

> *Lamb's Chapel* casts doubt on a central premise of separationism. Separationism assumes a sharp distinction between the private and public sphere and directs religion to the former. Were this distinction to reflect social reality, religion should be excluded from public life with little or no social cost. The facts of *Lamb's Chapel* reveal, however, in a light clearer than that reflected by the equal-access stories of *Widmar* and *Mergens*, the way in which religious perspectives have come to (re)present a valid approach to problems that society defines in public policy terms. However private the family is, its problems create externalities with which we all must cope, and religion is a source of longstanding insight on the structure and function of families.

Id.

[283] In this respect, *Lamb's Chapel* goes beyond *Widmar*, Salomone, *supra* note 61, at 17, for *Widmar* involved a designated or limited public forum for the students where content-based subject-matter exclusions are subject to strict scrutiny. Widmar v. Vincent, 454 U.S. 263, 267 n. 5; Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983) (classifying the forum in Widmar as a "public forum . . . created for a limited purpose [namely] use by certain groups." *Id.* at 46 n.7). *Lamb's Chapel* held that even in a nonpublic forum where the government may make content-based exclusions of an entire subject matter of speech, it may not use its discretion as a cloak for discriminating against religious viewpoints on subjects otherwise includible within the forum. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2146-48 (1993).

Chapel affirms the right of religious viewpoints to participate on an equal basis with secular viewpoints in the public debate on issues such as family and child-raising. Religious speech cannot be "cabin[ed] . . . into a separate excludible speech category."[284] As long as the forum is open to subjects which can be addressed from a religious perspective, the government may not exclude speakers who wish to address those subjects from such a religious perspective.[285]

2. The danger of subjective characterization

Lamb's Chapel has had a significant impact for religious equal access rights[286] and indeed is vital to the Court's decision in *Rosenberger*.[287] However, critics argue that *Lamb's Chapel* does away with whatever discretion government may have had in nonpublic forums.[288] Religious groups can broadly define the includible subject matter and claim that they have a religious perspective on that subject matter,[289] thus providing a "constitutional battering ram" to break open all kinds of nonpublic forums for religious access.[290] Cases can turn on skillful characterization of the includible subject matter.[291]

For example, if a school district opens its facilities for after hours use by the Scouts, must it open them for religious clubs? The Eighth Circuit in *Good News/Good Sports Club v. School District of Ladue*,[292] held

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[284] Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501, 1506 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 2640 (1995).

[285] *Lamb's Chapel*, 113 S. Ct. at 2147-48. *See also*, *Proposed Guidelines*, *supra* note 61, at 1041 (summarizing the holding of *Lamb's Chapel* in similar terms: "Where government has opened a forum to speech on a certain subject matter, it may not exclude or restrict speech concerning that subject matter based on the speaker's viewpoint (that is, perspective) on the subject.").

[286] *See* Ralph D. Mawdsley, *Lamb's Chapel Revisited: A Mixed Message on Establishment of Religion, Forum and Free Speech*, 101 Ed. Law Rep. 531, 101 WELR 531 (1995) (surveying cases that have applied *Lamb's Chapel*).

[287] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2517-18 (1995).

[288] Mawdsley, *supra* note 286, at *10.

[289] Kravitz, *supra* note 254, at *11 ("the outcome [of cases analyzed under *Lamb's Chapel*] is completely dependent upon the court's characterization of the topic of the expression at issue; this characterization may be susceptible to subjective judgments").

[290] Kravitz, *supra* note 254, at *1 (referring to equal access doctrine in general as a "constitutional battering-ram"; the term is equally applicable to the holding of *Lamb's Chapel*).

[291] Kravitz, *supra* note 254 at *11.

[292] 28 F.3d 1501 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 2640 (1995).

that the Scouts was an organization for the development of moral values, and that the district had to provide equal access to the Good News/Good Sports Club, a club dedicated to "foster[ing] the moral development of junior high school students from the perspective of Christian religious values."[293]

Critics argue that *Lamb's Chapel* means that if schools permit any kind of group—such as community groups or the Scouts—they "must grant the same access to all groups."[294] School rooms, library display cases, and community bulletin boards would be subject to claims of access by religious groups,[295] and not only religious groups but controversial political groups and "hate" groups as well.[296] Rather than open the door to such groups, governmental bodies might simply decide to close the door to all groups.[297] In fact, that is what happened in the

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[293] *Id.* at 1502. The dissent, on the other hand, characterized the Scouts as a "skills-oriented activity analogous and supplementary" to public school classroom instruction, entirely different from the Club, which is a "worship-oriented activity . . . more analogous to a church-operated Sunday school." *Id.* at 1518.

Take another example. Is a Christmas dinner for the community with an evangelistic message at the end a community event or religious proselytization? Grace Bible Fellowship v. Maine Sch. Admin. Dist. No. 5, 941 F.2d 45 (1st Cir. 1991), *discussed in* Kravitz, *supra* note 254, at *7. Is a magic show where the illusionist also shares with the audience "'an account of his investigation of the miracles of Christ' and his own discovery of Christ" an evangelistic event or a community event? Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3rd Cir. 1990).

The courts in these cases held that the religious groups had to be given access, although on grounds that the forums in question were "designated public forums" (versus nonpublic forums), not that the exclusions were viewpoint discriminatory. Kravitz, *supra* note 254, at *7-*8 (citing *Grace Bible*, 941 F.2d at 48 and *Gregoire*, 907 F.2d at 1378.

[294] John Burgess, Note, *Lamb's Chapel v. Center Moriches Union Free School District 113 S. Ct. 2141 (1993): A Critical Analysis of the Supreme Court's First Amendment Jurisprudence in the Context of Public Schools*, 47 VAND. L. REV. 1939, 1985 (1994).

[295] Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (the Constitution does not require the government to allow "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities [to] become Hyde Parks open to every would-be pamphleteer and politician.").

[296] Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501, 1516 n.5, 1517 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 2640 (1995) (dissenting opinion) (arguing that excluding access to hate groups with religious connections such as the Ku Klux Klan was a valid reason for the school board's policy of excluding religious groups).

[297] Burgess, *supra* note 294, at 1984-85 ("Instead of creating a high profile controversy every time a religious group or fringe political organization seeks access to school

Good News case: after the decision was rendered, to avoid granting the Christian club access, the school simply closed the forum, shutting out the Scouts and several athletic groups as well.[298] The net result would be to "narrow the universe of permissible speech on government property and seemingly violate fundamental First Amendment values."[299]

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facilities, public school districts may decide to exclude all groups, regardless of political or religious affiliation."); Ralph D. Mawdsley, *Extending Lamb's Chapel to After-School Religious Meetings*, 96 ED. LAW REP. (West) *8 (Feb. 23, 1995), *available in* WESTLAW, 96 WELR 17 ("[S]chool districts in the [*Good News*] circuit may end up closing their facilities to every organization after school hours, rather than risk permitting access to an objectionable organization").

[298] Respondents' Brief in Opposition to the Petition for a Writ of Certiorari at 9, *Good News* (No. 94-1299) (draft on file with author).

[299] Salomone, *supra* note 79, at 18. Burgess, *supra* note 294, at 1984 (stating that the "all or nothing approach" created by *Lamb's Chapel* "does not advance the First Amendment goal of free and uninhibited discussion; it hinders it."). One of the concerns of the First Amendment is that restrictions of speech might "reduce the total quantity of expression," thus "undermin[ing] the 'search for truth,' imped[ing] meaningful participation in 'self-governance,' and frustrat[ing] individual 'self-fulfillment'" Stone, *supra* note 251, at 193 (footnotes omitted).

On the other hand, the very purpose of the Free Speech Clause is to protect the rights of citizens to express their opinions, however unpopular or controversial. Lehman v. City of Shaker Heights, 418 U.S. 298, 316 (1974) (Brennan, J., dissenting). If a library display case is regularly made open to private community groups—as opposed to displaying the only the featured books of the library itself—should not a religious group with a display encouraging teenagers to "Just Say No" to pre-marital sex have the same access as an AIDS awareness group promoting "safe sex"?

Even the boy scouts are not such an easy case. For in the *Good News* case, one of the primary purposes of the Scouts was indeed the "reinforcement of moral values." *Good News*, 28 F.3d at 1505. Some of these moral values are set forth in Scouting manuals as trustworthiness, loyalty, kindness, obedience, thriftiness, and reverence. *Id.* at 1505-06. Religious activity was included in the Scout's program, including the awarding of religion badges and vague references to "God," the "Great Master," and "reverence" in its manuals. *Id.* at 1517 (citations to district court opinion omitted). Such religious references seem to have been uncontroversial and benign, as the school allowed the Scouts to use their facilities for a number of years without complaint. *Id.* at 1503 (School District had "long-standing tradition of cooperation with scout programs.").

By allowing the Scouts and excluding the Christian Good News Club, it could be argued that the school favored a majoritarian approach to moral instruction—where religion is safely accorded an inoffensive and unobtrusive role—and discriminated against a minority "sectarian" approach where a vibrant faith in God is viewed as indispensable to moral development.

Allowing this kind of viewpoint discrimination would violate fundamental constitu-

3. Is exclusion of religion as a subject matter per se viewpoint-based?

Another question raised by *Lamb's Chapel* is whether there is an intelligible distinction between content-based and viewpoint-based discrimination:[300] is a government regulation prohibiting religious speech as a subject matter from a forum *per se* viewpoint-based?[301] In *Good News*, the court seemed to state that the school policy which prohibited "any speech or activity involving religion or religious beliefs" was viewpoint-based on its face: "The . . . Policy excludes only one viewpoint expressly: the religious viewpoint."[302]

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tional values more than the closing of school doors to all. *See* Stone, *supra* note 247, at 197-98 (while a content-neutral regulation may have the ultimate effect of "reduc[ing] the sum total of information" (an important concern of the First Amendment), a viewpoint-based ban that reduces the "total quantity of communication" less but distorts public debate "perhaps . . . more fundamentally" violates core concerns of the First Amendment.). As the Court has stated, "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Police Dep't of Chicago v. Mosley, 409 U.S. 92, 96 (1972), *quoted in* Lehman v. City of Shaker Heights, 418 U.S. 298, 316 (1974) (Brennan, J., dissenting). Thus, the choice forced upon a school between opening its doors to all or completely closing its forum is merely a choice forced upon them by the First Amendment's protection of less-favored viewpoints. If schools wish to close their doors to "hate groups" and political and religious strife, they should not open their doors to outside groups addressing issues such as moral values; giving schools discretion to open their doors to address such topics of deeply-felt concern while excluding religious speech inevitably results in the favoring of majoritarian perspectives on such topics.

[300] Salomone, *supra* note 79, at 16. The distinction is, as a recent case states, "elusive." Grossbaum v. Indianapolis-Marion County Bldg Authority, 870 F. Supp. 1450, 1456 (S.D. Ind. 1994), *rev'd* No. 94-3790, 1995 WL 480646 (7th Cir. 1995),

[301] Salomone, *supra* note 79, at 16.

[302] *Good News*, 28 F.3d at 1507 and 1507 n.12. Similarly, in Hedges v. Wauconda Community Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993), Judge Easterbrook of the Seventh Circuit struck down as facially invalid a junior high school regulation that prohibited student distribution of religious literature, including literature that "promulgate[s] the teaches [sic] of the faith" and material "which represents an effort to proselytize other students." *Id.* at 1296. Judge Easterbrook, relying on *Lamb's Chapel*, wrote:

> Schools may not prohibit their pupils from expressing ideas. . . . [Government] may not discriminate on account of the speaker's *viewpoint*. Especially not on account of a religious *subject matter*, which the free exercise clause of the first amendment singles out for protection.

Id. at 1297 (emphasis added) (citations omitted). *See also id.* at 1300 (construing *Lamb's Chapel* to hold that even in a nonpublic forum government "may not adopt unjustified

The Court had considered this issue in *Lamb's Chapel*. The church had argued that the "*per se* exclusion of a religious perspective is viewpoint-discriminatory."[303] By opening its facilities to a broad range of uses, including social and civic uses and uses for "the welfare of the community," and excluding "religious uses," the school district singled out a particular perspective for exclusion, for religion provides a perspective on civic and social issues, as well as on the welfare of the community.[304]

However, the Court carefully avoided this issue, holding only that the regulation was unconstitutional as applied in the specific facts of that case—the district had allowed the subject of family issues within

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restrictions and may not discriminate against disfavored viewpoints or *subjects* (such as religion).") (emphasis added).

In *Hedges*, the other prohibitions included literature that was libelous, obscene, pornographic, pervasively lewd and vulgar, or speech of a commercial nature. *Id.* at 1296-97. Separationism's claim that religion is an excludible subject matter and that excluding "religious reasons . . . from the public realm" does "not imply a discriminatory message," Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 806-07 (1993), is false. It results in the relegation of private religious speech to the status of a proscribable speech category. As Judge Easterbrook stated, the regulation impermissibly "lumps religious speech with obscenity and libel for outright prohibition in the junior high school. Schools may not prohibit their pupils from expressing ideas." 9 F.3d at 1297. Justice Scalia made this point in a case decided around the same time as *Rosenberger*. Capitol Square Review and Advisory Board v. Pinette, 115 S. Ct. 2440, 2449 (1995) ("The contrary view . . . exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives, than to private prayers.)

[303] Brief for the Petitioners at 30, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024) (citing May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1104, 1114 (7th Cir. 1986)).

[304] United States Supreme Court Official Transcript at 9, 15, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024). The Attorney General had argued that religious advocacy has a benefit only to those who already believe and thus religious activities are irrelevant to the welfare of the community. *Id.* at 21. However, this is hard to swallow. With families in modern society in such disarray, there would no doubt be members of the community who would seek to hear the message of the Turn Your Heart Toward Home film series, which addressed topics such as parenting of adolescents and young children and overcoming a painful childhood. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2144 n.3 (1993). *See also* comments of Professor Lupu *supra* note 282.

the forum while excluding the Lamb's Chapel church which sought to address the very same topic from a Christian perspective.[305]

Perhaps the Court did not want to open a pandora's box. For if religion is a viewpoint, then what about politics?[306] Would all subject matter exclusions of religion be *per se* viewpoint-based, forcing schools to allow Catholic Masses whenever a few community lectures are allowed in their buildings?[307]

4. Content-based and viewpoint-based discrimination in Rosenberger

The distinction between content-based and viewpoint-based discrimination was a key issue in *Rosenberger*. Indeed, in an "unusual, even audacious strategy," at the Supreme Court level, the University bypassed the Establishment Clause argument and placed all its eggs into the content-based discrimination basket.[308]

The main argument was that "'[w]hen government funds speech, it may consider content.'"[309] Since funds, unlike facilities which can be

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[305] 113 S. Ct. 2141, 2147 (1993). At oral argument, one of the justices had said, "[Y]ou don't have to defend some of these rather extreme hypotheticals to win your case. Your position, I take it, is that since they have had family rearing matters shown and discussed, they can't exclude a family rearing presentation because of a religious perspective . . . ." United States Supreme Court Official Transcript at 18, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

[306] The question of whether "political speech" could be properly excluded within the government's discretion was one of the concerns of the justices. United States Supreme Court Official Transcript at 8-9, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024). ("QUESTION: But what if the school district had adopted a policy of excluding both religious and political speech on the grounds these tend to cause controversy and arguments and we'd just rather stay away from them?" *Id.* at 8).

[307] United States Supreme Court Official Transcript at 25-26, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024) ("QUESTION: [I]f you open your auditorium to two or three different lectures in the community . . . you're going to have to allow a Catholic mass to be said in that facility. Because I've heard [Mr. Sekulow, the attorney for the church] say nothing that would allow the Court to write a decision that gives any kind of reasonable assurance that we can design a category to prevent this use once we have two or three different lecture groups come in from the community at large.")

[308] Linda Greenhouse, *Justices Hear Campus Religions Case*, N.Y. TIMES, Mar. 2 1995, at A11. This was the University's main argument to the Supreme Court. *See* Brief for the Respondents, *Rosenberger* (No. 94-329). The brief barely discusses the Establishment Clause issue. *Id.* at 27-29.

[309] Brief for the Respondents at 17, *Rosenberger* (No. 94-329). The University argued

made available to student groups at "virtually zero marginal cost," are limited,[310] content-based distinctions in the allocation of funds are "both inevitable and lawful."[311] Government entities such as universities and schools make countless content-based decisions in allocating scarce funds such as the "selection of courses for the curriculum, the provision of support for research, and the hiring and promotion of professors."[312] The argument was based primarily on *Regan v. Taxation With Representation of Washington*[313] and *Rust v. Sullivan*,[314] two cases upholding the government's selective funding of certain messages, and not others, against speech discrimination claims.[315]

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that *Widmar* itself had made the distinction, suggesting that its decision was not meant to "'question the right of the University to make academic judgments as to how best to allocate scarce resources.'" Widmar v. Vincent, 454 U.S. 263, 276 (1981), *quoted in Rosenberger*, 115 S. Ct. at 2518.

[310] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2518 (1995); Brief for the Respondents at 14, *Rosenberger* (No. 94-329).

[311] *Rosenberger*, 115 S. Ct. at 2518.

[312] Brief for the Respondents at 14-15, *Rosenberger* (No. 94-329). Professor Jeffries argued:

> If the First Amendment were construed to demand content-neutrality in funding, routine decisions would invite a lawsuit. Everyday academic determinations would trigger the search for a compelling interest, and judicial review would supplant academic decisions in the management of public universities. In short, to require that scarce dollars be distributed without regard to the content of speech would be to disable public universities from using public funds to pursue public policies.

Id. at 15.

[313] 461 U.S. 540 (1983).

[314] 500 U.S. 173 (1991).

[315] In *Regan*, a nonprofit corporation, Taxation with Representation of Washington ("TWR"), sought tax exempt status from the Internal Revenue Service, but was denied because it engaged in lobbying. As a result, contributors to TWR could not deduct contributions to TWR from their income taxes. *Regan*, 461 U.S. at 541-43. The Court held that the statute did not penalize TWR in its exercise of constitutional rights, but that "Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 546.

In response to TWR's contention that Congress was discriminating against lobbying by subsidizing some speech but not speech that included lobbying, the Court held that Congress has broad discretion and that there is no entitlement to subsidization of constitutional rights. *Id.* at 546-50.

In *Rust*, federal funds were designated for family-planning services, but clinics that provided abortions or counseled or lobbied for abortions were ineligible for the funds. *Rust*, 500 U.S. at 178-81. In response to a challenge that the program discriminated against the viewpoint of those health care organizations that promoted abortion, *id.* at

The University argued that under forum doctrine, the SAF fell within the category of a nonpublic forum, and thus, the University could "set priorities and pursue policies . . . by reference to the content of funded speech."[316]

Thus, the denial of SAF monies to Wide Awake was a legitimate content-based exclusion under both subsidy and forum doctrine. The regulation and the denial were not viewpoint-based; the University had merely within its discretion excluded the subject matter of religious speech from funding, just as it had excluded political activities, philanthropic activities and social entertainment.[317] Excluding religion as a subject matter is no more viewpoint-based than excluding political lobbying and electioneering as subject matters.[318] As the University argued:

> If an across-the-board exclusion of all religious activities from funding amounts to viewpoint discrimination, then so does the exclusion of all lobbying, electioneering, or philanthropic activities. Indeed, if the exclusion of all religious activities from public funding constitutes viewpoint discrimination, then so does every categorical limitation on public funding of expressive activities. In short, petitioners' argument turns every content-based limitation on funding into unconstitutional viewpoint discrimination.[319]

The district court decided the case on these grounds, finding the SAF to be a nonpublic forum[320] and stating that if exclusion of religion as a subject matter could be characterized as viewpoint discrimination, then "every decision by the University results in viewpoint discrimination."[321]

191, Justice Rehnquist, writing for the majority, stated that the Government could "selectively fund a program" promoting childbirth without having to fund those organizations which practiced abortion. *Id.* at 193 "In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.*

Thus, both of these cases, according to the University, teach that the government may make "reasonable content-based distinctions in the distribution of public funds," subject only to a reasonableness standard. Brief for the Respondents at 20-21, *Rosenberger* (No. 94-329).

[316] Brief for the Respondents at 31-32, *Rosenberger* (No. 94-329).

[317] *Id.* at 23.

[318] *Id.* at 23.

[319] *Id.* at 24.

[320] Rosenberger v. Rector & Visitors of Univ. of Va., 795 F. Supp. 175, 180 (W.D. Va. 1992), *aff'd*, 18 F.3d 369 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510.

[321] *Id.* at 181-82. Such a view "may be true in the abstract, but this court, and the University, must live in the real world." *Id.*

Of the two barriers to religious equal access, the second one is perhaps the more subtle and difficult to overcome. The first barrier, the Establishment Clause argument, is straightforward: no monetary aid can go to core religious activity. The unequal and discriminatory results are plain and manifest.[322] On the other hand, the second barrier, a discretionary exclusion of religious speech, appears less discriminatory, but for that reason is all the more dangerous to religious speech rights.

Under forum doctrine, the exclusion of religion as a subject matter need only be reasonable and not viewpoint discriminatory. This deferential reasonableness test is easily satisfied.[323] "Reasonable" reasons for excluding Wide Awake from SAF funding could be a "fear" of violating the Establishment Clause—without showing any actual violation—to avoid getting involved in inter-religious strife,[324] and to preserve the SAF for "educational purposes."[325]

However, these reasons rest on the same assumptions as separationism does: to say that religious perspectives on sexuality, race-relations, or other topics debated by students in the academic setting are not "educational" while other perspectives are, is merely another way of

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[322] *See* discussion *supra* part III.B.3.

[323] *See e.g.*, *Rosenberger*, 795 F. Supp. at 180 ("It is not the province of this court to second guess the legal judgments made by the University" and thus the University's proffered reasons for excluding Wide Awake were reasonable); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806-11 (1985) (excluding political advocacy groups from pool of charitable organizations soliciting federal employees to avoid controversy and appearance of political favoritism); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (plurality opinion) (restriction of political advertising from bus-advertising panels reasonable to protect revenue from commercial advertising, keeping bus riders free from the "blare of political propaganda," and avoiding the appearance of political favoritism. *Id.* at 304).

[324] *Rosenberger*, 795 F. Supp. at 180 (Fears of violating the Establishment Clause and getting entangled with religion were reasonable "[g]iven the complexity of the law" in this area); Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501 (8th Cir. 1993) (dissenting opinion) (school policy excluding religious groups from after-hours access reasonable to avoid a potential violation of the Establishment Clause, *id.* at 1514-16, and to avoid the school from being turned into a "religious battleground," with access opened to hate groups and other fanatical groups, *id.* at 1516-17, 1519), *cert. denied*, 115 S. Ct. 2640 (1995).

[325] Luba L. Shur, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665 (1995) (arguing that compelling University to give SAF funding to Wide Awake "usurps from the university the right to define what is educational.").

saying that religion is a private matter that is unsuitable for public debate.[326]

Thus, either argument against religious equal access in *Rosenberger*—that the Establishment Clause forbids direct financial aid to core religious activity or that the government has discretion to exclude religion as a subject matter from nonpublic forums and subsidy programs—would achieve the same result, the exclusion of religious voices from the realm of public debate that separationism considers inappropriate for religion.[327]

IV. THE *Rosenbeger* Decision

Rosenberger v. Rector and Visitors of University of Virginia,[328] as the progeny of *Widmar*, *Mergens*, and *Lamb's Chapel*, justly deserves the description of the fourth religious equal access case. Based on the equal access principles established in the earlier cases, a five to four majority[329] held that the University of Virginia had discriminated against the religious viewpoint of Wide Awake by denying SAF monies to the

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[326] For commentators critiquing this understanding, see *supra* note 63.

[327] The issue of whether religion is a subject matter or viewpoint in some ways is central to the equal access debate. Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 806-07 (1993). As Professor Teitel observes:

> The equal access principle may remedy the prior separation model's unequal treatment of religion. This argument, however, begs the threshold question of whether inequality exists.
>
> Under the discourse model, religious claims have been understood as an excluded viewpoint. Such exclusion is presumptively invalid under the First Amendment and gives rise to a mandate to restore equality of access.
>
> Under a competing understanding of religious claims, these claims are considered as a speech category. Consequently, to the extent that religious reasons are excluded from the public realm, the exclusion would not imply a discriminatory message. Whether religion is deemed to implicate viewpoint issues or subject matter affects what will constitute religious equality in representation in the public sphere.

Id.

[328] 115 S. Ct. 2510 (1995).

[329] Justice Kennedy authored the opinion and was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas. *Id.* at 2513. Justice O'Connor in her concurring opinion agreed that the University had discriminated against Wide Awake's religious viewpoint. *Id.* at 2528. Justice Souter's dissent was joined by Justice Stevens, Justice Ginsburg, and Justice Breyer. *Id.* at 2533.

magazine,[330] and a plurality[331] found that the Establishment Clause would not be violated if the University paid Wide Awake's printing bill from the SAF.[332]

A. Free Speech: Viewpoint Discrimination

1. The majority

Justice Kennedy, writing for the majority,[333] found that the University regulation denying funding to religious activities, both by its terms and in its application, discriminated against the Wide Awake students on the basis of their "religious editorial viewpoint."[334] The SAF, while not a forum in a "spatial or geographic sense," was nevertheless a "forum more in a metaphysical . . . sense" requiring application of forum principles.[335]

Relying on *Lamb's Chapel* as "[t]he most recent and most apposite case,"[336] Justice Kennedy noted that Wide Awake magazine was denied funding for no other reason than its religious perspective, just as the church film series in *Lamb's Chapel* was denied access for no other reason than its religious viewpoint on family and child-raising issues.[337]

Wide Awake magazine addressed a wide variety of otherwise approved subjects from a Christian perspective.[338] It applied for SAF funding as a "student news, information, opinion, entertainment, or academic com-

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[330] *Id.* at 2528.

[331] Justice O'Connor agreed that the Establishment Clause would not be violated by allowing Wide Awake to have SAF monies but wrote separately to analyze the Establishment Clause issue under an endorsement test. *Id.* at 2525-28. Justice Thomas, while joining the Court's opinion, wrote "separately to express [his] disagreement with the historical analysis put forward by the dissent." *Id.* at 2528.

[332] *Id.* at 2520-28.

[333] *Id.* at 2513.

[334] *Id.* at 2517.

[335] *Id.* at 2517. This was contrary to the Fourth Circuit which rejected the idea that the SAF fund was a public forum, stating that "the long line of public forum cases have taken 'forum' in a fairly literalistic way involving physical space." Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 287 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

[336] *Rosenberger*, 115 S. Ct. at 2517.

[337] *Id.* at 2518.

[338] *Id.* at 2517.

munications media group,"[339] a category of speech otherwise approved within the forum. The magazine was denied only because of its Christian perspective.[340]

Justice Kennedy in fact went further than holding that the University had discriminated against Wide Awake. He held that the University regulation was invalid on its face because it excluded a class of student groups only on the basis of their religious perspective: "By the very terms of the SAF prohibition, the University . . . selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[341]

Responding to the University's argument that the Guidelines and denial were a permissible content-based exclusion in a nonpublic forum,[342] Justice Kennedy acknowledged that the distinction between content discrimination and viewpoint discrimination[343] was "not a precise one"[344] and conceded that religious inquiry was a subject matter constituting a "comprehensive body of thought."[345] Nevertheless, he asserted, religion "also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."[346]

Justice Kennedy argued that the cases upholding the right of government to selectively fund certain messages while not funding others[347] merely embody the "principle that when the *State* is the speaker, it may make content-based choices."[348] This includes "when it enlists private entities to convey its own message"[349] as was the case in *Rust v. Sullivan* where the government funded certain private health services to "promote a particular policy"[350] (of encouraging childbirth instead of abortion).[351]

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[339] *Id.* at 2522.

[340] *Id.* at 2517-18.

[341] *Id.* at 2517.

[342] *Id.*

[343] *Id.* ("Thus in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

[344] *Id.*

[345] *Id.*

[346] *Id.*

[347] *See* discussion *supra* notes 309-15 and accompanying text.

[348] *Rosenberger*, 115 S. Ct. at 2518 (emphasis added).

[349] *Id.*

[350] *Id.* at 2518-19.

[351] Rust v. Sullivan, 500 U.S. 173, 193 (1991). In *Rosenberger*, Justice Kennedy

The SAF, on the other hand, was not created to convey the *University*'s favored message; rather, its purpose was "to encourage a diversity of views from *private* speakers."[352] Indeed, the University specifically took steps to distance itself from the messages conveyed by the CIOs, requiring each CIO to sign a contract agreeing that they "are not the University's agents, are not subject to its control, and are not its responsibility."[353] Thus, when the University is funding "private speakers who convey their own messages, [it] may not silence the expression of selected viewpoints."[354]

Justice Kennedy found two dangers to First Amendment liberties in the University's regulation. The first was the power it gave to the State to scrutinize and examine publications for certain ideas.[355] The second was the regulation's chilling effect on student speech in the University

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[351] Rust v. Sullivan, 500 U.S. 173, 193 (1991). In *Rosenberger*, Justice Kennedy reasoned:

> In . . . Rust v. Sullivan . . . we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Rosenberger, 115 S. Ct. at 2518-19.

Justice Kennedy distinguished *Regan* as involving "preferential treatment of certain speakers—veterans organizations—and not a distinction based on the content or messages of those groups' speech." *Id.* at 2519 (discussing Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548 (1983)). In *Regan* the preferential treatment accorded to veterans' organizations was based upon their status as those who had served in wars, not "on the content of any speech they may use, including lobbying." *Regan*, 461 U.S., at 548. On the other hand, the University's regulation in *Rosenberger* "has a speech-based restriction as its sole rationale and operative principle." *Id.*

[352] *Rosenberger*, 115 S. Ct. at 2519 (emphasis added).

[353] *Id. See also, Rosenberger*, 115 S. Ct. at 2526-27 (O'Connor, J., concurring) ("[T]he agreement requires that student organizations include in every letter, contract, publication, or other written materials [a] disclaimer" stating that the "organization is independent of . . . the University.").

[354] *Id.* at 2519.

[355] *Id.* at 2520.

setting "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[356]

The regulation, argued Justice Kennedy, "effects a sweeping restriction on student thought and inquiry."[357] The definition of religious activity as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality"[358] has a "vast potential reach."[359] The words "promote" and "manifest" could encompass any student writing that simply exhibits belief in an ultimate reality or deity.[360]

As Justice Kennedy noted, "Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes," as well as anti-religious "under-graduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre.[361] Justice Kennedy continued:

> If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) perfections.[362]

Thus, the University "regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment."[363]

2. The dissent

The dissent, authored by Justice Souter, took the position that the regulation was content-based rather than viewpoint-based. Justice Souter argued that the regulation and denial was a restriction of the subject matter of religious advocacy.[364] The regulation does not restrict just any writing that happens to manifest or promote religious belief, but

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[356] *Id.*
[357] *Id.*
[358] *Id.* at 2515, 2520.
[359] *Id.* at 2520.
[360] *Id.*
[361] *Id.*
[362] *Id.*
[363] *Id.* at 2510.
[364] *Id.* at 2549.

only those that *primarily* manifest and promote belief in a deity or ultimate reality.[365] Furthermore, the articles in Wide Awake magazine were not mere "descriptive writing informing a reader about the position of a given religion"[366] but instead involved "straightforward" religious exhortation and proselytization.[367]

According to Justice Souter, viewpoint discrimination occurs when government allows one viewpoint into a forum but excludes the opposing or competing viewpoint.[368] Here, the University had merely excluded an entire topic, namely religious advocacy.[369] If the University had, as in *Lamb's Chapel*,[370] funded anti-religious advocacy such as atheist journals while excluding Wide Awake, the situation would be different. But the restriction applied evenhandedly to all religious advocacy, excluding not only Christian advocacy, but agnostic and atheist, as well as "Muslim and Jewish and Buddhist" advocacy.[371] Thus, the University did "not skew debate by funding one position but not its competitors."[372]

Justice Souter argued that the Court's holding amounts to the position that "religious and antireligious speech, grouped together, always provides an opposing (and not merely a related) viewpoint to any speech about any secular topic."[373] In other words, exclusion of the topic of religious advocacy as a topic from a forum is always viewpoint discriminatory because it will always provide an opposing view to other topics within the forum. Citing cases upholding exclusions

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[365] *Id.* at 2550 (The Court reads the word "primarily" . . . right out of the Guidelines. . . .) (Souter, J., dissenting).

[366] *Id.*

[367] *Id.* at 2535.

[368] *Id.* at 2548-49 ("[V]iewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond.").

[369] *Id.* at 2549.

[370] Justice Souter argued that in *Lamb's Chapel*, the school district at oral argument had candidly admitted that it would allow anti-religious—specifically, atheistic and communist—views on the family while excluding the Christian perspective on the same subject. *Id.* at 2550 n.13.

[371] *Id.* at 2549.

[372] *Id.* at 2550. As Justice Souter argued, a "university's decision to fund a magazine about racism, and not to fund publication aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion." *Id.* at 2551.

[373] *Id.*

of political speech as a category from various forums,[374] he argued that the Court had "all but eviscerated the line between viewpoint and content,"[375] and warned that the Court's holding would "significantly expand access to limited-access forums."[376]

Justice Kennedy responded that Justice Souter's concept of viewpoint discrimination "reflects an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech."[377] "Public discourse" is much more "complex and multifaceted," and excluding both religious and atheistic voices from the debate on racism, for example, would be just as bad as excluding one or the other, or "yet another political, economic, or social viewpoint."[378] The exclusion of "multiple voices" from the debate merely skews the debate in "multiple ways."[379]

Furthermore, making the fine distinction between speech *advocating* religion as opposed to speech *about* religion would require the University to "scrutinize the content of student speech"[380] in a manner which not only "raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy,"[381] but would "entangle the [government] with religion in . . . forbidden [ways]."[382] The Court in *Widmar* had addressed a similar issue about distinguishing worship speech from speech about religion,[383]

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[374] *Rosenberger*, 115 S. Ct. at 2551 (quoting Greer v. Spock, 424 U.S. 828 (1976) (upholding regulation prohibiting political speeches on military bases); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985) (exclusion from fundraising drive of political activity or advocacy groups is facially viewpoint neutral despite inclusion of charitable, health and welfare agencies); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (ability of teachers' bargaining representative to use internal school mail system does not require that access be provided to 'any other citizen's group or community organization with a message for school personnel'); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (exclusion of political messages from forum permissible despite ability of nonpolitical speakers to use the forum).).

[375] *Id.* at 2550.

[376] *Id.* at 2551.

[377] *Id.* at 2518.

[378] *Id.*

[379] *Id.*

[380] *Id.* at 2524.

[381] *Id.*

[382] *Id.* at 2524 (quoting Widmar v. Vincent, 454 U.S. 263, 269-70 n.6 (1981)).

[383] Widmar v. Vincent, 454 U.S. 263, 284-86 (1981). The dissent had argued that verbal worship acts are different from speech discussing religion and therefore, the

and had concluded that the distinction might be "unintelligible" and not within "judicial competence to administer."[384]

B. Establishment Clause

1. The plurality

Justice Kennedy's Establishment Clause opinion, unlike the Free Speech holding which commands a majority, is only a plurality opinion. Justice O'Connor, providing the fifth crucial swing vote, concurred in the result but wrote separately, analyzing the Establishment Clause issue under her fact-specific endorsement test.[385]

Justice Kennedy, not explicitly mentioning the *Lemon* test, instead stated that Establishment Clause questions were analyzed by "inquir[ing] first into the purpose and object of the governmental action . . . and then into the practical details of the program's operation."[386] A "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion."[387]

Thus, Justice Kennedy, relying on the neutrality principle articulated in the "aid-to-religion" cases, basically applied equal access reasoning to uphold SAF funding of Wide Awake.[388] The distribution of SAF monies to Wide Awake would not violate the Establishment Clause because it was "neutral toward religion."[389] The basic principle is that the Establishment Clause is not violated "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[390]

Such was the case here. The University created the SAF to "open a forum for speech and to support various student enterprises . . . in

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University could make content-based distinctions to exclude religious worship, even though such worship involves speech, without being subject to Free Speech challenge. *Id.*

[384] *Rosenberger*, 115 S. Ct. at 2540 (quoting Widmar v. Vincent, 454 U.S. 263, 269-70 n.6 (1981).

[385] *Id.* at 2525-28 (O'Connor, J., concurring)

[386] *Id.* at 2521.

[387] *Id.*

[388] *See supra* part III.B.2. and accompanying text.

[389] *Rosenberger*, 115 S. Ct. at 2522.

[390] *Id.* at 2521.

recognition of the diversity and creativity of student life,"[391] not to advance religion. The funds would be neutrally distributed to "student news, information, opinion, entertainment, or academic communications media groups."[392] And Wide Awake sought funding as a student journal under this category, not as a "religious organization," a category of organizations ineligible for funding.[393]

In addition, the University's SAF program "respect[ed] the critical difference 'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect.'"[394] Thus, because the University had taken "pains to disassociate itself from private" student speech,[395] there was no realistic danger that Wide Awake's religious speech was "being either endorsed or coerced by the State" or that people would mistakenly attribute its religious message to the University.[396]

Justice Kennedy also distinguished the mandatory $14.00 fee from "a tax levied for the direct support of a church or group of churches."[397] The $14.00 fee, while an exaction upon the students, was not a "general tax designed to raise revenue for the University,"[398] and as such, any disbursements from the SAF would not be equivalent to government expenditures from a "general public assessment designed and effected to provide financial support for a church."[399] The SAF was a special fund collected for the purpose of supporting diverse student activities from which any CIO could draw for uses "consistent with the University's educational mission."[400]

However, what about the bar against direct financial aid to pervasively sectarian organizations? Admitting that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions,"[401] Justice Kennedy nevertheless

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[391] *Id.* at 2522.

[392] *Id.*

[393] *Id.*

[394] *Id.* (quoting Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990)).

[395] *Id.* at 2523.

[396] *Id.*

[397] *Id.* at 2522.

[398] *Id.*

[399] *Id.*

[400] *Id.*

[401] *Id.* at 2523.

stated that the no-direct-aid principle did not apply because in this case "no public funds flow directly to [Wide Awake Publications'] coffers."[402]

In making this difficult argument, Justice Kennedy emphasized that payments were made to a third-party printer, not directly to Wide Awake.[403] The mere expenditure of government money for benefits in which religious groups share does not violate the Establishment Clause; if it did, "*Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled"[404] because the government undoubtedly had to expend money to provide religious groups access to rooms, "if only [to pay for] electricity and heating or cooling costs."[405]

Like the neutrally provided benefits of rooms and maintenance services, the University could also provide services to students such as the use of University computers, xerox machines and printing facilities to its students.[406] There would be no Establishment Clause violation in allowing religious groups to use these services, as long as they were made generally available on a "religion-neutral, say first-come-first-served, basis."[407] There would be no logical difference between the University itself providing the printing services and the University paying a third-party contractor to provide the printing services for Wide Awake.[408] Thus, "[a]ny benefit to religion is incidental to the government's provision of [the] secular service" of printing, which is a "routine, secular, and recurring attribute of student life."[409]

Justice Kennedy distinguished Wide Awake magazine from a church, stating that the "student publication is not a religious institution" under either case law or as defined by University regulations.[410] Instead, he characterized Wide Awake magazine as a student "publication involved in a pure forum for the expression of ideas."[411]

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[402] *Id.*
[403] *Id.*
[404] *Id.*
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.* at 2524.
[409] *Id.*
[410] *Id.* at 2524 (It was not a "religious organization," defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.").
[411] *Id.* at 2524.

2. The dissent

Justice Souter, joined by three other justices, would have held that the Establishment Clause compelled the University to withhold SAF funds from Wide Awake because "if nothing else" the Establishment Clause "categorically forbid[s]"[412] "direct public funding of core sectarian activities."[413]

Quoting articles from Wide Awake, Justice Souter characterized the magazine as "straightforward exhortation" of a proselytizing nature, the "preaching [of] the word," not an objective discussion of issues from a Christian editorial perspective.[414] He cited both history[415] and the prior Supreme Court religion cases[416] as repeatedly and categorically stating the same rule: that the Establishment Clause "absolutely prohibit[s] government-financed . . . indoctrination into the beliefs of a particular religious faith."[417]

Justice Souter claimed that the evenhandedness and neutrality principle is based on a "subsidiary body of law"[418] which is only a "'significant factor' in certain Establishment Clause analysis, [but] not a dispositive one."[419] He further noted that in *Bowen v. Kendrick*, the Court had articulated an evenhandedness principle, allowing federal funds to be neutrally given to a broad range of organizations including religious ones for "adolescent sexuality and pregnancy" services[420]; however, if a religious group receiving funds was actually engaged in inculcating religious faith, the funds would have to be cut off.[421]

Justice Souter distinguished *Widmar*, *Mergens*, and *Lamb's Chapel* as involving "free speech on the model of the street corner":[422]

> While [these cases] do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street

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[412] *Id.* at 2535.
[413] *Id.* at 2540.
[414] *Id.* at 2535.
[415] *Id.* at 2535-37.
[416] *Id.* at 2539. See *supra* note 180 for cases cited by Justice Souter.
[417] *Id.* at 2538 (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)).
[418] *Id.* at 2540.
[419] *Id.*
[420] *Id.* at 2543.
[421] *Id.*
[422] *Id.* at 2546.

> corner . . . and on the analogy between the public street corner and open classroom space.[423]

In contrast:

> There is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid.[424]

Thus, Justice Souter would hold that the rule against direct financial aid to religion forbids not only outside printing but printing provided by the University as well.[425] With a tone of warning, Justice Souter stated, "The Court today, for the first time, approves direct funding of core religious activities by an arm of the State."[426]

3. Justice O'Connor's crucial swing vote and Justice Thomas' concurrence

Justice O'Connor provided the crucial swing vote in a separate highly fact-specific opinion that analyzed the Establishment Clause issue using the endorsement test.

Acknowledging that the prohibition against viewpoint discrimination and the prohibition against direct public funds to religion were both "bedrock principles"[427] of "equal historical and jurisprudential pedigree,"[428] Justice O'Connor stated that resolution of the conflict "depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause."[429]

Four specific considerations led Justice O'Connor to conclude that the Establishment Clause would not be violated if the University were to give SAF money to Wide Awake. First, "the student organizations, at the University's insistence, remain strictly independent of the Uni-

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[423] *Id.*
[424] *Id.*
[425] *Id.*
[426] *Id.* at 2533.
[427] *Id.* at 2525.
[428] *Id.* at 2526.
[429] *Id.* at 2525-26.

versity."[430] Second, "financial assistance is distributed in a manner that ensures its use only for permissible purposes," with payment directly to the third-party vendor, and not to Wide Awake Publications.[431]

Third, the "widely divergent viewpoints" represented by the student journals, "all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University."[432]

Fourth, students who objected to their money going to Wide Awake had a potential Free Speech challenge to demand a refund for student activity funding that supported speech they did not agree with.[433] The lower courts are divided on this question,[434] but if the Court were to rule in favor of an "opt-out" right, it would give students a right not generally available to citizens who object to government monies expended on causes they disagree with.[435] This would "provide[] a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding and from government funds generally."[436] Under this view, the SAF is "a

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[430] *Rosenberger*, 115 S. Ct. at 2526. The University's agreement with the CIOs provided that "the CIO is not part of [the University], but rather exists and operates independently of the University. . . . The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities." The agreement also required that the CIOs include disclaimers in "every letter, contract, publication, or other written materials." *Id.*

[431] *Id.* at 2527.

[432] *Id.* Justice O'Connor pointed out:

> Besides the general news publications, for example, the University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al-Salam, a publication to "promote a better understanding of Islam to the University Community." Given this wide array of non-religious, anti-religious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical.

Id. (citation omitted).

[433] *Id.*

[434] *Id.* (citing Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993); Kania v. Fordham, 702 F.2d 475, 480 (4th Cir. 1983); Good v. Associated Students of Univ. of Wash., 86 Wash.2d 94, 105-06, 542 P.2d 762, 769 (1975) (en banc); Smith v. Regents of Univ. of Cal., 4 Cal.4th 843, 863-64, 844 P.2d 500, 513-14, *cert. denied*, 115 S. Ct. 181 (1993)).

[435] *Rosenberger*, 115 S. Ct. at 2527 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

[436] *Id.*

fund that simply belongs to the students," and thus not subject to the Establishment Clause prohibition against government resources—whether from tax revenue or other sources—funding religious activity.[437]

Justice Thomas wrote separately on the Establishment Clause issue to "express [his] disagreement with the historical analysis put forward by the dissent."[438] Citing numerous examples from history where the founding fathers approved monetary aid to religious causes,[439] Justice Thomas took issue with the strict "no-aid" rule that the dissent claimed was at the heart of Establishment Clause concerns.[440] Although he fully joined the opinion of the plurality, in actuality he seems to go further, indicating that he would accept direct monetary funding of religious entities: "The [Establishment] Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants."[441]

V. Analysis and Impact

A. Free Speech Opinion

1. Religious viewpoints in the marketplace of ideas

The viewpoint discrimination holdings of *Rosenberger* both apply and extend the teachings of *Lamb's Chapel*. In a sense, *Rosenberger* is an "easy case" under *Lamb's Chapel*. There is no real problem that the includible subject matters are being subjectively characterized in a

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[437] *Id.* at 2528.

[438] *Id.* Justice Thomas argued that the Virginia assessment bill provided for a tax to be levied for no other purpose but supporting religious clergy. *Id.* The assessment was invalid "not because it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits." *Id.* at 2529.

[439] *Id.* at 2528-32. One of the examples he cites is the granting of property tax exemptions for religious institutions which has been upheld by the Court in Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1969). Justice Thomas argued:

> In my view, the dissent's acceptance of this tradition puts to rest the notion that the Establishment Clause bars monetary aid to religious groups even when the aid is equally available to other groups. A tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy.

Id. at 2531.

[440] *Id.*

[441] *Id.* at 2532.

questionable manner.[442] The topics within the forum funded by the SAF were broad and varied, including gay and lesbian, environmental and other social issues, as well as politics, philosophy, and literature.[443] Wide Awake magazine sought to address many of these same issues and was excluded only because of its Christian perspective.[444] As Professor McConnell argued on brief:

> To exclude a magazine which explains and advocates [a Christian perspective on] issues such as racism, crisis pregnancy, eating disorders, market economics, music, education, and the fall of the Soviet Union, solely because the perspective is "religious," is plainly discrimination on the basis of viewpoint.[445]

In a context where a wide variety of ideologies and perspectives are funded, denial of funding to Wide Awake would implicate the central concerns of viewpoint discrimination.[446] Debate would be distorted, tilted towards secular ideologies and perspectives on issues of critical concern; and Wide Awake would be burdened in its ability to compete with its ideological competitors in the marketplace of ideas.[447] Such discrimination against Wide Awake would be especially egregious in the University setting, a forum that is "peculiarly 'the marketplace of ideas,'"[448] where truth is discovered "out of a multitude of tongues."[449]

2. Religious advocacy

If *Lamb's Chapel* and *Rosenberger* teach that religions can offer a perspective on debatable issues within a forum,[450] then religious groups

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[442] *See supra* part III.C.2.

[443] Brief for the Petitioners at 4-5, *Rosenberger* (No. 94-329). The funded publications included the Journal of Law and Politics, Loki Science Magazine, the Virginia Environmental Law Journal, and the Virginia Literary Review. *Id.* at 5.

[444] Brief for the Petitioners at 4-5, *Rosenberger* (No. 94-329).

[445] Brief for the Petitioners at 19, *Rosenberger* (No. 94-329).

[446] *See supra* notes 277-80 and accompanying text.

[447] Brief for the Petitioners at 19, *Rosenberger* (No. 94-329).

[448] Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

[449] Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, D.C., 52 F. Supp. 362, 372 (1943)).

[450] *Rosenberger*, 115 S. Ct. at 2549 ("[T]o permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees" (quoting Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976) (footnote omitted)).

should be allowed to advocate their perspectives, even if such advocacy involves religious preaching, teaching, and proselytization.[451] Such "religious advocacy" is no different than the ideological advocacy engaged in by other student groups.[452] As stated by Professor McConnell at oral argument, "[P]roselytize . . . is nothing but an ugly word for persuade, which is just exactly what the Free Speech Clause is designed to protect."[453]

"Secular" ideological approaches to issues such as race, gender, and sexual orientation engage in "proselytization."[454] They vigorously attempt to persuade their listeners to accept their perspectives about the problem—whether it be that there is unequal political and legal treatment or stereotypes perpetrated in the culture—and they hope that their listeners will change not only their thinking, but their behavior as well—that they will stop discriminating or get involved politically or otherwise.

The persuasive speech engaged in by Wide Awake was not different, except for its religious perspective.

For example, the article on racism, which Justice Souter claimed was nothing but a subterfuge to engage in evangelism[455]:

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[451] Justice Souter made much of the fact that Wide Awake magazine was involved in "core" religious speech, in preaching, teaching, and evangelism—encouraging its readers to religious conversion and to follow Christian teaching. *Rosenberger*, 115 S. Ct. at 2534-35. He pointed out that the mission statement of Wide Awake was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means," *id.* at 2534, and that many of the articles were explicit challenges to religious conversion, *id.* ("The only way to salvation through Him is by confessing and repenting of sin." (quoting Wide Awake magazine) (citations to record omitted)). Many articles address spiritual subjects such as prayer and the meaning of biblical texts. *Id.* at 2535. Another article proclaims that "Christ is the Bread of Life. . . . He alone can provide the ultimate source of spiritual fulfillment which permeates the emotional, psychological, and physical dimensions of our lives." *Id.* (citation omitted).

[452] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (the right to engage in vigorous religious persuasion is "essential to enlightened opinion and right conduct on the part of the citizens of a democracy," in spite of potential for abuses).

[453] United States Supreme Court Official Transcript at 53, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329).

[454] United States Supreme Court Official Transcript at 53, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329), *available in* WESTLAW, SCT-ORALARG DATABASE, 1995 WL 117631.

[455] *Rosenberger*, 115 S. Ct. at 2535. Justice Souter argued:

Even featured essays on facially secular topics become platforms from which to

> God calls us to take the risks of voluntarily stepping out of our comfort zones and to take joy in the whole richness of our inheritance in the body of Christ. We must take the love we receive from God and share it with all peoples of the world.
>
> Racism is a disease of the heart, soul, and mind, and only when it is extirpated from the individual consciousness and replaced with the love and peace of God will true personal and communal healing begin.[456]

This writing is simply persuasion based upon a religious perspective of the problem of racism. Its perspective is that the underlying nature of the problem is not legal, political, or socio-economic, but spiritual—race-hatred and bigotry lies in the heart of man; it is "a disease of the heart, soul, and mind."[457] A spiritual problem requires a spiritual cure: namely repentance and a change of heart. Thus, the Wide Awake article attempted to persuade its readers to change their minds and behavior[458]—to allow racism to be "extirpated from the individual consciousness and replaced with the love and peace of God" so that "true personal and communal healing [could] begin."[459]

> call readers to fulfill the tenets of Christianity in their lives. Although a piece on racism has some general discussion on the subject, it proceeds beyond even the analysis and interpretation of biblical texts to conclude with the counsel to take action because that is the Christian thing to do.

Id. After quoting the racism article, he continued that such writing was not a "mere descriptive" explanation of a religious perspective on racism, but rather it was "straightforward exhortation.' *Id.* It was "not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit." *Id.* at 2526.

[456] *Id.* at 2535 (quoting Wide Awake magazine).

[457] *Id.* (Souter, J., concurring) (quoting Wide Awake magazine article on racism).

[458] The word "repent," which Justice Souter considered to capture the essence of religious advocacy, *Rosenberger*, 115 S. Ct. at 2551, in its original meaning—at least in biblical usage—simply means, "to undergo a change in frame of mind and feeling." THE ANALYTICAL GREEK LEXICON REVISED 266 (Harold Moulton, ed., 1977).

[459] *Rosenberger*, 115 S. Ct. at 2535 (quoting Wide Awake magazine article on racism). Another religious perspective on the subject of racism is found in the Civil Rights movement.

Professor Stephen Carter points out that much of the Civil Rights movement was religiously motivated. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 228 (1993). Civil rights proponents unquestionably engaged in religious advocacy. They vigorously challenged, exhorted, and persuaded their listeners to take action based on religious visions of a just society that reflected the kingdom of God. Martin Luther King, Jr.'s "I Have a Dream Speech" exemplifies this, as Professor Carter writes:

> One of the great political speeches of our era, it was really a sermon, replete with references to "God's children." It could have been delivered from the pulpit without a single change, for it drew upon long-established themes in the

As argued by Justice Kennedy, if "religious advocacy" could be excluded from funding, it would require the University to "scrutinize the content of student speech" to ensure that it was not too religious.[460] This would "raise the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy."[461]

This kind of censorship is dangerous. For how religious is too religious? Justice Souter would allow "objective" discussions of religion, but not the "straightforward exhortation" to follow Christian teaching that Wide Awake was involved in.[462] However, as Justice

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> black church tradition. The concluding tag line, "Free at last, free at last; thank God Almighty, we are free at last," was, as King himself said, taken from "the words of the old Negro spiritual."

Id. (footnote omitted). The visions of a just society where people are "not judged by the color of their skin but by the content of their character," MARTIN LUTHER KING, JR., I HAVE A DREAM (August 28, 1963), *reprinted in* DOCUMENTARY HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT, at 122, 124 (Peter B. Levy ed., Greenwood Press 1992) was intertwined with King's understanding of a biblical promise that "one day every valley shall be exalted, every hill and mountain shall be made low, the rough places will be made plains, and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together." *Id.* at 125. This passage is a direct quote from the Old Testament prophet Isaiah. *Isaiah* 40:4, 5. King's understanding of the relationship between God's law and man's law is stated in his "Letter from Birmingham City Jail," "A just law is a man-made code that squares with the moral law or the law of God." CARTER, *supra*, at 228 (citation omitted).

Civil rights activists encouraged people to engage in nonviolent action inspired by "Judaeo-Christian traditions" that "seek[] a social order of justice permeated by love." *Id.* at 228 (quoting statement adopted by the Student Nonviolent Coordinating Committee). If a university in the 1960s had denied funding to such voices because they constituted "religious advocacy," it most certainly would have disfavored certain viewpoints in the campus debate on racism.

[460] *Rosenberger*, 115 S. Ct. at 2524.

[461] *Id.*

[462] *Id.* at 2535. Justice Souter argues:

> [The] writing [in Wide Awake] is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ.

Id.

Brennan in another context stated, "The line between ideological and nonideological speech is impossible to draw with accuracy."[463]

For example, the University funded Al-Salam, a magazine published by the Muslim Students Association to "promote a better understanding of Islam to the University Community."[464] What is the difference between this and Wide Awake, which was published to "facilitat[e] discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"?[465] Al-Salam was funded as a cultural activity, but in certain societies, culture and religious faith are "inseparable and interdependent."[466] To promote the culture is to promote the religion.[467] Islamic societies could arguably fall within this category.

The difference seems to be one more of "style, than [of degree of] religiosity."[468] As Professor McConnell pointed out, "Scottish Presbyterians are not less 'religious' than Pentecostals just because they are more restrained and taciturn."[469] The end result is the danger of "selective application" of the SAF restriction,[470] with decisionmakers funding "restrained and taciturn" religious groups while denying funding to more aggressive groups that might be controversial or unpopular.[471]

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[463] Lehman v. City of Shaker Heights, 418 U.S. 298, 319 (1974) (Brennan, J., dissenting). And as Justice Kennedy in this context stated. *Rosenberger*, 115 S. Ct. at 2524 (quoting Widmar v. Vincent, 454 U.S. 263, 269-70 (1981)).

[464] Brief for the Petitioners at 19, *Rosenberger* (No. 94-329).

[465] Brief for the Petitioners at 6, *Rosenberger* (No. 94-329) (citation omitted).

[466] Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (Amish society).

[467] It is true that because the first issue of Al-Salam was considered by the Student Council to be too religious and thus in danger of losing its funding, the Muslim Students Association "published a second and very different issue," Reply Brief for the Petitioners at 18, *Rosenberger* (No. 94-329) (quoting Brief for the Respondents at 10, *Rosenberger* (No. 94-329)), which was "exorcised of its references to the Koran, Islamic theology, and spirituality." *Id.* at 18-19. Who is to say that the second issue was not religious or that the first issue was too religious? As argued by Professor McConnell:

> The line between "culture and "religion" is highly subjective, if it exists at all. Who is to say that Wide Awake does not contribute to the cultural diversity of the University of Virginia campus?

Brief for the Petitioners at 20, *Rosenberger* (No. 94-329).

[468] Reply Brief for the Respondents at 12, *Rosenberger* (No. 94-329).

[469] *Id.*

[470] Charles Roth, Comment, *Rosenberger v. Rector: The First Amendment Dog Chases its Tail*, 21 J. C. & U. L. 723, 760 (1995).

[471] Brief for the Petitioners at 19, *Rosenberger* (No. 94-329) ("administration of the

Disallowing religious advocacy would thus in the end have a discriminatory impact on aggressive religious groups,[472] tilting debate in favor of both aggressive *secular* ideological advocates, and those religious groups which do not proselytize.[473]

3. Facial viewpoint-discrimination

Rosenberger, while applying and affirming *Lamb's Chapel*, also extends *Lamb's Chapel* by holding that the University regulation was not only discriminatory as applied to Wide Awake, but was in fact viewpoint-based on its face: "By the very terms of the SAF prohibition, the University . . . selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[474]

This finding seems to be correct if taken in context, but it does have its problems. The main problem is that it seems to "collapse" the distinction between subject matter and viewpoint so that religion is

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Guidelines demonstrates that the University is engaged in systematic discrimination not just between religious and nonreligious viewpoints, but among the various religious viewpoints represented at the University of Virginia." *Id.*).

The comments of one of the students responsible for making SAF determinations in the school terms following the Wide Awake incident, Brief for the Respondents at 10 n.6, *Rosenberger* (No. 94-329), illustrates the dangers of "arbitrariness and prejudice" inherent in the University regulation:

> Tanisha Sullivan, a third-year student who heads the committee that decides which student groups will get university funds, admitted in an interview that evangelical Christians are viewed warily by many students here.
>
> "It raises an eyebrow, and you look at it a little more closely just because it's Christianity," she said. "Everyone is so on edge when it comes to Christianity."
>
> The Muslim students' magazine is "teaching the culture of Islam," Sullivan said. That's a politically correct value in these days of multiculturalism. But Christianity is viewed differently, she said. "People don't consider Christianity to be part of a culture. . . . My generation is taking a turn away from Christianity and trying to explore other things, trying to break away from the norm. When you have people like the Bakers [sic] and Jerry Falwell, my generation sees Christianity as money-grubbing, sort of a farce."

Brief for the Petitioners at 20 n.12, *Rosenberger* (No. 94-329) (quoting James Gannon, *Christian Magazine Denied University Funds*, DENVER POST, Nov. 8, 1994, at 5F).

[472] *See Subject-Matter Restrictions*, *supra* note 244, at 110-11 (subject-matter restrictions that have a "de facto, viewpoint-differential impact" may be analyzed under strict scrutiny). For further discussion see *infra* notes 493-97 and accompanying text.

[473] *See infra* note 497.

[474] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2517 (1995).

always a viewpoint.[475] But the definition of religious activities as any activity that "primarily promotes or manifests a particular belief in . . . a deity or an ultimate reality"[476] seems to be aimed at a subject matter, not a viewpoint. Even if it were so far-reaching that only essays on "pasta or peanut butter cookies" would be acceptable, that still would not make it a viewpoint-based regulation.[477] It might be equivalent to banning the whole category of ethics or the humanities from funding, which are also "vast area[s] of inquiry"[478] but not necessarily viewpoints.

The Court's finding is best understood in light of three factors which are all related to the *context* of the regulation. The first factor is that the category for funded activities was in fact very broad—the University of Virginia had chosen to fund "student news, information, opinion, entertainment, or academic communications media groups."[479] In the University context, such broad criteria for eligibility—with virtually no content-based restrictions[480]—invites a multitude of subjects and issues to be addressed by an equally diverse and broad range of ideological perspectives and viewpoints. That is the nature of the forum.

Religion by its very nature is broad and all-encompassing, touching all areas of life, and will inevitably have a perspective to contribute when the range of issues is so broad.[481] As argued by Professor McConnell:

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[475] Luba L. Shur, Note, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1666 (1995).

[476] *Rosenberger*, 115 S. Ct. at 2515.

[477] *Id.* at 2520.

[478] *Id.* at 2517.

[479] *Id.* at 2522.

[480] The other regulations are defined with reference to what they "do and are" rather than their speech. Reply Brief for the Petitioners at 9, *Rosenberger* (No. 94-329). For example, while philanthropic activities are excluded from funding, a magazine advocating philanthropy would not be excluded. *Id.* at 9-10. Controversial political viewpoints are allowed to receive funding as the restriction on political activities and organizations is read to only apply to electioneering and lobbying. *Rosenberger*, 115 S. Ct. at 2514.

[481] No doubt there are some religions for which religious devotion is confined to an insignificant aspect of its adherents lives; but for a significant portion of religious believers, religious belief is vitally important, pervasively affecting every area of their lives, as well as providing them with strong convictions on various issues of social concern such as racism, *see* discussion *supra* note 459, abortion, euthanasia, and capital punishment. *See* CARTER, *supra* note 63, at 213-62.

> Christianity (like other religions) is a comprehensive world view that offers a way of thinking about everything from the nature of ultimate reality, to the way human beings ought to treat one another, to the character and quality of the culture. It competes in the marketplace of ideas with scores of secular philosophies, ideologies, and worldviews, as well as with other religions.[482]

Seen as "worldviews,"[483] religions have a perspective on the news, on information and opinion, and on academic issues, as well as on the particular subjects such as racism, sexuality, or the environment that will inevitably be discussed. The regulation at the outset carves out a range of perspectives—those that "primarily promote or manifest . . . belief in . . . a deity or an ultimate reality"[484]—from providing information, news, and opinion on the range of issues of concern that are a part of the forum. In other words, all periodicals are acceptable except those that approach the topics from a viewpoint that there is a God or Ultimate Reality.

The key factor is that the category of included uses of the forum is very broadly defined.[485] When the University has opened a forum that is so broad in nature, a regulation closing the door to only religious "worldviews" while allowing all other worldviews is viewpoint-based on its face.[486]

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[482] Brief for the Petitioners at 18-19, *Rosenberger* (No. 94-329).

[483] Under a broad understanding of "world view," everybody has one; it is defined by Dr. James Sire as "a set of presuppositions (assumptions which may be true, partially true or entirely false) which we hold (consciously or subconsciously, consistently or inconsistently) about the basic make-up of our world." JAMES W. SIRE, THE UNIVERSE NEXT DOOR (2d ed. 1988). Dr. Sire proposes a number of questions to get at the nature of a particular world view. These include: "What is prime reality—the really real? To this we might answer: God, or the gods, or the material cosmos"; "What is the nature of external reality, that is, the world around us?"; "What is a human being? To this we might answer: a highly complex machine, a sleeping god, a person made in the image of God, a 'naked ape'"; "How do we know what is right and wrong? Again, perhaps we are made in the image of a God whose character is good, or right and wrong are determined by human choice alone, or the notions simply developed under an impetus toward cultural or physical survival." *Id.* at 19. Dr. Sire attempts to catalog some of the basic worldviews that are influential in the Western world, including naturalism—which presupposes that only the material world without any spiritual realm or deity exists, *id.* at 62-63—New Age thought, *id.* at 156-208, existentialism, *id.* at 108-34, and Christian theism, *id.* at 22-44.

[484] *Rosenberger*, 115 S. Ct. at 2515.

[485] United States Supreme Court Official Transcript at 27, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024).

[486] Seen in this light, the Court would be adopting the position of the church in

The second factor in understanding the finding of facial unconstitutionality is the University context, where concerns about freedom of academic inquiry are paramount.[487] In such a setting, the broadly defined regulation would suppress speech in a way that implicates core free speech concerns.[488] Justice Kennedy discusses these concerns in his opinion: the "vast potential reach" of the regulation—censoring "hypothetical student contributors" such as Plato, Descartes, Marx and Sartre[489]—the danger of governmental censorship and scrutiny when

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Lamb's Chapel that when a forum is defined broadly to include a wide range of uses such as social and civic uses and uses for the community welfare, religious groups will provide a perspective on these categories and excluding religious purposes would be *per se* viewpoint-based discrimination. United States Supreme Court Official Transcript at 9, 14-15, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (No. 91-2024). If the school district had narrowly defined its forum to give access only to recreational activities such as bowling, it could probably legitimately exclude religious uses as a category without implicating viewpoint discrimination (although there might be some hypothetical "religious perspective" on bowling). *Id.* at 18, 24-27.

[487] *Rosenberger*, 115 S. Ct. at 2520 (discussing the University setting as one "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."). *See also* Keyishian v. Board of Regents of the Univ. of State of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[488] *Rosenberger*, 115 S. Ct. at 2520.

[489] *Id.* Overbreadth doctrine would invalidate a regulation or statute on its face if it "sweeps within its ambit," TRIBE, *supra* note 77, at §§ 12-27, 12-28, 1022 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)), a substantial amount of protected speech activity. *Id.* at §§ 12-27, 12-28, 1022, 1024-29. Thus, if the SAF regulation is not facially viewpoint-based (in which case it would be automatically invalidated, *id.* at § 12-28, 1025 (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)), then it may be overbroad in that a substantial part of its applications will reach protected speech—i.e., will discriminate on the basis of viewpoint—as compared to the portion of applications that reach "unprotected" speech, in this case, applications which discriminate only on the basis of subject matter. *Id.*

In other words, one can imagine some applications of the regulation which are not viewpoint-based. For example, a hypothetical booklet of liturgies offering "pure" worship to God does not seem to attempt to offer a perspective on debatable issues such as racism, the environment, or international relations (although one could argue that a "New Age" or Buddhist group that wanted to publish a booklet with meditations

governmental decisionmakers are given too much discretion,[490] and its chilling effect on student speech in the University setting.[491]

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and chants that promote world peace, would have a perspective on the subject matter of world peace). This would be a legitimate "subject-matter" application of the regulation. However, since the regulation is so broad in its sweep that it will cover a substantial number of religious student periodicals and activities (such as Wide Awake) which do in fact seek to offer a viewpoint on otherwise includible topics, it is overbroad.

[490] 115 S. Ct, at 2520, 2524-25 ("The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief."). *See* Saia v. N.Y., 334 U.S. 558 (1948) (holding that a prior restraint is invalid because it gives uncontrolled discretion to public officials and will cause arbitrary and discriminatory suppression of ideas. *Id.* at 560-61). *See also* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 712 (1993) (rationale for overbreadth and vagueness doctrines is to "minimiz[e] official discretion in the enforcement of statutes that might curtail speech.").

[491] *Rosenberger*, 115 S. Ct. at 2520. *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 712 (1993) (one of the rationales for overbreadth and vagueness doctrine is "to minimize 'chilling effect' of rules on people's willingness to speak up, protest, and the like.").

The University argued that the regulation is interpreted to mean only those activities which implicate "core" religious activity—proselytization, preaching, teaching, and worship—not mere academic discussions about religion. Brief for the Respondents at 6 and 6 n.2, *Rosenberger* (No. 94-329) (interpreting regulation excluding "religious activities" from funding to encompass only "religious observances and proselytizing," and not activities that have any incidental connection to religion). As already argued, this kind of distinction may not be administrable and leads to potential selective enforcement of the regulation against controversial or aggressive religions. *See* discussion *supra* notes 468-71 and accompanying text.

The Guidelines also have a chilling effect on student speech in that they will, as argued by one author, "encourage groups to become less religious, without setting a limit on how non-religious groups must become before they can qualify for aid." Charles Roth, Comment, *Rosenberger v. Rector: The First Amendment Dog Chases its Tail*, 21 J. C. & U. L. 723, 760 (1995). The Black Voices, a gospel singing group, received funding as a "cultural organization." Brief for the Respondents at 7, *Rosenberger* (No. 94-329). However, when the group "was told to stop 'praying at practices and encouraging members to be more of a model of faith' if it wanted to continue to be eligible for funding," it chose to forego funding. Brief for the Petitioners at 18, *Rosenberger* (No. 94-329). The Muslim Students Association also watered down their magazine, Al-Salam, in response to a warning that they might lose funding for being too religious. Reply Brief for the Petitioners at 18-19, *Rosenberger* (No. 94-329). The result of such "self-censorship" is that individual religious voices become "more secular and less distinctive," decreasing the "pluralism and diversity" at the University of Virginia, Reply Brief for the Petitioners at 19, *Rosenberger* (No. 94-329), and

Perhaps a useful comparison would be if the University had excluded the whole category of the humanities or ethical subjects from funding. Such restrictions would also implicate the same concerns, having a "vast potential reach" as arguably, the humanities touch every area of life, and moral issues are part and parcel of the topics that are commonly discussed on campuses.[492] Decisionmakers would need to scrutinize the speech-content of student groups' activities for moral and other ideas, and student discussion would be chilled.

A third factor in understanding the holding that the SAF regulation is facially viewpoint-based is to see it as having a "viewpoint-differential impact."[493] In certain contexts, excluding a subject-matter from a forum may actually have a "de facto" adverse impact on certain viewpoints.[494]

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suppressing the free inquiry and thought among students that is a "vital" part of any university or college. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2520 (1995).

[492] The groups at the University of Virginia such as the Student Alliance for Virginia's Environment and the Lesbian and Gay Student Union, Brief for the Petitioners at 4, *Rosenberger* (No. 94-329), would probably be engaged in moral discussion: the environmental group would claim that it is an egregious wrong to dispose of nuclear waste in areas that could harm the environment, and the Lesbian and Gay Student Union would claim that to "hate" a person on the basis of sexual orientation is morally offensive.

[493] *Subject-Matter Restrictions*, *supra* note 244, at 110.

[494] *Subject-Matter Restrictions*, *supra* note 244, at 110; Wiggin, *supra* note 230, at 2031-2037 (making the same argument that exclusion of "political" and "ideological" speech from a similar university student activities funding program has a viewpoint-differential impact). Professor Stone argues that when a subject-matter restriction is "defined in terms of speech about a specific issue or, perhaps, about a relatively narrow cluster of issues," *Subject-Matter Restrictions*, *supra* note 244, at 109, there is a likelihood that a certain side of the debate will be disadvantaged. *Id.* at 110. *See also* TRIBE, *supra* note 77, at § 12-3, 800 n.23 ("If defined sufficiently narrowly, a subject-matter restriction can also closely approximate a viewpoint regulation."). For example, a restriction barring student groups that are "organized around sexual preference" from university funding is a narrowly defined subject-matter restriction. Wiggin, *supra* note 230, at 2033 (discussing Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 364 (8th Cir. 1988)). Although facially viewpoint-neutral in the sense that both heterosexuals and homosexuals are treated in the same way, it would "disparately impact students who hold the more controversial view on the subject," because "[s]tudents who practice or believe in heterosexuality do not have the same need to organize for support and education as students who practice or believe in homosexuality; mainstream culture is geared towards heterosexuality, obviating the need for a person who supports heterosexuality to take a political stand on the issue." *Id.* at 2034. Thus, Professor Stone proposes that all such narrow issue subject matter restrictions be subject to strict scrutiny. *Subject-Matter Restrictions*, *supra* note 244, at 111.

It could be argued that the University of Virginia is just such a context.

When groups within a forum like the SAF address issues of deeply-felt human concern such as sexuality and gender equality, they touch on areas that various religions have traditionally been concerned with. "Secular" perspectives often challenge traditional religious approaches to these subjects as outmoded or oppressive.[495] When a forum that addresses such issues is closed to religious speech, secular groups within the forum can freely and vigorously advocate their positions without having to deal with a response from the opposing side—a response that can "reasonably be expected" given the nature of the subjects addressed.[496] The result is a de facto discriminatory impact on "traditional" religious viewpoints in the debate on issues of vital concern.[497]

The way for a government entity to restrict religious speech as a subject matter without implicating viewpoint discrimination is to define its forum narrowly—to fund only math journals, or newspapers covering campus events, or as Justice Kennedy suggested, essays on "pasta or peanut butter cookies."[498] Although one might argue that there is even a religious perspective on math or cooking, it is unlikely that such a claim would cause much controversy.[499] The key inquiry is the nature of the forum. Is the category of included speech broad and

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[495] *See e.g.*, Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 213-14 (1992) (secular ideologies that promote gender equality stand in opposition to traditional "notions of the natural subordination of women to men drawn by some from the Bible.").

[496] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2548-49 (1995) (Souter, J., dissenting). Such a situation would fulfill Justice Souter's conception of viewpoint-discrimination as "occur[ing] when government allows one message while prohibiting the messages of those who can reasonably be expected to respond." *Id.*

[497] For example, at the University of Hawai'i, the student senate appropriated money for a "National Coming Out Day" fair, which included "live music, a panel on same-sex marriage and informational booths." Dave Richardson, *Health Center Proposes Semester Fee*, KA LEO O HAWAI'I, Oct. 2, 1995, at 1. However, Campus Crusade for Christ, an evangelical group, was denied funding "to show a film entitled, 'How's Your Love Life,' and '[t]o present a creative seminar to help students deal with relationships from a [C]hristian perspective.'" Tipton v. University of Hawaii, 15 F.3d 922, 923-24 (1994).

Campus Crusade for Christ's more "traditional" perspective on the subject of sexual relationships was thus unable to compete on an equal basis with the "secular" perspective of the gay and lesbian students.

[498] *Rosenberger*, 115 S. Ct. at 2520.

[499] For example, there might be a Buddhist vegetarian perspective on cooking, or a Jewish Kosher perspective. However, these probably would not be controversial and the forum would probably not try to exclude these religiously-laden recipes.

without content-based speech constraints? Does the forum by nature invite discussion on issues of deeply-felt concern such as sexuality, the family or moral values?[500] If so, then excluding the subject-matter of religious speech will likely also constitute viewpoint-based discrimination against religious perspectives.

4. Tension with precedent: the question of political speech

Rosenberger's treatment of religion as a viewpoint may be in significant tension with precedent which upholds the right of government to exclude partisan political speech and political advocacy as subject-matters.[501] If an outright prohibition of religious speech in certain contexts can be viewpoint-discriminatory, why not the same for political speech?

Is there a "political perspective" on issues of concern as there are religious perspectives?[502] Justice Brennan in his dissent in *Lehman*, seems to have argued that politics provides a perspective on issues of concern that stands in opposition to a "commercial" perspective, pointing out that the city policy would discriminatorily allow "a commercial advertisement peddling snowmobiles . . while a counter-advertisement calling upon the public to support legislation controlling the environmental

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[500] Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 2640 (1995).

[501] *Rosenberger*, 115 S. Ct. at 2551 (1995). Justice Souter argued that the Court in "ha[d] all but eviscerated the line between viewpoint and content," *id.* at 2550, and that the "holding amount[ed] to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums." *Id.* at 2551. Among the cases that Justice Souter cited were Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985) (exclusion of political lobbying and advocacy organizations from charitable fundraising campaign not facially viewpoint discriminatory); Greer v. Spock, 424 U.S. 828 (1976) (upholding ban of partisan political speech such as "(d)emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" from military base; the base had invited other civilian speakers who addressed topics such as business management and drug abuse. *Id.* at 831); and Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion) (upholding city ordinance prohibiting political advertising but not commercial and public service advertisements from bus card spaces).

[502] Wiggin, *supra* note 230, at 2033 (arguing that "just as the Court [in *Lamb's Chapel*] regarded speech that incorporates a religious view of the world as speech of a particular viewpoint, speech that is informed by a political view of the world should be categorized as viewpoint-based . . . .").

destruction and noise pollution caused by snowmobiles would be rejected."[503]

In certain contexts, treating political speech with disfavor would have a viewpoint-differential impact on groups which feel the need to take political action to challenge the status quo.[504] If a university funded only student groups that were University-related and "beneficial to the

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[503] Lehman v. City of Shaker Heights, 418 U.S. 298, 317-18. Justice Brennan also quotes at length from a California Supreme Court decision with a similar argument:

> A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisement that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conversation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program. The district would accept an advertisement from a television station that is commercially inspired, but would refuse a paid nonsolicitation message from a strictly educational television station. Advertisements for travel, foods, clothing, toiletries, automobiles, legal drugs—all these are acceptable, but the American Legion would not have the right to place a paid advertisement reading, "Support Our Boys in Viet Nam. Send Holiday Packages."

Id. at 317 n.10 (quoting Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51, 57-58, 434 P.2d 982, 986-86 (1967)).

The counter-argument is that if politics is a viewpoint, "then consistency places commercial speech in a viewpoint-based category too." Luba L. Shur, Note, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1701 (1995). It would also be viewpoint discrimination to permit "Democrats to rail against smoking on health grounds, but preclude sellers of cigarettes from reminding people that a shorter, sweeter life may be better than a long life of denial." *Id.*

As in *Lehman*, the dissent in *Cornelius* also argued that a subject-matter exclusion of political advocacy organizations, while including other charitable organizations, from a forum was viewpoint discriminatory. Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 811-12 (1985) (Blackmun, J., dissenting). Justice Blackmun argued that the restriction discriminated against public service organizations with the viewpoint that social goals are best achieved by political action rather than through other means such as education and research. *Id.* at 832-33. The regulation thus favored charitable organizations which believed in working "within the confines of existing social policy and the status quo." *Id.* at 833.

[504] Wiggin, *supra* note 230, at 2033-37.

student body,"[505] but not political groups, it would favor "complacent mainstream groups" over "their politicized opponents."[506]

Justice Kennedy in *Rosenberger* suggests there is a "political" perspective just as there can be a religious perspective on issues of concern, stating that it would violate the First Amendment to exclude a "political, economic, or social viewpoint" on the issue of racism.[507] The language implies that there is a political viewpoint, a "political perspective" on the issue of racism, just as there is a religious or social one. If this is so, then perhaps the rule of *Rosenberger* and *Lamb's Chapel* should apply to political speech as well as religious speech: "[I]t discriminates on the basis of viewpoint to permit . . . all views about [issues of concern] except those dealing with the subject matter from a [political] standpoint."[508]

B. The Establishment Clause Opinion

1. The intuitively correct result

The Court arrived at what seems to be the intuitively correct result in *Rosenberger*. To hold that the Establishment Clause requires denial of SAF monies to Wide Awake would not be neutral, but hostile toward religion. It would "strip[] religious speakers of the constitutional protection accorded to secular perspectives and points of view."[509] Lower courts have stringently protected various secular groups—a Gay and Lesbian Students Association, a black separatist newspaper, and an anti-war speaker[510]—from discrimination on the basis of their contro-

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[505] *Id.* at 2012.

[506] *Id.* at 2037. Wiggin argues that heterosexuals do not feel the need to engage in political action because they are in the mainstream. On the other hand, homosexuals, who stand against mainstream culture, must often promote political action. The university rule barring political groups from funding would differentially impact groups such as the Gay and Lesbian Student Union who "oppose the status quo" and feel the need to be involved in political advocacy. *Id.* at 2036-37.

[507] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2518 (1995) (alteration in original).

[508] *Id.* at 2517 (quoting Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2145 (1993)).

[509] Brief for the Petitioners at 24, *Rosenberger* (No. 94-329).

[510] *See* Brief for the Petitioners at 15-16, *Rosenberger* (No. 94-329) (discussing Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) (University of Arkansas' refusal to give student activities funding to Gay and Lesbian Students Association found to be viewpoint discriminatory), Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) (cutting off university funding for black separatist newspaper is censorship), and Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969) (university's denial of funding to an anti-war speaker due to his controversial views is impermissible)).

versial viewpoints when they sought funding from universities. However, when it comes to Wide Awake magazine, the stringent protection the Free Speech Clause normally gives to particular viewpoints would give way to the Establishment Clause's prohibition against direct monetary aid to religion.

Such a result would convey hostility, not neutrality toward religion; it would, in the words of Justice Brennan, "subject [religious people] to unique disabilities,"[511] giving them less constitutional rights than other citizens. Yet, this is what the Fourth Circuit would hold. After finding that the University's regulation was viewpoint discriminatory, "creat[ing] an uneven playing field on which the advantage is tilted towards CIOs engaged in wholly secular modes of expression,"[512] the court nevertheless held that such discrimination was mandated by the Establishment Clause.[513]

In other words, viewpoint discrimination, the most egregious form of content-based speech discrimination,[514] is a constitutional requirement when it comes to religious viewpoints. The Fourth Circuit would hold this even in the university setting, a forum that is "uniquely the marketplace of ideas"[515] where all the core concerns of distorting public debate are implicated.[516] Such a legal doctrine, argues Professor McConnell, "puts the Establishment Clause on a collision course with the rest of the First Amendment," and results in the position that the "clauses of the First Amendment [are] so inconsistent that enforcement of one require[s] violation of the other."[517]

The Court recognized this conflict and thus arrived at what seems the intuitively correct result. However, the analytical path taken to achieve this result seems ultimately flawed, sidestepping the key issue of whether the government may provide direct financial aid to religious speakers in a forum for the exchange of ideas.

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[511] McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment), *quoted in* Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 248 (1990).

[512] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 281 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

[513] *Id.* at 285-86.

[514] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2516 (1995).

[515] Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (quoting Healy v. James, 408 U.S. 169, 180 (1970)).

[516] *See* discussion *supra* note 277-80.

[517] Brief for the Petitioners at 24, *Rosenberger* (No. 94-329).

The most straightforward resolution of this conflict would have been to overturn the strict rule barring financial aid to religion and hold that principles of equal access apply as much to funding as to facilities: Government supports the forum, it supports the "free and robust marketplace of ideas," not the particular religious messages within the forum,[518] when it neutrally distributes funds to encourage a diversity of speech, even if some of the funding recipients are as robustly and aggressively religious as their secular counterparts are aggressive in promoting their particular partisan ideology.[519]

Of course, articulation of such a principle of equal access to funding would have made *Rosenberger* a landmark case, overturning a long line of precedent, challenging what has been seen as a non-negotiable Establishment Clause concern, and opening the door for "pervasively religious" schools, soup kitchens, and drug rehab centers to receive government money on an equal basis with their secular counterparts.

The Court, however, did not choose to resolve the case in this manner. Perhaps it is too soon to ask for that, given the current composition of the Court.[520] Instead, *Rosenberger* is a case that strains to uphold both equal access principles and the no-direct-aid rule, a narrowly decided case that in spite of itself is a significant step towards equality of treatment of religious speakers.

2. *Does the provision of funds to Wide Awake magazine implicate the "no-aid" rule?*

Both Justice Kennedy and Justice O'Connor attempted to distinguish the *Rosenberger* case from the prior no-aid cases. Justice Kennedy claimed that the no-aid rule was inapplicable because no funds went directly to Wide Awake magazine's coffers and because the SAF is not a tax, at least not an impermissible tax levied for the sole support of religion.[521] Justice O'Connor also tried to distinguish the SAF from impermissible government expenditures in support of religion, stating that the SAF

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[518] *Rosenberger*, 115 S. Ct. at 2527 (O'Connor, J., concurring).

[519] *Id.* ("Given this wide array of non-religious, anti-religious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical.").

[520] Four of nine justices dissented. *Id.* at 2533.

[521] *Id.* at 2522-23.

is potentially "a fund that simply belongs to the students."[522] The reasoning of both the plurality and the concurrence seems ultimately unsatisfactory.

Justice Kennedy claimed that the no-direct-aid to religion rule was simply inapplicable because the money went to a third party printer instead of directly into the coffers of Wide Awake.[523] His basic argument, as summarized by Justice Souter, seems to be that "providing religion with economically valuable services [such as printing and computer terminals] is permissible [because such] services are economically indistinguishable from religious access to governmental speech forums"[524] such as school classrooms.

School classrooms involve government cost (for heating and maintenance) and a financial benefit to religious groups (in terms of rent money saved).[525] Therefore, services such as the use of computers and printers may also be provided to religious groups, as long as they are provided on a religion-neutral basis.[526] The University of Virginia in fact did provide computer and printing services to all CIOs, including, presumably, Wide Awake magazine.[527] It would be formalistic, according to Justice Kennedy, to allow the University itself to provide printing benefits to religious student groups, but forbid it to do so when it offers to pay an outside contractor to provide the same services.[528]

Where Justice Kennedy seems to err is in failing to recognize that it is also formalistic to differentiate between paying an outside contractor for printing services on behalf of a student group and paying the student group directly. In Wide Awake's case, it would save $5,862.00 either way.

The $5,862.00 would directly support sectarian activity. Unlike the prior cases which stopped short of funding "pervasively sectarian"

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[522] *Id.* at 2527-28 (O'Connor, J., concurring). Justice Souter reads Justice O'Connor's opinion as concluding "that the funding differs so sharply from religious funding out of governmental treasuries generally that it falls outside [the] Establishment Clauses' purview. . . ." *Id.* at 2546 (Souter, J., dissenting).

[523] *Id.* at 2523.

[524] *Id.* at 2534 (Souter, J., dissenting).

[525] *Id.* at 2545 (Souter, J., dissenting).

[526] *Id.* at 2523.

[527] Brief for the Petitioners at 46, *Rosenberger* (No. 94-329); Brief for the Respondents at 13-14, *Rosenberger* (No. 94-329).

[528] *Rosenberger*, 115 S. Ct. at 2523-24. Justice Kennedy draws an analogy to differentiating between the government providing its own janitorial services for maintaining a building and contracting a third-party service to maintain the facilities. *Id.* at 2524.

organizations or made scrupulously sure that only "secular" aspects of a religious organization received funding,[529] SAF funds would directly support the printing of Wide Awake magazine, which involves religious teaching, exhortation, and proselytization, calling people to accept Christianity and to follow its teaching on issues such as racism, eating disorders, and sexuality.[530] The religious and secular aspects of the magazine seem to be "inextricably intertwined" and the students did not argue that they were separable.[531]

Justice Kennedy's characterization of printing as a "secular" benefit[532] simply does not address the fact that this benefit directly supports religious activity.[533] If a Catholic parochial school had requested government aid to print religious textbooks, it undoubtedly would have been denied, regardless of whether the money was paid to a third-party printer or to the school directly.[534] The key issue is not the nature of the benefit—i.e., whether printing is "secular" and "neutral"—but the nature of the activity benefitted—i.e., whether it is religious or secular.[535] And here, Wide Awake magazine seems unquestionably pervasively religious.[536]

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[529] *See* cases and discussion *supra* notes 186-96 and accompanying text.

[530] *See* discussion and citations *supra* note 451 and accompanying text. The Fourth Circuit had the same view of Wide Awake: "Indeed, after reading its contents dispassionately, we are compelled to mark Wide Awake's unflagging invocation of religious, specifically Christian, themes. The journals pages are pervasively devoted to providing a 'Christian perspective' in printer's ink at the University of Virginia." Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 273 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

[531] Meek v. Pittenger, 421 U.S. 349, 366 (1975) (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring). See *supra* note 186 and accompanying text for discussion of doctrine of separability.

[532] *Rosenberger*, 115 S. Ct. at 2524.

[533] *Id.* at 2533 (Souter, J., concurring). Justice Souter contended that the majority did not look closely at the character of Wide Awake magazine. *Id.* The "aid-to-religion" cases looked not only at the nature of the aid but the character of the aided institution in analyzing whether there was impermissible support of religion. *See, e.g.*, Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 750 (1976) (plurality opinion). Even if the aid was "neutral and secular," it was still invalid if it went to an institution where it was impossible to separate the secular and the religious. Wolman v. Walter, 433 U.S. 229, 250 (1977). *See* discussion *supra* notes 186-92 and accompanying text.

[534] Board of Educ. of Central Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 244-45 (1968) (upholding loan of textbooks to parochial schools because they were secular and not religious; the statute "does not authorize the loan of religious books, and the State claims no right to distribute religious literature.").

[535] Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 750 (1976) (plurality

Thus, Justice Souter's statement seems more in line with the facts: "The Court today, for the first time, approves direct funding of core religious activities by an arm of the State."[537]

Justice Kennedy also argued that the no-aid rule was inapplicable because the SAF is distinguishable from a tax.[538] However, as Justice Souter observed, the fee, like a tax, is mandatory, exacted upon the students by the "power of the State" exercised by the University;[539] furthermore, Justice Souter argued that the Establishment Clause prohibits not only tax money but any kind of government money in support of religion.[540]

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opinion) ("The character of the aided institutions" is a significant factor in the Establishment Clause analysis). If the nature of the benefit were the only consideration, then one could argue money itself is a "secular, neutral" benefit—it has no inherently religious or non-religious nature.

[536] *See* discussion and citations *supra* note 451 and accompanying text. Justice O'Connor observes that "financial assistance is distributed in a manner that ensures its use only for permissible purposes." *Rosenberger*, 115 S. Ct. at 2527. She argued that paying the third-party contractor rather than the religious student group "ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective." *Id.* However, the fact that Wide Awake magazine is a magazine engaged in strong religious advocacy—even if it also addressed topics of general concern—means that the assistance would already be going to an "impermissible purpose." The money is paying for the printing costs of evangelism and religious instruction. If the University had given the money directly to Wide Awake and found that it was using the money to print evangelistic literature, it would probably have stepped in and forbade such a sectarian use.

[537] *Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting).

[538] *Id.* at 2522.

[539] *Id.* at 2538 (Souter, J., dissenting).

[540] *Id.* at 2534, 2546-47. Justice Souter argues that "the Court has never held that government resources obtained without taxation could be used for direct religious support, and our cases on direct government aid have frequently spoken in terms in no way limited to tax revenues." *Id.* at 2546. Justice Souter's argument is also a response to Justice O'Connor's opinion which does not assume that only governmental tax funds in aid of religion are invalid, but nevertheless distinguishes the SAF from other forms of prohibited governmental aid. *Id.* at 2546. He argued that the Establishment Clause had "dual objectives," one being to avoid "the destructive consequences of mixing government and religion," and the other "to protect religion from the corrupting dependence on support from the Government." *Id.* at 2547. Thus, since this latter goal "does not turn on whether the Government's own money comes from taxation" or some other source, it is irrelevant whether tax money is involved or not. *Id.* at 2547. While one of the underlying historical values of the Establishment Clause was to protect religion from the state—in Roger Williams' memorable language, to protect the "Garden of the Church" from the corrupting influence of the world,

Thus, the Court, by allowing SAF money to support Wide Awake magazine does seem to violate the "no-financial-aid" rule, resulting in a "decision [that] is in unmistakable tension" with prior interpretations of the Establishment Clause.[541] The Court would have done better by confronting the rule head-on, overturning it, and holding that religious groups have a right of equal access to government funding programs.

3. The SAF as a metaphysical forum: equal access to governmentally-subsidized mediums for communication

Despite its evasion of the key issue, the *Rosenberger* opinion is still an important case that may have significant impact. *Rosenberger* is essentially a case involving equal access to funding, if not for direct payments to religious groups, then for government-subsidized services, such as printing, for religious activity.

A significant holding of *Rosenberger* is that the SAF—a funding program—can be considered a forum in a "metaphysical" sense.[542] Thus, a government funding program can be analyzed under forum doctrine instead of subsidy doctrine. This is key, for it allows for the "crucial difference" between government and private speech endorsing religion.[543]

As *Rosenberger* held, subsidy doctrine involves the government as speaker.[544] The government may endorse certain messages by selectively

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Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1566 (1989) (quoting R. WILLIAMS, MR. COTTONS LETTER LATELY PRINTED, EXAMINED AND ANSWERED (London 1644), *in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (Russell & Russell, Inc. 1963))—it is hard to see how money that is neutrally distributed with an explicit disclaimer that the government has no other control over the groups than the CIO contract, would have a "corrupting influence" on the church. *Rosenberger*, 115 S. Ct. at 2526-27 (O'Connor, J., concurring). If anything, the corrupting influence comes from the prohibition of funding for "pervasively religious" activities, because it forces religious institutions to compromise their convictions and water-down their religious message in order to receive government funding. Reply Brief for the Petitioners at 18-20, *Rosenberger* (No. 94-329).

[541] *Rosenberger*, 115 S. Ct. at 2534 (Souter, J., dissenting).

[542] *Id.* at 2517.

[543] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990). *See also* Wiggin, *supra* note 230, at 2030. ("When subsidies are used in a program that the public understands to support private speech on a content-neutral basis, the standards of public forum doctrine apply.").

[544] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2518 (1995).

funding them; it may "promote a particular policy"[545] (of encouraging childbirth instead of abortion).[546] If every case where distributions of government money were analyzed under subsidy principles, religious groups could never receive government money, because the government, while free to convey any other views, may not convey religious views.[547]

However, key to forum analysis is the distinction between the private speaker and the government.[548] As government might open property for private speakers to use, so can it distribute funds to encourage private speakers to express their own messages.[549] Thus, as in the equal access cases, the Establishment Clause would not be violated when religious speakers participate in such a forum on an equal basis with secular speakers.[550]

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[545] *Id.* at 2518.

[546] Rust v. Sullivan, 500 U.S. 173, 193 (1991).

[547] TRIBE, *supra* note 77, at § 12-4, 807, 807 n.11 (the government may enter the marketplace of ideas and promote certain messages, but it "may not endorse a religious point of view" *Id.* at 807 n.11); Laycock, *supra* note 5, at 3 (government "may not take a position on questions of religion in its own speech"). Essentially, if all funding programs were analyzed under subsidy doctrine, every distribution and receipt of government funds would become "state action," and the Establishment Clause would be implicated every time money was given to a religious organization. Sekulow, *supra* note 61, at 1018 (the Establishment Clause "prohibits only state, not private, action."); Brief for the Petitioners at 25-26, *Rosenberger* (No. 94-329) ("mere receipt of government funds does not convert a private decision into state action.").

[548] Forum doctrine attempts to balance "the individual's right to speak while on public property against the state's interest in restricting the property for specific uses." WHITEHEAD, *supra* note 80, at 67.

[549] Wiggin, *supra* note 230, at 2030.

[550] *See supra* notes 518-19. The concept of funding programs as forums also answers the argument that the government may make content-based choices within its discretion under subsidy doctrine. When the government is speaking, it is free to convey certain messages; it need not be "ideologically 'neutral.'" TRIBE, *supra* note 77, at § 12-4, 804. It may promote a patriotic message by displaying the flag and it need not give equal time to an anti-patriotic message. *Id.* at § 12-4, 807. In a sense, under subsidy doctrine, the government is free to promote its own viewpoints, and is subject to a lesser standard of scrutiny. *Id.* at § 11-5, 783 (under subsidy doctrine, "[e]ven when viewpoint bias is acknowledged, a complicating feature of the analysis arises from whatever special freedom government might be thought to enjoy when it acts less as a regulator of expression than as a participant in the marketplace of ideas.").

On the other hand, if the government were "dedicating a forum to public communication," it would, in the flag scenario, have to provide equal access to both patriotic and anti-patriotic messages. *Id.* at § 12-4, 808. A funding program as forum is subject to the same equal access principles.

The understanding of funding programs as forums also clarifies prior forum cases which could arguably be interpreted as seeing forums in a "fairly literalistic way involving physical space."[551]

The *Rosenberger* holding seems to be correct, for forums do seem to involve more than just physical space.[552] When schools allow student clubs to meet, often the clubs are given more than just the right to meet in classrooms: they may advertise in the school newspaper, on the bulletin board, or over the public address system.[553] As part of their status as participants in the forum, they are given access to whatever mediums that the school makes available to communicate their message. These mediums may also include access to video and sound equipment, to xerox machines, and, as provided at the University of Virginia, computer terminals and printers, all with expenses paid by the school thus saving student groups from incurring costs such as xeroxing or rental of the audio-visual equipment.

Thus, one could argue that forums like those discussed in *Widmar*, *Mergens* and *Lamb's Chapel* involve not only access to physical space but also to whatever "funded" mediums that facilitate communication and that are integral to the particular forum.

Justice Souter, however, would differ. He would explain the religious equal access cases as involving only physical space as "forums for literal speaking."[554] Providing services such as printing or xeroxing,

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[551] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 287 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

[552] Even the principal forum cases such as *Perry* and *Cornelius* involved more than literal space. *Perry* involved not merely a claim of access to the mailbox space, but to "the interschool delivery system." Wiggin, *supra* note 230, at 2023. Thus, argues Wiggin, "[a]ccess to the public forum of the mail system was desirable because it constituted subsidized transmission of messages to teachers." *Id. Cornelius* involved the Combined Federal Campaign ("CFC"), a fund-raising drive for charities seeking contributions in the federal workplace. Each charity submitted a 30-word statement for inclusion in CFC literature, which was distributed to federal workers. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 790 (1985). The Court held that the CFC was a forum. The excluded groups were "seek[ing] access to a particular means of communication." *Id.* at 801. The benefits provided in this forum presumably included the cost to print the brochures, as well as whatever other expenses were necessary to ensure that the 30-word messages were delivered to the readers.

[553] Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 247 (1990).

[554] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2546 (1995) (Souter, J., dissenting).

on the other hand, would be providing direct aid to religion beyond what was intended by those cases.[555] Thus, religious clubs can use classrooms for meeting space but not xerox machines, printing services, audio-visual equipment or any other services.[556]

Such reasoning is discriminatory against religious groups. If a university allowed all other student groups to use xerox machines, video equipment, and computer terminals, but allowed religious groups only to meet in classrooms, it would convey the message that religious groups have second-class status.[557] It would also burden their ability to compete effectively against other groups in the marketplace, creating "an uneven playing field on which the advantage is tilted towards . . . secular" speakers.[558] Religious groups would have to pay for video and sound equipment, printing, and other resources that other groups have free access to. Those groups with limited resources would be forced to forego the advantage of these communication-enhancing mediums.[559]

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[555] *Id.* (Souter, J., dissenting).

[556] Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L. Q. 529, 565 (1985) (arguing that provision of access to "school publications, bulletin boards, photocopy machines, public address systems, and yearbooks" "raises entanglement problems.").

[557] Carolyn Wiggin argues:

> Seth Kreimer understands public forum doctrine to be based on a theory that when the government has historically made its property available for private speech, it must continue to do so because citizens have a "baseline" expectation that they will be able to speak freely in that space. In addition, Professor Kreimer sees the "principle of equality of distribution as the baseline from which allocational decisions can be judged" as critical to public forum cases. A scheme that singles out one class of speakers, denying that class benefits available to others, offends the First Amendment. If the norm is to fund speech, as it is in the context of a public university in which student organizations that comply with content-neutral regulations are generally able to receive funds with which to engage in speech, then refusing to subsidize a subset of student organizations based on the content of their speech violates the public forum doctrine when understood in terms of baseline expectations.

Wiggin, *supra* note 230, at 2024-25 (footnotes omitted).

[558] Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 281 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

[559] To illustrate, imagine a literal forum as a paradigm: a panel discussion with many speakers on stage. If all speakers but the religious one were given microphones, it would certainly burden the religious speakers' ability to compete within the forum. Ridiculous as that would seem, it is exactly what a literal application of Justice Souter's analysis requires. The forum cases only require providing religious speakers with access

Indeed, that is what happened with Wide Awake; after the University denied funding, the magazine was shut down due to lack of funds.[560]

Justice Souter's argument is based on his understanding of facilities as analogous to the street corner as a traditional public forum: when a school opens its classrooms as a designated or limited public forum, they become open to "all comers" like the street corner is traditionally open to all comers.[561] On the other hand, "[t]here is no traditional street corner printing provided by the government on equal terms to all comers . . . ."[562] While religious speakers are entitled to use space to speak, forum principles cannot be extended to services such as printing "without admitting that new economic benefits" are being given to religion in violation of the rule against financial aid to religion.[563]

However, there is no right for "all comers" to use government buildings. The government must open its buildings for outside speakers. Only after it opens the doors must it grant access to "all comers" on an equal basis.[564] The crucial question is not whether there is a traditional "street corner" right to printing, but whether the government has provided access to these communicative services in the same way that it has provided access to buildings. Has it opened access to just buildings, or has it decided to give open access to the sound equipment and the services of the sound man as well?

Once it has opened its facilities for citizens to use, the government has provided a valuable benefit to those who are given access: with government funds, it has built the facility, maintained it—paying for maintenance, "electricity and heating or cooling costs"[565]—and citizens have saved the rent, as well as the expense and trouble of finding another place.[566] It has been argued that meeting space is a financial resource:

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to the literal space, the chairs at the panel table on the stage. The Establishment Clause would prohibit giving religious speakers the benefit of communication-enhancing services such as a sound system because these involve a benefit to religion beyond the space for "literal speaking." *Rosenberger*, 115 S. Ct. at 2546 (Souter, J., dissenting).

[560] Linda Greenhouse, *Justices Hear Campus Religion Case*, N.Y. TIMES, Mar. 2, 1995, at A11.

[561] *Rosenberger*, 115 S. Ct. at 2545-46.

[562] *Id.* at 2546 (Souter, J. dissenting).

[563] *Id.*

[564] *See* discussion *supra* notes 150-52 and accompanying text.

[565] *Rosenberger*, 115 S. Ct. at 2523.

[566] *Id.* at 2545 (Souter, J., dissenting). Consider also the remarks of Justice Blackmun

> Space is a resource that, like any other resource student organizations need to engage in speech, can be reduced to financial terms. Simply by maintaining a forum without charging any user fee, the government in effect subsidizes the speech that takes place within that forum. A group that can use university facilities for speech in meetings and presentations to the larger campus community saves the significant cost of renting space.[567]

The Court has upheld the rights of religious speakers to use facilities in spite of vigorous arguments that such financial benefits were being provided to religion,[568] and in spite of the fact that they were engaging

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in *Cornelius*:

> Access to government property can be crucially important to those who wish to exercise their First Amendment rights. Government property often provides the only space suitable for large gatherings, and it often attracts audiences that are otherwise difficult to reach. Access to government property permits the use of the less costly means of communication so "essential to the poorly financed causes of little people" and "allow[s] challenge to governmental action at its locus."

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 815 (1985) (citation omitted) (alteration in original).

[567] Wiggin, *supra* note 230, at 2022. The government financial expenditure in providing access to spatial forums can be tremendous. For example, for the use of the National Mall by the Pope for an outdoor Mass, the Interior Department had to pay between $100,000.00 and $150,000.00 for "police protection, the construction and removal of fences and barriers, the provision of electricity and other utilities, and maintenance and trash removal." O'Hair v. Andrus, 613 F.2d 931, 932-33 (D.C. Cir. 1979). Madalyn Murray O'Hair sued for an injunction to "restrain the celebration of the Mass," claiming that it violated the Establishment Clause to spend such large sums of money for the benefit of religion. *Id.* at 932, 936. The court held that provision of such "services is a legitimate function of government and not an 'establishment' of religion." *Id.* at 936. Equal access to the forum would not violate the Establishment Clause:

> When the National Mall is, as a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to all others (religionists and anti-religionists), there is no "establishment of a religion," and there cannot be a meaningful perception of one.

Id. at 934 (footnote omitted). The equal access policy would foster the pluralism and religious diversity that "reflects the very purpose of the Establishment Clause," *id.* at 934-35, and uphold the neutrality toward religion required by the Constitution. *Id.* at 935-37.

[568] In *Widmar*, the University had argued and the district court had held that permitting religious worship and teaching in federally-subsidized, "university-owned buildings would have the primary effect of advancing religion." Chess v. Widmar,

in "core" religious activity such as worship, preaching, and teaching.[569] Justice Kennedy rightly recognized that if merely providing services paid for by government money for core sectarian activity would violate the Establishment Clause, "then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled."[570]

Thus, the access provided to government-built and government-maintained buildings in *Widmar*, *Mergens*, and *Lamb's Chapel* involve a kind of government subsidy for the purpose of communication.[571] The finding that the SAF is a metaphysical forum is a logical extension of those cases, recognizing that government-provided facilities are a subsidized medium for communication that in principle is indistinguishable from other subsidized mediums that facilitate communication such as video equipment, printing services, and computer terminals with a free e-mail account.[572] *Rosenberger* merely failed to take the final step that

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480 F. Supp. 907, 915-16 (W. D. Mo., 1979), *rev'd sub nom.* Widmar v. Vincent, 454 U.S. 263 (1981).

Professor Ruti Teitel argued that equal access would provide "the free use of tax-financed classrooms, heat and light," and, in the case of secondary schools, "free monitoring by teachers or government authorities." Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L. Q. 529, 562 (1985). *See also* Merle Wilna Fleming, *Mergens: The Beginning, Not the End, of Questions Arising Under the Equal Access Act*, 64 ED. LAW REP. 15, ——, 64 WELR 15, *8 (1991) (arguing that providing compensated supervisors for religious clubs under the Equal Access Act, and potential costs resulting from liability for injuries incurred by students in rooms and from physical damage to the premises are "more than an 'incidental cost.'"), *available in* WESTLAW, JLR-DATABASE. Professor Teitel also argued (before *Lamb's Chapel*) that "even weekend use of the public schools on a rent-free or artificially low rent basis may afford an unconstitutional benefit to religion." Teitel, *supra*, at 564.

[569] Widmar v. Vincent, 454 U.S. 263, 269 and 269 n.6 (1981). The *Widmar* Court held that "religious worship and discussion" are "forms of speech and association protected by the First Amendment," *id.* at 269, rejecting Justice White's dissent that "'religious worship' is not speech generally protected by" the Free Speech Clause. *Id.* at 269 n.6.

[570] *Rosenberger*, 115 S. Ct. at 2523.

[571] Wiggin, *supra* note 230, at 2022-23 ("creation and maintenance of a public forum can be seen as a subsidy of speech that occurs on public property"). Seen in this light, the benefit to religious groups given in the prior equal access cases was from the start in tension with the rule against direct financial aid to religion. The facts of the *Rosenberger* case merely bring that tension into sharper relief.

[572] Justice O'Connor explicitly stated that the University would be "providing equal access to a generally available printing press (or other physical facilities)," *Rosenberger*,

direct financial subsidies are in principle no different from services and building space,[573] and that equal access principles should apply to funds as well as services and rooms. To find otherwise means that the University of Virginia can deny funding to Wide Awake by merely changing the form from direct payment to printers to direct reimbursement to the student groups for the same printing services.

4. Practical application

What will the practical impact of *Rosenberger* be? Some lawmakers and judges may see *Rosenberger* for what it really is, the approval of government financial aid to core religious activity as long as it is in an equal access context.[574]

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115 S. Ct. at 2527 (O'Connor, J., concurring), a valuable government-provided service. *See also* Joseph C. Beckham, *Forum Analysis in Cyberspace: The Case of Public Sector Higher Education*, 98 ED. LAW REP. 11 (1995) (applying forum analysis to computer networks).

[573] Brief for the Petitioners at 43-47, *Rosenberger* (No. 94-329) (arguing that distinguishing cash subsidies from other government benefits that the Court has approved such as "free use of government facilities, tax benefits, and police, fire, sewerage, and other services," *id.* at 43, is "a classic example of elevating form over substance," *id.* at 46.); Reply Brief for the Petitioners at 17, *Rosenberger* (No. 94-329). In the Reply Brief, the petitioners argued:

> The empty formalism of [the] line between money and services or facilities would have the practical consequence of enabling recalcitrant institutions to frustrate students' constitutional rights by manipulating the forms of aid. For example, a university could charge all groups a fee for use of empty classrooms, while appropriating money from the resulting fund to reimburse qualified student organizations for this cost. Under [a result prohibiting direct cash subsidies], religious student groups would be ineligible for the reimbursement, since it would be in the form of a "cash subsidy." In structuring its student benefits in this fashion, the university could effectively negate the student's equal access rights in *Widmar*.

Id.

[574] Indeed, in Wisconsin, the legislature recently passed a statute authorizing reimbursement of school tuition for those who attend private schools, including religious schools. Miller v. Benson, ___ F.3d ___, 1995 WL 601531 (7th Cir. 1995). The statute originally authorized only "nonsectarian private school" students to receive reimbursement. On July 29, 1995, a month after the *Rosenberger* decision was handed down, the Wisconsin legislature amended the statute to "authorize[] reimbursement of tuition at religious schools, provided the schools (and students) meet the other statutory criteria." *Id.* at *1. Thus, possibly as a direct result of *Rosenberger*, at least one state has attempted to apply equal access principles to a governmental funding

The most likely application is that *Rosenberger* will be seen as upholding equal access to communicative media within forums. Like the printing services upheld in *Rosenberger*, religious student groups will have access to video equipment, sound systems, computer e-mail accounts, P.A. systems, and newspaper spaces as long as such media are made available to all the other student groups and no money goes directly into the treasury of the religious group.

At the secondary school level, *Rosenberger* will have impact. In *Mergens*, the Court held that "equal access" included not only the right to meet in classrooms but the right to "official recognition," which included "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair."[575] However, according to Steven McFarland, director of the Christian Legal Society's Center for Law and Religious Freedom, "many administrators still forbid . . . access" for Bible clubs to such media.[576] The reasoning of *Rosenberger* would argue that providing such communicative media are merely the "neutral, secular" benefits that are a part of a forum for communication and does not violate the Establishment Clause even though government money is expended to provide these media.[577] In the secondary school setting, the argument of the imprimatur of school sponsorship would still have to be overcome.[578]

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program. *Id.* at *1 ("The amendment gives plaintiffs exactly what they sought in this litigation—equal treatment of secular and sectarian private schools under the state's funding program.").

At present, a suit in state court has been filed, challenging the law as an establishment of religion. *Id.* at *1. The challengers of the statute may have chosen a wise strategy by filing in state rather than federal court. Wisconsin's constitution calls for a more stringent separation of church and state than the U.S. Constitution, with language specifically forbidding aid to religious sects, Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 632, 632 n. 38 (1985), and thus, this is a case that the Supreme Court may never hear.

[575] 496 U.S. 226, 247 (1990).

[576] Steven T. McFarland, *Religious Rights*, WORLD, Sept. 9, 1995, at 18.

[577] This would go beyond the Equal Access Act itself, which states that the Act shall not be "construed to authorize" the government to "expend public funds beyond the incidental cost of providing the space for student-initiated meetings." 20 U.S.C. § 4071 (d) (3) (1984).

[578] Ceniceros v. Board of Trustees of San Diego Unified Sch. Dist., ___ F.3d ___, 1995 WL 569636, at *10 (9th Cir. 1995) (dissenting opinion) (arguing that Widmar and Rosenberger should be distinguished from a high school situation due to the more structured environment of high schools and the immaturity of high school students; thus, school should not provide equal access to a religious club seeking to meet during lunch hours as the other clubs were doing).

Of course, *Rosenberger* will have its broadest application at the university level. As long as there is a mandatory student fee program that funds the diversity of student activities on campus, a religious group should be eligible for funding as long as the money does not pass directly through the coffers of that group. Thus, a Christian group may show a film series, publish a magazine, advertise Bible studies, a Buddhist group may distribute pamphlets with meditations and chants, and they may have the printing and video rental costs paid for, as long as the money does not go directly to their treasuries and the services are provided on an equal basis to all groups without regard to religion. This is true notwithstanding the fact that they are engaged in the core sectarian activity of worship, teaching, and proselytization. As speakers may engage in whatever religious speech they want to in university facilities opened for communicative purposes,[579] so may they speak, whether it be for proselytization, preaching, or other purposes, using media such as videos or computer e-mail that are provided as part of a communicative forum by a university to all forum-participants on an equal basis without regard to religion. Such use does not violate the Establishment Clause.[580]

What may limit *Rosenberger*'s application is the language that attempts to distinguish student activities funds from taxes and other governmental expenditures. Most other governmental funding programs involve tax money. If the Court decides that students have an "opt-out" right from mandatory fee programs, then *Rosenberger* will be even more distinguishable, and its holding more limited. Thus, *Rosenberger*

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[579] Widmar v. Vincent, 454 U.S. 263, 269 and 269 n.6 (1981).

[580] It is a different question whether the university is *required* by the Free Speech Clause to provide such services to core sectarian activity. Under *Rosenberger* and *Lamb's Chapel*, if the activity fee program were construed to be a nonpublic forum, the religious activity would have to somehow provide a perspective on topics that are otherwise includible within the forum or the regulation would have to be facially viewpoint-based. *See supra* parts III.C.1 and V.A.1.

An argument could also be made that programs such as the SAF are more akin to designated or limited public forums, Wiggin, *supra* note 230, at 2028-30, such as the forum in *Widmar*. Under *Widmar*, content-based subject-matter regulations excluding religious speech—including worship and other core religious speech—would be analyzed under strict scrutiny. Widmar v. Vincent, 454 U.S. 263, 267-70 (1981).

In any case, under *Rosenberger*, the Establishment Clause presents no bar to a university providing subsidized communicative services to groups engaging in core religious activity as long as other groups are provided the same services on an equal basis.

may be limited to the narrow sphere of University mandatory student programs or similar situations.

Language in the opinion that may allow for an application beyond such situations is Justice Kennedy's argument that the government benefits provided in *Widmar*, *Mergens*, and *Lamb's Chapel* are no different from other services such as printing provided on a neutral basis. Both involve the government expenditure of money. However, it is important to note that the cost to build and maintain physical facilities is paid for out of *tax* money. Thus, one could argue that outside the university and school student fee setting, religious groups have the right of equal access to services that facilitate communication such as printing or sound systems, notwithstanding the fact that tax money is expended to provide these services.

VI. Conclusion

Rosenberger, as the fourth equal access case, is a significant affirmation of the constitutional rights of religious people. Its expansive understanding of religion as a viewpoint protects religious speakers from discrimination in the guise of governmental discretion and ensures their right to participate on an equal footing with other speakers in the marketplace of ideas. However, *Rosenberger* may be in significant tension with prior forum cases which have upheld subject-matter exclusions of political speech. It may be that "political," like religious, in some contexts may be considered a perspective or viewpoint rather than a subject-matter.

By finding that the Establishment Clause would not be violated by giving SAF money to pay for Wide Awake's printing costs, the Court arrived at the intuitively correct result. However, its evasion of the no-direct-aid rule and failure to articulate a principle of equal access to government funding leaves unresolved the current tension between the Establishment and Free Speech Clauses. Thus, *Rosenberger* is the landmark case that could have been.

Nevertheless, *Rosenberger* is still significant, for it extends the equal-access-to-facilities cases to their next logical step—equal access to communication-enhancing mediums and services that are integral to speech forums. This result is significant, for it allows religious speakers, at least in Universities and schools, to participate equally in neutrally available services such as printing, xerox costs, video and sound equipment, and computer network access.

The real significance of *Rosenberger* is that in fact, the "Court . . . for the first time, approves direct funding of core religious activities

by an arm of the State."[581] Whether this holding will be limited to the narrow circumstances set forth by the Court, or will be the step towards something more, remains to be seen.

Andrew A. Cheng[582]

[581] Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2533 (1995) (Souter, J., dissenting).

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The *Qualitex* Quandary: Was Trademark Protection for Color Per Se Clearly Resolved?

I. INTRODUCTION

In 1946, Congress passed the Lanham Act[1] ("Act") to consolidate the existing trademark laws and to provide protection to both the public and the trademark owner.[2] Protecting valid trademarks encourages competition by requiring marks to be distinguishable from one another, thus giving the consumer a choice between competing goods.[3] Since the passage of the Act, many types of marks that were previously unprotected were granted protection, including slogans,[4] sound,[5] smell,[6] ornamental labels,[7] and containers.[8] Only recently, however, has color been granted the same treatment.

On September 27, 1994, the United States Supreme Court granted certiorari to decide whether the Lanham Act prohibited trademark

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[1] Trademark Act of 1946, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified at 15 U.S.C. §§ 1051 - 1127 (1988)).

[2] S. REP. No. 1333, 79th Cong., 2d Sess. 5 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1274.

[3] *Id.* at 1275.

[4] Roux Labs., Inc. v. Clairol Inc., 427 F.2d 823, 824 (C.C.P.A. 1970) (protecting the slogan: "Hair so natural only her hairdresser knows for sure").

[5] Patent and Trademark Office, Registration Nos. 523,616 (April 4, 1950) and 916,522 (July 13, 1971) (granting trademark registration for the particular sound of NBC's three chimes).

[6] *In re* Clarke, 17 U.S.P.Q.2d 1238, 1239 (T.T.A.B. 1990) (permitting registration of a mark consisting of floral fragrance applied to sewing thread and embroidery yarn).

[7] *In re* Swift and Co., 223 F.2d 950, 955 (C.C.P.A. 1955) (holding polka-dot bands to be registrable).

[8] *In re* Morton-Norwich Products, Inc., 671 F.2d 1332, 1342 (C.C.P.A. 1982) (holding household cleaner spray pump container registrable).

registration for color alone.[9] The question presented was narrowly phrased to restrict the issue to trademark registration for color per se (color in and of itself). The issue is distinguished from the broader and more prevalent situation where color is used in a product's trade dress. "The trade dress of a product is its overall image as it is presented to the consumer and includes aspects such as the size, *color*, or design of the product."[10] Since Section 43(a) of the Lanham Act already protects color when used in a product's trade dress,[11] the Court's analysis in the case at bar was limited to situations where color was claimed to be a trademark apart from the color's integration with other aspects of the product's trade dress.[12]

By granting certiorari, the Court sought to resolve a dispute that had split the federal Courts of Appeal. In the 1985 landmark case of *In re Owens-Corning Fiberglas Corp.*,[13] an innovative Court of Appeals for the Federal Circuit held that the color pink when used in residential fiberglass insulation was registrable as a trademark. Just two years later, however, the Court of Appeals for the Ninth Circuit affirmed the District Court's denial of trademark protection for the color yellow as a background color for an antifreeze container.[14] Following this precedent, in 1990, the color blue of sugar substitute packages was denied trademark protection by the Court of Appeals for the Seventh Circuit.[15] More recently, however, in 1993, the Court of Appeals for the Eighth Circuit, relying in part on the Federal Circuit's 1985

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[9] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 40 (1994).

[10] NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1027 n.7 (7th Cir. 1990) (emphasis added) (although the court denied protection for color per se, it did note that color can be protected when used in connection with other features of the product's trade dress), *cert. denied*, 499 U.S. 983 (1991).

[11] *Id.* at 1027 (color is protected under Section 43(a) when used in connection with some definite arbitrary symbol or design).

[12] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1308 (1995). In distinguishing color trademarks from color used in a product's trade dress, the court noted that:

> One can understand why a firm might find it difficult to place a usable symbol or word on a product (say, a large industrial bolt that customers normally see from a distance); and, in such instances, a firm might want to use color, pure and simple, instead of color as part of a design.

Id.

[13] 774 F.2d 1116, 1128 (Fed. Cir. 1985).

[14] First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1382-83 (9th Cir. 1987).

[15] *NutraSweet*, 917 F.2d at 1027.

decision, emphatically rejected the Seventh Circuit's 1990 holding by reversing the District Court's denial of trademark registration for the color blue when used in photographic film leader splicing tape.[16] Thus, in the ten short years since the Federal Circuit announced its decision granting trademark protection for color per se, the federal Courts of Appeal have struggled over the issue and have failed to provide consistency and predictability in this area of intellectual property law.

On March 28, 1995, the United States Supreme Court issued its opinion in the case of *Qualitex Co. v. Jacobson Products Co., Inc.*.[17] In a unanimous decision, the Court reversed the Court of Appeals for the Ninth Circuit by holding that the green-gold color of Qualitex Co.'s ("Qualitex") trademark was registrable and was subject to trademark protection under the Lanham Act.[18] The Court concluded that when color alone meets the legal trademark requirements, no special rule prevents it from serving as a trademark.[19]

This piece analyzes the decision rendered by the Court and questions whether it has resolved the dispute surrounding trademark protection for color per se. Part II provides a brief background of the case. Part III discusses the leading arguments relied on in prior cases to deny trademark registration or protection for color per se. All of the arguments discussed in this section were dismissed by the Court as unpersuasive. Lastly, Parts IV and V discuss the heart of the Court's opinion - the requirement of distinctiveness and non-functionality. These two parts also include a critical analysis of the Court's attempt to clarify the law regarding distinctiveness and non-functionality and a discussion of the proper test that should be applied when these two issues arise.

II. Case Background

In 1957, Qualitex began manufacturing and selling its "SUN GLOW" (Registered) press pad for use on dry cleaning presses.[20] The green-gold color used on its press pads was registered as a trademark on February 5, 1991.[21] From 1957 to June 1989, when Jacobson Products

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[16] Master Distributors, Inc. v. Pako Corp., 986 F.2d 219, 225 (8th Cir. 1993).

[17] ___ U.S. ___, 115 S. Ct. 1300 (1995).

[18] *Id.* at 1308.

[19] *Id.* at 1302.

[20] Qualitex Co. v. Jacobson Products Co., Inc., 21 U.S.P.Q.2d 1457, 1457 (C.D. Cal. 1991), *aff'd in part, rev'd in part on other grounds, rem.*, 13 F.3d 1297 (9th Cir. 1994), *rev'd on other grounds*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[21] *Id.* at 1458.

Co., Inc. ("Jacobson") began selling its imitation press pad, Qualitex was the exclusive manufacturer of the green-gold colored press pad.[22] For decades, other press pad manufacturers used the colors lime green, grey, dark green, light blue, orange, peach, blue/grey, and other colors on their press pads.[23] The green-gold color of Qualitex's press pad cover did not affect the quality, longevity, or performance of the press pad itself and was more expensive than other colors used by competing manufacturers.[24] While Jacobson could have chosen any other color for its press pad, it intentionally copied the color and overall look of Qualitex's green-gold press pad.[25]

In March 1990, Qualitex brought suit to enforce its registered trademark in the green-gold color against infringement by Jacobson.[26] The District Court held that Qualitex had a valid trademark in the green-gold color and that Jacobson had infringed upon that mark.[27] On appeal, the Court of Appeals for the Ninth Circuit canceled the registration of the green-gold color mark by reversing the District Court on the issue of trademark registration for color per se.[28] The court did, however, affirm the infringement violation based on trade dress protection under Section 43(a) of the Lanham Act.[29] The Supreme Court, limited to the issue of trademark registration, reversed the Court of Appeals by granting trademark registration and protection for Qualitex's green-gold color mark.[30]

III. Rejection of Historical Trademark Bars For Color Per Se

Prior to the *Owens-Corning* decision in 1985, color per se was not "capable of appropriation as a trademark."[31] This proposition was

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[22] *Id.*

[23] *Id.*

[24] *Id.* at 1460.

[25] *Id.* at 1459.

[26] Qualitex Co. v. Jacobson Products Co., Inc., 13 F.3d 1297, 1299-1300 (9th Cir. 1994), *rev'd on other grounds*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[27] Qualitex Co. v. Jacobson Products Co., Inc., 21 U.S.P.Q.2d 1457, 1460, 1462 (C.D. Cal. 1991), *aff'd in part on other grounds, rev'd in part, rem.*, 13 F.3d 1297 (9th Cir. 1994), *rev'd*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[28] Qualitex Co. v. Jacobson Products Co., Inc., 13 F.3d 1297, 1305 (9th Cir. 1994), *rev'd*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[29] *Id.*

[30] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1308 (1995).

[31] 1 J.T. McCarthy, Trademarks and Unfair Competition § 7.16[1] (3d ed. 1995).

justified in view of the wide variety of theoretical arguments used by the courts to deny trademark protection for color per se.[32] Before the *Qualitex* Court could affirm registration of Qualitex's color mark, these theoretical hurdles had to be cleared. The *Qualitex* Court addressed each of these arguments in turn and ruled them unpersuasive.

A. Statutory Language Bar

Although there are no major post-Lanham Act cases denying trademark status for color per se based on a statutory bar, Jacobson asserted this argument before the Court.[33] Jacobson argued that color is not a "brand, logo, symbol, [or] device" and is therefore not a trademark as defined in Section 45 of the Lanham Act.[34]

The Court rejected this argument upon its determination that color per se can act as a symbol and thus qualify as a trademark.[35] The Court noted that, due to the policy consideration which provides trademarks with extensive national protection,[36] the definition of "trademark" in Section 45 of the Lanham Act, including the term symbol, was to be interpreted broadly.[37] Under this definition, a symbol, according to the Court, was anything that had the capability of carrying meaning.[38] The Court reasoned that since shape, sound, and fragrance

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[32] *See, e.g., In re* L. Teweles Seed Co., 140 U.S.P.Q. 75, 76 (T.T.A.B. 1963) (the word "blue" as applied to bluegrass seed is nothing more than part of the common descriptive name of a variety of grass seed); Campbell Soup Co. v. Armour & Co., 175 F.2d 795, 798-99 (3d Cir. 1957), *cert. denied*, 338 U.S. 847 (1949) (red and white soup can label denied trademark protection based on color depletion theory); Sylvania Electric Products, Inc. v. Dura Electric Lamp Co., 247 F.2d 730, 732 (3d Cir. 1957) (blue dot on light bulb denied trademark registration based on utilitarian functionality doctrine).

[33] Brief for Respondent at 5, Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300 (1995) (No. 93-1577).

[34] *Id.* (citing Lanham Act § 45, 15 U.S.C. § 1127 (1988) ("The term trademark includes any word, name, symbol, or device, or any combination thereof . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods[.]")).

[35] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1303 (1995).

[36] *See* S. REP. No. 1333, 79th Cong., 2d Sess. 5 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1277 (the policy of trademark law is to provide broad protection to marks that meet the legal requirements of the trademark laws).

[37] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1302.

[38] *Id.* at 1302-03.

can act as symbols, so too can color.[39] Furthermore, where a mark has the ability to satisfy the traditional trademark policies of competitive shopping, investment of goodwill, avoidance of consumer confusion, and fair competition, the mark should not be disqualified merely because of its "ontological status as [a] color, shape, fragrance, word, or sign[.]"[40]

The Court further bolstered its analysis by relying on the legislative history of the Trademark Law Revision Act of 1988 ("TLRA"). The TLRA amended portions of the Lanham Act but failed to change the pertinent language of Section 45.[41] At the time the TLRA was enacted, Congress had as background information: (1) the *Owens-Corning* decision allowing registration for color per se;[42] (2) the Patent and Trademark Office's ("PTO") clear policy permitting registration of color as a trademark;[43] and (3) the United States Trademark Association ("USTA") Commission's 1987 report.[44] The USTA report noted that the subject matter which had historically qualified as a trademark should not be limited in any way and that the definition of "trademark" should not preclude registration of "such things as a *color*, shape, smell, sound, or configuration which functions as a [trademark]."[45] A statement in the Senate Report accompanying the TLRA noted that the "revised definition intentionally retain[ed] . . . the words 'symbol or device' so as not to preclude the registration of colors, shapes, sounds or configurations where they function as trademarks."[46] This statement clearly showed a congressional reliance on the background information. The Court concluded that Congress in 1988 had re-enacted the terms "word, name, symbol, or device" against a legal background favoring

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[39] *Id.* at 1303.

[40] *Id.* at 1303-04.

[41] *Id.* at 1307.

[42] *Id.* (citing *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1128 (Fed. Cir. 1985)).

[43] *Id.* (citing U.S. Department of Commerce, Patent and Trademark Office, Trademark Manual of Examining Procedure § 1202.04e (at page 1200-12 of the January 1986 edition and page 1202-13 of the May 1993 edition)).

[44] *Id.* (citing The United States Trademark Association, Trademark Review Commission Report and Recommendations to USTA President and Board of Directors, 77 TRADEMARK REP. 375 (1987)).

[45] The United States Trademark Association, Trademark Review Commission Report and Recommendations to USTA President and Board of Directors, 77 TRADEMARK REP. 375, 421 (1987) (emphasis added).

[46] S. REP. No. 515, 100th Cong., 2d Sess. 44 (1989), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5607.

the interpretation that color per se was capable of acting as a trademark.[47] The Court concluded that the language of the Act and the basic principles of trademark law did not prohibit trademark registration and protection for color per se.[48]

B. Shade Confusion

After ruling that the Lanham Act, on its face, did not prohibit trademark registration for color per se, the Court addressed Jacobson's "shade confusion" argument. The shade confusion theory is premised on the belief that trademark registration and protection for color per se is likely to cause confusion[49] and is thus barred under Section 2(d) of the Lanham Act.[50] The purpose of the Section 2(d) registration bar is to prevent confusion among the consuming public and to protect the owner of the mark from unfair competition.[51] Proponents of the shade confusion theory assert that the courts would be faced with the difficult, if not impossible, task of determining how different a color shade must be to not cause confusion.[52] This argument was bolstered by the fact that the Court of Appeals for the Ninth Circuit canceled Qualitex's trademark registration based on the shade confusion theory.[53]

Addressing these concerns, the Court held that colors are no different from words, phrases or symbols.[54] The Court cited a variety of cases in which the lower courts compared closely related words and phrases without difficulty.[55] The Court concluded that color marks, like words

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[47] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1308.

[48] *Id.*

[49] NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1027 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991).

[50] Lanham Act § 2(d), 15 U.S.C. § 1052(d) (1988) (registration of a mark will be denied if the mark is "likely . . . to cause confusion, or to cause mistake, or to deceive").

[51] S. REP. No. 1333, 79th Cong., 2d Sess. 5 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275.

[52] *See NutraSweet*, 917 F.2d at 1027; *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1131 (Fed. Cir. 1985) (Bissell, J., dissenting).

[53] Qualitex Co. v. Jacobson Products Co., Inc., 13 F.3d 1297, 1302 (9th Cir. 1994), *rev'd*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[54] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1304-05 (1995).

[55] *Id.* (citing G.D. Searle & Co. v. Chas. Pfizer & Co., 265 F.2d 385, 389 (7th Cir.), *cert. denied*, 361 U.S. 819 (1959) (comparing "Bonamine" and "Dramamine"

and phrases, can be differentiated by the courts under existing legal standards, thereby making the shade confusion argument unpersuasive.[56]

C. Color Depletion

With the shade confusion theory dismissed, the Court turned its attention to the more difficult color depletion argument. Under the color depletion theory, there are a limited number of colors in the spectrum, which may be depleted if trademark registrants are allowed to prohibit competitors from using registered color marks.[57] By granting trademark registration, the courts would be allowing manufacturers to monopolize colors which would quickly deplete those colors that are available to other competitors.[58] This would put other manufacturers at a competitive disadvantage.[59] The color depletion theory relies on the public policy that disapproves of acts that hinder competition.[60]

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motion sickness remedies); Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd., 774 F.2d 1144, 1146-47 (Fed. Cir. 1985) (comparing "Huggies" and "Dougies" diapers); Upjohn Co. v. Schwartz, 246 F.2d 254, 262 (2d Cir. 1957) (comparing "Cheracol" and "Syrocol" cough syrup); Hancock v. American Steel & Wire Co., 203 F.2d 737, 740-41 (C.C.P.A. 1953) (comparing "Cyclone" and "Tornado" wire fences); Dial-A-Mattress Franchise Corp. v. Page, 880 F.2d 675, 678 (2d Cir. 1989) (comparing "Mattress" and "1-800-Mattres" mattress franchisor telephone numbers)).

[56] *Id.*

[57] *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1120 (Fed. Cir. 1985).

[58] Campbell Soup Co. v. Armour & Co., 175 F.2d 795, 798 (3d Cir.), *cert. denied*, 338 U.S. 847 (1949). As noted by the court:

> What the plaintiffs are really asking for, then, is a right to the exclusive use of labels which are half red and half white for food products. If they may thus monopolize red in all of its shades the next manufacturer may monopolize orange in all its shades and the next yellow in the same way. Obviously, the list of colors will soon run out.

Id.

[59] NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1028 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991). As explained by the court:

> It is likely, however, that if each of the competitors presently in the tabletop sweetener market were permitted to appropriate a particular color for its product, new entrants would be deterred from entering the market. The essential purpose of trademark law is to prevent confusion, not to bar new entrants into the market.

Id.

[60] *See* Campbell Soup Co. v. Armour & Co., 175 F.2d 795, 798 (3d Cir.), *cert. denied*, 338 U.S. 847 (1949).

In *First Brands Corp. v. Fred Meyer, Inc.*,[61] the Court of Appeals for the Ninth Circuit relied on the color depletion theory to affirm the lower court's denial of trade dress protection.[62] The product in question was a yellow-colored antifreeze container. The court held that granting trade dress protection would, in essence, give the claimant a trademark in the color yellow.[63] "[T]his would deplete a primary color available to competitors and deprive them of a competitive need."[64] The court concluded that the use of the color depletion theory to deny protection under the Lanham Act was proper.[65]

Using *First Brands* as a foundation, Jacobson argued that the color depletion theory extended beyond the use of primary colors. Jacobson hypothesized that for certain products only some colors were usable.[66] When the colors that were not appealing to customers and those that were too close in shade to registered trademarks were removed from the selection spectrum, competing manufacturers would be left with only a handful of colors in which to choose from.[67] In this situation, granting trademark status to one or more of the usable colors would prevent a competitor from finding a suitable color and would put that competitor at a significant disadvantage.[68]

The Court dismissed this argument on the grounds that Jacobson's hypothetical attempted to create a per se prohibition of color trademarks based on an occasional occurrence.[69] The Court further reasoned that, should the situation arise as described in Jacobson's hypothetical, other doctrines, such as the functionality doctrine,[70] were available to the courts to prevent the anti-competitive consequences that Jacobson sought to protect.[71]

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[61] 809 F.2d 1378 (9th Cir. 1987).

[62] *Id.* at 1383.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1305 (1995).

[67] *Id.* at 1305-06.

[68] *Id.* at 1306.

[69] *Id.*

[70] *See infra* Part V.

[71] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1306 (the Court relied on the "functionality" doctrine to prevent the anti-competitive effects that the color depletion argument relied on).

D. Other Color Per Se Bars

In addition to the statutory language bar, the shade confusion, and the color depletion arguments, Jacobson asserted arguments to the effect that extending trademark protection to color per se contradicts prior case law (both Supreme Court and lower court decisions) and that trademark protection is unnecessary since color is already protected under Section 43(a) of the Lanham Act when integrated with a product's trade dress.[72]

In regards to the first issue, the Court distinguished the cases cited by Jacobson[73] from the case at bar, since all of the cited cases were pre-Lanham Act decisions.[74] With the passage of the Lanham Act in 1946, the courts were given freedom to "reevaluate the preexisting legal precedent which had absolutely forbidden the use of color alone as a trademark."[75] The statutory analysis, as discussed above, gives credence to this premise. In regards to the alternate cause-of-action argument under Section 43(a), the Court gave little significance to the argument since trade dress and trademark laws are not equivalent where the protective rights of the holder of the mark are concerned.[76] Where applicable, the law should be able to provide both trademark and trade dress protection for a valid trademark.[77] The Court concluded that both of these arguments were unpersuasive.[78]

IV. Trademark Protection For Color Per Se - The Distinctiveness Requirement

Once the Court cleared the statutory language hurdle and the prior theoretical bars to trademark protection, the Court focused on the legal

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[72] *Id.* at 1307-08.

[73] Brief for Respondent at 7, Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300 (1995) (No. 93-1577) (citing Coca-Cola Co. v. Koke Co., 254 U.S. 143, 147 (1920) ("coloring matter is free to all who make if no extrinsic deceiving element is present"); Radio Corp. of America v. Decca Records, 51 F. Supp. 493, 495 (S.D.N.Y. 1943) ("color qua color may not be a trademark"); *In re* Canada Dry Ginger Ale, 86 F.2d 830, 833 (C.C.P.A. 1936) ("a mark is not registrable if color alone is its distinguishing characteristic"); *In re* L.E. Waterman Co., 34 App.D.C. 185 (1909) (color of fountain pen not protected); Shaeffer Pen Co. v. Coe, 27 F. Supp. 380, 381 (D.C. 1939) (plating in a particular color not protected)).

[74] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1307.

[75] *Id.* at 1308.

[76] *Id.* (citing 15 U.S.C. § 1124 (1988) (ability to prevent importation of confusingly similar goods); *id.* § 1072 (constructive notice of ownership); *id.* § 1065 (incontestible status); *id.* § 1057(b) (prima facie evidence of validity and ownership)).

[77] *Id.*

[78] *Id.* at 1305.

requirements for color per se to qualify as a trademark. The Court ruled that color per se must act as a "symbol that distinguishes a firm's goods and identifies their source, without serving any other significant function."[79] In other words, the Court was requiring a showing of distinctiveness and non-functionality.

The first of these two seemingly simple requirements discussed by the Court was distinctiveness. The Lanham Act requires a qualifying mark to be "distinctive of the applicant's goods in commerce" before registration is granted.[80] A mark is distinctive if it either (1) is inherently distinctive or (2) has achieved distinctiveness through secondary meaning.[81] Secondary meaning is acquired when consumers associate the mark with a particular manufacturing source, showing that the mark is distinctive of that source's product.[82]

A. Distinctiveness Classifications

Whether a mark is inherently distinctive or whether it requires secondary meaning to achieve distinctiveness depends on the classification of the type of mark. A mark is either (1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful.[83] Under trademark law, generic marks are never protected.[84] Generic marks are those that refer to the "genus of which the particular product is a species"[85] (i.e. "Ivory" for ivory elephant tusks, "Deep Bowl" for a deep bowl). A mark may begin in a non-generic classification but due to continued use of the mark in a non-trademark manner, it may become generic.[86] Protection of generic marks would deprive competing manufacturers of the product of the right to call an article by its name.[87]

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[79] *Id.* at 1304.

[80] Lanham Act § 2, 15 U.S.C. § 1052 (1988).

[81] Two Pesos, Inc. v. Taco Cabana, Inc., ___ U.S. ___, 112 S. Ct. 2753, 2758 (1992).

[82] *In re* Hehr Manufacturing Co., 279 F.2d 526, 528 (C.C.P.A. 1960). *See also In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1124 (Fed. Cir. 1985).

[83] Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976). *See also* Two Pesos, Inc. v. Taco Cabana, Inc., ___ U.S. ___, 112 S. Ct. 2753, 2757 (1992).

[84] *Abercrombie & Fitch*, 537 F.2d at 9.

[85] *Id.*

[86] King-Seeley Thermos Co. v. Aladdin Industries, Inc., 321 F.2d 577, 579 (2d Cir. 1963) (the mark "thermos" became generic for a vacuum-insulated container).

[87] J. Kohnstam, Ltd. v. Louis Marx and Co., 280 F.2d 437, 440 (C.C.P.A. 1960).

Descriptive marks, on the other hand, are those that merely describe a significant characteristic of the article.[88] As an example, "Deep Bowl" when used with a deep bowl spoon describes a characteristic of the spoon and is not the common descriptive name of the article which, in this case, is a spoon.[89] Descriptive marks require proof of secondary meaning to be protected under the Lanham Act.[90]

The third classification, suggestive, has been defined as a mark which requires the consumer's imagination, thought, and perception to determine the nature of the goods.[91] Examples of suggestive marks are "Orange Crush" when used with a fruit beverage and "Roach Motel" for insect traps.[92]

The last classification in the spectrum is arbitrary or fanciful. Arbitrary marks are those that use a familiar word in an unfamiliar way.[93] A mark is classified as fanciful when a word is invented solely for its use as a trademark.[94] Examples of arbitrary and fanciful marks are "Dutch Boy" for paints and "Clorox" for household bleach.[95] Suggestive, arbitrary and fanciful marks are all inherently distinctive and do not require proof of secondary meaning for trademark protection.[96]

How color per se is classified - generic, descriptive, suggestive, arbitrary or fanciful - is important in determining whether the legal requirements for distinctiveness have been met. Color, by its nature, carries a "difficult burden in demonstrating distinctiveness and trade-

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[88] *Abercrombie & Fitch*, 537 F.2d at 10 n.11 (citing Fletcher, *Actual Confusion as to Incontestability of Descriptive Marks*, 64 TRADEMARK REP. 252, 260 (1974)).

[89] *Id.*

[90] *Id.* at 10.

[91] Stix Products, Inc. v. United Merchants & Manufacturers Inc., 295 F. Supp. 479, 488 (S.D.N.Y. 1968) (the court differentiated descriptive marks from suggestive marks by noting that the former conveys an immediate idea of the ingredients, qualities, or characteristics of the goods). *See also* 1 J.T. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 11.21[1] (3d ed. 1995).

[92] Orange Crush Co. v. California Crushed Fruit Co., 297 F 892, 893 (D.C. 1924); American Home Products Corp. v. Johnson Chemical Co., Inc., 589 F.2d 103, 106 (2d Cir. 1978).

[93] *Abercrombie & Fitch*, 537 F.2d at 11 n.12.

[94] *Id.*

[95] National Lead Co. v. Wolfe, 223 F.2d 195, 199 (9th Cir.), *cert. denied*, 350 U.S. 883 (1955); Clorox Chemical Co. v. Chlorit Manufacturing Corp., 25 F. Supp. 702, 705 (E.D.N.Y. 1938).

[96] *Abercrombie & Fitch*, 537 F.2d at 11. *See also* Two Pesos, Inc. v. Taco Cabana, Inc., ____ U.S. ____, 112 S. Ct. 2753, 2757 (1992).

mark character."[97] This burden became apparent when the *Qualitex* Court determined that a product's color was not inherently distinctive - suggestive, arbitrary, or fanciful classifications - since the color would not automatically tell a consumer that it refers to a brand.[98] Instead, color, whether inherent or used as an additive in a product, is more consistent with descriptive marks since the color mark (i.e. the word "pink" for pink fiberglass insulation) merely describes a characteristic of the product in terms of its appearance. Thus classified, color marks face the difficult burden of proving secondary meaning.[99] Fortunately, like descriptive word marks, color can achieve secondary meaning since, over time, consumers could come to identify and distinguish the goods based on the color (e.g. the color pink when used with fiberglass insulation became synonymous with the manufacturer, Owens-Corning).[100] Thus, for color per se to meet the distinctiveness requirement for trademark protection there must be proof of secondary meaning.[101]

B. Secondary Meaning

How a color achieves secondary meaning - becomes known as an indicator of the product's origin - is a question of fact.[102] As such, the legal problem surrounding the issue of secondary meaning is mainly evidentiary.[103] Some courts have established evidentiary tests or "grocery lists" of factors to help in deciding whether secondary meaning has been acquired.[104] Although not explicitly enumerated, the District

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[97] *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1127 (Fed. Cir. 1985).

[98] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1303 (1995) ("The imaginary word 'Suntost,' or the words 'Suntost Marmalade,' on the jar of orange jam immediately would signal a brand or a product 'source'; the jam's orange color does not do so").

[99] *See Abercrombie & Fitch*, 537 F.2d at 10.

[100] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1303.

[101] *Id.*

[102] American Heritage Life Insurance Co. v. Heritage Life Insurance Co., 494 F.2d 3, 13 (5th Cir. 1974).

[103] 2 J.T. McCarthy, Trademarks and Unfair Competition §15.10[1] (3d ed. 1995).

[104] *See, e.g.*, Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 795 (5th Cir. 1983) ("Factors such as amount and manner of advertising, volume of sales, and length and manner of use may serve as circumstantial evidence relevant to the issue of secondary meaning."); Laureyssens v. Idea Group, Inc., 964 F.2d 131, 136 (2d Cir. 1992) ("In determining whether a trade dress has acquired secondary meaning we look to factors such as consumer studies establishing consumer recognition, length and exclusivity of trade dress use, sales success, advertising expenditures, and unsolicited media coverage.").

Court in *Qualitex* relied on advertisement of the mark, advertising expenditures, length and exclusivity of use, and sales success of the product to conclude that the green-gold color had acquired secondary meaning.[105] The court's findings of fact showed that: (1) Qualitex advertised its press pad in the green-gold color in a wide variety of media; (2) Qualitex had spent approximately $1,621,000 in advertising the green-gold press pad from 1960 to 1990; and (3) the green-gold press pad had been in continuous and exclusive use for thirty years, resulting in a significant amount of sales before Jacobson started selling its "imitation" press pad.[106] Although all of these factors were relevant to the court's analysis, the court seemed to place a primary emphasis on the "long and exclusive use" of the color in the marketplace in concluding that secondary meaning had been acquired.[107]

Whether the factors used by the District Court were conclusive or if the "long and exclusive use" factor was determinative[108] was not clear since the Supreme Court did not elaborate on its acceptance of the lower court's findings. Although secondary meaning is a question of fact that will not be disturbed on appeal unless clearly erroneous,[109] the Court merely reiterated the District Court's finding that Qualitex had developed secondary meaning due to customer identification of Qualitex's green-gold color.[110] It is important to note that how the courts currently decide the issue of secondary meaning, including what

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[105] Qualitex Co. v. Jacobson Products Co., Inc., 21 U.S.P.Q.2d 1457, 1458-59 (C.D. Cal. 1991), *aff'd in part, rev'd in part on other grounds, rem.*, 13 F.3d 1297 (9th Cir. 1994), *rev'd on other grounds*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[106] *Id.* at 1458.

[107] *Id.* ("As a result of the long and exclusive use of its green-gold color in the marketplace Qualitex' SUN GLOW (Registered) pad has acquired distinctiveness or secondary meaning.").

[108] Under § 1052(f) of the Lanham Act, exclusive and continuous use of a mark for five years is prima facie evidence of distinctiveness. However, this may be rebutted by evidence showing that secondary meaning had not been achieved. *See, e.g., Zatarains*, 698 F.2d at 797 (Registration of the word mark based on exclusive use was canceled due to a lack of secondary meaning. Evidence showed that only 11% of the consumers associated the mark with the manufacturer.); R.L. Winston Rod Co. v. Sage Manufacturing Co., 838 F. Supp. 1396, 1402 (D. Mont. 1993) (claim for common-law trademark in color green based on seven year exclusive use denied due to lack of secondary meaning).

[109] American Heritage Life Insurance Co. v. Heritage Life Insurance Co., 494 F.2d 3, 13 (5th Cir. 1974).

[110] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1305 (1995).

factors are relevant and the relative strength of each factor, has been inconsistent and confusing and in dire need of clarification. As a result, the trademark policies encouraging investment of goodwill and fair competition are in jeopardy since manufacturers cannot reasonably predict when trademark protection will be provided. By accepting the District Court's finding at face value, the Court passed up the opportunity to provide guidance and subsequent consistency in the determination of secondary meaning.

As an example of the inconsistent application of the law in the lower courts, the test used in *In re Owens-Corning Fiberglas Corp.*,[111] was significantly different than the test used in *Qualitex*. In *Owens-Corning*, the Court of Appeals applied a test that included "evidence of the trademark owner's method of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product."[112] The court held that the color pink used by Owens-Corning to dye its residential fiberglass insulation was registrable.[113] The court's finding that the color pink had acquired secondary meaning was based on advertising expenditures (the method of using the mark) and a consumer recognition survey (the effectiveness of such use).[114] The evidence showed that Owens-Corning had spent over $42,000,000 in advertising expenses over a twenty-five year period and had achieved a consumer recognition of 50% regarding the source of "pink" insulation.[115] These two findings alone were deemed sufficient proof of secondary meaning.[116]

Although criticized as a "limited precedent"[117] due to its "unusual set of facts,"[118] the *Owens-Corning* test which relied on different factual evidence as compared to the *Qualitex* test makes it difficult to determine when secondary meaning will be achieved. Which factors are really relevant and what weight should be given to those factors that are relevant to prove secondary meaning?

Even when the courts have applied the same evidentiary test, the degree of proof required to meet the burden has been inconsistently

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[111] 774 F.2d 1116 (Fed. Cir. 1985).

[112] *Id.* at 1125.

[113] *Id.* at 1128.

[114] *Id.* at 1127.

[115] *Id.*

[116] *Id.* at 1127-28.

[117] Nor-Am Chemical v. O.M. Scott & Sons Co., 4 U.S.P.Q.2d 1316, 1319 (E.D. Penn. 1987).

[118] First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1382 (9th Cir. 1987).

interpreted. In *R.L. Winston Rod Co. v. Sage Manufacturing Co.*,[119] the court applied the *Owens-Corning* evidentiary test requirements and held that the color green for graphite fly fishing rods had failed to achieve secondary meaning.[120] Both the method of using the mark and the effectiveness of such use were inadequate to prove secondary meaning.[121] The claimant's failure to advertise and promote the color as a distinctive feature of its fishing rod was unfavorably compared to "Owens-Corning's substantial efforts to advertise its pink insulation so as to reinforce the secondary meaning in the eyes of the public."[122] This implies that the standard of proof for advertising expenditures is comparable to that shown in *Owens-Corning*.

In regards to the effectiveness issue, the court initially criticized the survey, which was sent to sellers of the product, for its failure to solicit views from the consuming public.[123] The effectiveness of a mark can only be measured by the ultimate consumer's association of the mark with a particular source.[124] Although no figures were cited, the court did note that the identification of other manufacturers of green fly fishing rods in the survey results was proof of the claimant's failure to prove secondary meaning.[125] Contrary to *Owens-Corning* where the recognition percentage was important, the *Winston Rod* court seemed to emphasize the number of competitors reported in the survey as evidence of market dilution or non-effectiveness.[126]

Other non-color trademark cases have only fueled the debate by deciding the question of secondary meaning on fewer or weaker factors. For example, in *In re Hollywood Brands, Inc.*,[127] the court found secondary meaning where advertising expenses devoted to the mark were $378,000 over a six year period and sales of the product during this period were

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[119] 838 F. Supp. 1396 (D. Mont. 1993).

[120] *Id.* at 1401-02.

[121] *Id.* at 1402.

[122] *Id.* at 1401.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 1401-02.

[126] *Id.* ("[E]ven if [the survey were] taken at face value, it does not establish that Winston has created a secondary meaning. The [survey] identified a number of manufacturers of high-end green fishing rods, including some not parties to this lawsuit.").

[127] 214 F.2d 139 (C.C.P.A. 1954).

significant (evidence of sales success).[128] In this case, the court noted that a consumer survey was not essential to prove secondary meaning.[129] Similarly, in *Roux Laboratories, Inc. v. Clairol Inc.*,[130] advertising expenses of $22,000,000 over a ten year period were, without any other evidence, sufficient to prove secondary meaning.[131] On the other hand, in *In re Hehr Manufacturing Co.*,[132] the court relied primarily on a consumer survey to establish secondary meaning. The survey results showed that a "majority" of consumers interviewed associated the mark with the manufacturer even though the manufacturer had spent only $6,000 per year in advertising the mark over a five year period.[133] Although no percentages were given in the case, majority, by definition, connotes a greater than 50% recognition rate. These cases show that in some circumstances the method of use or the effectiveness of such use are alone sufficient to prove secondary meaning.

However, where the method of use or the effectiveness of such use are not sufficient alone to prove secondary meaning, some courts have made the determination based on a combination of the two factors. For example, in *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*,[134] the court initially relied on a consumer survey to prove secondary meaning.[135] However, unlike the *Hehr* case, the recognition rate in this case was a mere 23%.[136] The court held that the survey results, coupled with advertising expenditures of $400,000 over a five year period, "tipped the scales in favor of a finding of secondary meaning."[137]

Thus, in light of the aforementioned case law, it is clear that the courts are not in agreement in terms of what factors are relevant and to what degree those factors are determinative when secondary meaning is an issue. Should excessive advertising alone be sufficient to prove

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[128] *Id.* at 141.

[129] *Id.*

[130] 427 F.2d 823 (C.C.P.A. 1970).

[131] *Id.* at 829.

[132] 279 F.2d 526 (C.C.P.A. 1960).

[133] *Id.* at 528.

[134] 698 F.2d 786 (5th Cir. 1983).

[135] *Id.* at 795.

[136] *Id.*

[137] *Id.* (however, in regards to the second product in the case, the court held that an 11% survey result coupled with minimal advertising expenditures was insufficient evidence to prove secondary meaning).

secondary meaning or should the courts require proof of consumer recognition? The *Qualitex* Court left this issue unresolved.

C. The Proper Test For Secondary Meaning

As noted, the issue of secondary meaning is a question of fact[138] that is centered around the type and adequacy of evidence proffered by the claimant. Although it is the trial court's domain to make factual determinations, for consistency purposes, the Supreme Court should have expressed some sort of evidentiary test to provide parameters when a determination of secondary meaning is necessary. Since secondary meaning is acquired when consumers associate the mark with a particular source of manufacturer, it is clear that the major inquiry should focus on the consumer's attitude toward the mark.[139] As a leading commentator has noted, the prime element of secondary meaning is a mental association in the buyer's mind between the alleged mark and a single source of the product.[140]

With this premise in mind, the test in assessing a claim of secondary meaning should focus on the consumer's association of the mark with the manufacturer of the product. Since the consumer's subjective belief is determinative on the issue, the best evidentiary proof that can directly show the consumer's actual state of mind is a consumer survey. Thus, some courts have articulated that survey evidence is the most direct and persuasive way of establishing secondary meaning.[141]

The survey functions as a means to elicit, from the consumer, the source or the good in response to an inquiry about a particular trademark (e.g. a favorable survey response would occur when a consumer answers "Qualitex" to the question: "What company do you think makes green-gold press pads?"). The survey results are then converted into a percentage which reflects the number of respondents who correctly identified the source or the good over the total number

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[138] *See* American Heritage Life Insurance Co. v. Heritage Life Insurance Co., 494 F.2d 3, 13 (5th Cir. 1974).

[139] *Zatarains*, 698 F.2d at 795.

[140] 2 J.T. McCarthy, Trademarks and Unfair Competition § 15.02[1] (3d ed. 1995).

[141] *See, e.g., Zatarains*, 698 F.2d at 795; Vision Center v. Opticks, Inc., 596 F.2d 111, 119 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

of respondents. When this figure represents a "substantial number"[142] of relevant buyers to prove secondary meaning is not clear.

As shown above, the case law is not helpful. Requiring 100% of the respondents to answer correctly would clearly establish secondary meaning. However, requiring this high a figure is unrealistic and would virtually eliminate all trademarks. Just where the line should be drawn on the percentage scale - greater than 50%, 50%, or as low as 23% - is difficult to determine without factoring in other evidentiary considerations.

In *Zatarains*, the court noted that "factors such as amount and manner of advertising, volume of sales, and length and manner of use may serve as circumstantial evidence relevant to the issue of secondary meaning."[143] Circumstantial evidence of this type was distinguished from survey results in that circumstantial evidence does not directly reflect the consumer's association of the mark with the manufacturer.[144] Circumstantial evidence merely helps to provide a link in the "minds of the consumer between product and source."[145] Thus, cases such as *Hollywood Brands* and *Roux Laboratories* where secondary meaning was proven solely on circumstantial evidence are erroneous since there was no proof that the consumer actually associated the mark with the manufacturer.

The court in *Zatarains* applied a test similar to the *Owens-Corning* evidentiary test - evaluation of the method of using the mark (circumstantial evidence) and the effectiveness of such use (survey results) - except the *Zatarains* test properly emphasized that the primary proof of secondary meaning was the survey result. Circumstantial evidence was only used because the survey result did not clearly reflect that a substantial number of people associated the mark with the manufacturer.[146]

Using *Zatarains* as a foundation, the test proposed herein uses a sliding scale to decide the issue of secondary meaning. The greater the percentage of consumer recognition in the consumer survey, the lower

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[142] The term "substantial number" has been used by some courts when proof of secondary meaning is an issue. *See, e.g.*, National Shoe Stores Co. v. National Shoes of New York, Inc., 113 U.S.P.Q. 380, 384 (Md. 1957); RESTATEMENT (FIRST) OF TORTS § 727 cmt. c (1938).

[143] *Zatarains*, 698 F.2d at 795.

[144] *Id.*

[145] *Id.*

[146] *Id.*

the need and amount of circumstantial evidence necessary to prove secondary meaning. And conversely, the lower the percentage of consumer recognition in the consumer survey, the greater the need and the amount of circumstantial evidence.

A consumer survey with a recognition rate greater than 50% would, in all likelihood, be deemed a significant number in the eyes of the trier of fact and would prove secondary meaning without the need of circumstantial evidence.[147] One court even went so far as deeming a 50% recognition rate an "extremely significant" number of consumers.[148] Conversely, a recognition rate at or near 10% would be an insignificant number and would fail to prove secondary meaning.[149] It is the difficult cases, those where the issue is close (a consumer recognition range of 20%-40%), where circumstantial evidence must be introduced and weighed in conjunction with the survey results to determine if secondary meaning has been acquired. A weighing of these factors will take into consideration the trademark policies of investment of goodwill, consumer confusion, and fair competition. The lower the consumer recognition rate the more likely that there will be consumer confusion. However, in some instances, a low consumer recognition rate could be the result of market dilution caused by a competitor's illegal use of a similar mark. Under these circumstances, unless circumstantial evidence is factored in, an innocent trademark owner could be denied trademark protection which would then reward the competitor for his unfair practices. To ease the hardship on the innocent trademark owner, evidence of good faith investment of goodwill, which includes advertising and promotion of the mark, can supplement a low recognition rate. This balancing is the key to the secondary meaning determination. Difficult as this may sound, the issue is still a question of fact and is, thus, for the trier of fact to decide whether the circumstantial evidence has, as *Zatarains* notes, "tipped the scales in favor of a finding of secondary meaning."[150] This

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[147] 2 J.T. McCarthy, Trademarks and Unfair Competition, § 15.14[1] (3d ed. 1995).

[148] Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 381 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976).

[149] *See, e.g.*, Roselux Chemical Co. v. Parson Ammonia Co., 299 F.2d 855, 862 (C.C.P.A. 1962) (survey result showing a 10% recognition rate inadequate to prove secondary meaning); *Zatarains*, 698 F.2d at 797 n.10 (survey result of 11% inadequate to show secondary meaning).

[150] *Zatarains*, 698 F.2d at 795.

test, although not perfect in all respects, forms a framework for courts to decide the issue of secondary meaning and, in the long run, will provide more consistency and predictability in this area of the law.

D. Application Of The Test To Qualitex

The test outlined above requires the use of direct evidence (a consumer survey) to determine if secondary meaning has been acquired. If the survey does not clearly reflect a consumer association between the mark and a manufacturer, then circumstantial evidence may be used to meet the burden of proof. In *Qualitex*, the District Court concluded that secondary meaning had been acquired even though the court had not relied on any direct evidence (consumer survey). Does this mean that the court's conclusion was incorrect? Yes, if the court did not have or failed to consider any direct evidence. Without direct evidence there is no proof that the consumer has associated the mark with the manufacturer.

In this case the District Court did have in evidence, a valid consumer survey reflecting a recognition rate of 39%.[151] Unfortunately, the court used the survey results exclusively in its "likelihood of confusion" determination on the infringement claim.[152] Likelihood of confusion and secondary meaning are separate but related legal issues.[153] Their relationship arises from the use of the same evidentiary findings.[154] Where the evidence shows that there is a likelihood of confusion, it follows that there must be secondary meaning—one cannot be confused if there is no association of the mark with a particular manufacturer.[155] However, the court's error was not in its conclusion that secondary meaning had been achieved; instead, it was in its method of making that determination. The District Court's failure to use the survey results in the secondary meaning determination could create problems for other courts relying on the District Court's analysis since likelihood

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[151] Qualitex Co. v. Jacobson Products Co., Inc., 21 U.S.P.Q.2d 1457, 1459 (C.D. Cal. 1991), *aff'd in part, rev'd in part on other grounds, rem.*, 13 F.3d 1297 (9th Cir. 1994), *rev'd on other grounds*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[152] *Id.*

[153] Levi Strauss & Co. v. Blue Bell, Inc., 632 F.2d 817, 821 (9th Cir. 1980).

[154] *Id.*

[155] Union Carbide Corp. v. Ever Ready, Inc., 531 F.2d 366, 381 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976).

of confusion is not always an issue in trademark cases.[156] Had the court, in its determination of secondary meaning, used the 39% survey results in conjunction with the circumstantial evidence - advertising efforts, advertising expenditures, long and exclusive use of the mark, and sales success - it is very likely that the court would have found that the preponderance of evidence showed that secondary meaning had been acquired.

Thus, although the results are the same - Qualitex's green-gold color mark had acquired secondary meaning - the method used in reaching that result is very different from the Court's analysis. The test herein proposed emphasizes the evidentiary need for direct evidence. Since secondary meaning is based on the consumer's subjective belief that an association between the mark and the manufacturer exists, it is only proper that the evidentiary proof reflect this association.

V. Trademark Protection For Color Per Se - The Non-Functionality Requirement

After distinctiveness, the second of the Court's legal requirements for color per se was non-functionality. In addition to being distinct, a mark must be non-functional to act as a trademark. The basic theory behind the functionality bar to trademark protection is that legitimate competition will be inhibited by allowing a manufacturer to control or monopolize a useful product feature.[157] A product's useful or functional features are governed by the patent laws, which allow a monopoly for a limited time.[158] On the other hand, non-functional features that indicate a product's source, may be "monopolized"[159] in perpetuity

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[156] Although likelihood of confusion is a major consideration in cancellation proceedings (*see* Flavor Corp. of America v. Kemin Industries, Inc., 493 F.2d 275, 280 (8th Cir. 1974) (where cancellation of a mark is at issue, a finding of likelihood of confusion will cancel the mark), in registration cases likelihood of confusion is not always an issue. *See, e.g., In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116 (Fed. Cir. 1985); *In re* Clarke, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990).

[157] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1304 (1995) (useful features are governed by patent law, not trademark law).

[158] *Id.*

[159] *But see* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97-98 (1918) ("In truth, a trade-mark confers no monopoly whatever in the proper sense, but is merely a convenient means for facilitating the protection of one's good-will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.").

under the trademark laws.[160] The functionality doctrine reflects a tension between two fundamental principles of trademark law: the right to protect a product feature serving as a source indicator and the right to effectively compete by copying articles that are not protected by patent or copyright.[161] Thus, if a mark is a useful product feature, it is deemed a functional feature and is barred from trademark protection. But what is a useful product feature? This question is at the heart of the functionality issue and has generated disputes in the courts and among the commentators.

A. The Qualitex Standard of Functionality

The Court began its analysis of functionality by explaining that "'"in general terms, a product's feature is functional,' and cannot serve as a trademark, 'if it is essential to the use or purpose of the article or if it affects the cost or quality of the article[.]'"'[162] If a product feature satisfied any of these standards, exclusive use of the feature would put competitors at a significant non-reputation related disadvantage, which was against trademark policy.[163] The Court went on to note that the functionality doctrine did not create an absolute bar to the use of color per se as a mark since sometimes color was not essential to a product's use or purpose and did not affect the cost or quality.[164]

After establishing this basic functionality standard, the Court took a leap of faith and accepted the District Court's finding that Qualitex's green-gold color mark was non-functional.[165] Although the lower court's functionality determination was a question of fact reviewed under the clearly erroneous standard,[166] the Court, as it did in the distinctiveness issue, failed to elaborate on the propriety of the lower court's finding. The Court's acceptance implies that the District Court used and properly applied the "essential to use/affects cost or quality" standard

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[160] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1304.

[161] *See In re* Morton-Norwich Products, Inc., 671 F.2d 1332, 1339 (C.C.P.A. 1982).

[162] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1304 (quoting Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 850 n.10 (1982)).

[163] *Id.*

[164] *Id.*

[165] *Id.* at 1305.

[166] Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 614 (9th Cir. 1989). *See also* Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527, 1530 (Fed. Cir. 1994) (citing *In re* Morton-Norwich Products, Inc., 671 F.2d 1332, 1340 (C.C.P.A. 1982)), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1426 (1995).

annunciated by the Court or, at a minimum, that the District Court's analysis could be replicated. However, it is arguable whether the District Court actually used and applied the same test.

1. The District Court and functionality

The District Court addressed the functionality issue by acknowledging that a "product feature is functional if it is essential to the [product's] use . . . or if it affects the cost or quality of the article."[167] Thus, initially, both the District Court and the Supreme Court defined functionality in the same way. The findings of fact made by the District Court established that the green-gold color was not the natural color of the press pad cover material and that the color did not make the press pad perform better.[168] In addition, the product's overall quality and longevity were unaffected by the use of color.[169] The green-gold color was merely an additive that made the press pad look more pleasing in appearance (an aesthetic or ornamental adornment).[170] In light of the "essential to use/affects cost or quality" test, the District Court concluded that the color green-gold was not functional because it was not "related in any way to the product's use, cost, quality or longevity."[171]

In addition to the "essential to use/affects cost or quality" test, the court, in its findings of fact and conclusions of law, made reference to two other functionality tests - the competitive need test and the aesthetic functionality test.[172] In regards to the competitive need test, the court concluded, without elaborating, that there was no competitive need for the color green-gold since other colors were equally usable.[173] There was, however, a competitive need for color in general, but this was irrelevant since there were so many available colors to choose from.[174] What this meant in terms of the "essential to use/affects cost or

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[167] Qualitex Co. v. Jacobson Products Co., Inc., 21 U.S.P.Q.2d 1457, 1461 (C.D. Cal. 1991), (quoting Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 850 n.10 (1982)), *aff'd in part, rev'd in part on other grounds, rem.*, 13 F.3d 1297 (9th Cir. 1994), *rev'd on other grounds*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

[168] *Id.* at 1459-60.

[169] *Id.* at 1461.

[170] *Id.* at 1460.

[171] *Id.* at 1461.

[172] *Id.* at 1460-61.

[173] *Id.* at 1460.

[174] *Id.*

quality" test was not expressed. The court's discussion on aesthetic functionality was even more succinct when it simply rejected the aesthetic functionality in favor of the "essential to use/affects cost or quality" test.[175]

What is the competitive need test and how and when does it apply? What is aesthetic functionality and why was it rejected by the court? How do these two functionality tests affect the "essential to use/affects cost or quality" test? Although these questions, as will be shown, are important to the functionality analysis, the District Court's brief discussion and its implied reliance on these other functionality doctrines generated more questions than answers. By unconditionally accepting the District Court's findings, the Supreme Court failed to provide a clear and concise functionality standard.

2. *Further analysis of the Qualitex functionality standard*

The Court's initial analysis of functionality which led to its acceptance of the lower court's finding of non-functionality, although lacking in thoroughness in some respects, was still basically sound. However, it was from this point on that the Court's discussion of functionality began to waver and conflict. In its discussion of the color depletion theory,[176] the Court noted that the functionality doctrine was available as a means to prevent competitive disadvantages.[177] The Court gave a very brief synopsis of three prior trademark cases and the Restatement (Third) of Unfair Competition as examples of how the "essential to use/affects cost or quality" test was interpreted to protect competitors from a disadvantage unrelated to source identification.[178]

a. *Inwood Laboratories, Inc.*

The first case cited by the Court, *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*,[179] dealt with a trade dress infringement claim where

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[175] *Id.* at 1461 (citing First Brands Corp. v. Fred Meyer Inc., 809 F.2d 1378, 1382 n.3 (9th Cir. 1987) (in *First Brands*, the court used the term "utilitarian" functionality to express the "essential to use/affects cost or quality" test)).

[176] *See supra* Part III, Section C.

[177] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1306 (1995).

[178] *Id.*

[179] 456 U.S. 844 (1982).

color was used on medicinal capsules.[180] Although this case dealt with trade dress, the Court's functionality analysis can still be applied to trademarks since the "functionality" requirement is the same under both trade dress and trademark law.[181] In this case, the District Court held that there was no trade dress infringement under Section 43(a) of the Lanham Act because the color was functional.[182] In affirming the lower court's decision, the Supreme Court ruled that the District Court's functionality finding was not clearly erroneous.[183]

The Court noted, in the now oft-quoted language, that "a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article."[184] In this case, the color functioned in the following manner: (1) it had a therapeutic effect on some elderly patients; (2) it helped some patients to differentiate and identify their medicines when the drugs were commingled in one container; and (3) it helped pharmacists to identify name brand drugs and their equivalent generic counterparts.[185] Based on these general characteristics of color, the District Court concluded that color when used with medicine capsules was functional.[186]

b. Deere & Co.

After its brief discussion of the *Inwood Laboratories* case, the *Qualitex* Court continued its discussion of the "essential to use/affects cost or quality" functionality doctrine by referring to a lower court case that denied trademark protection for the color green on farm machinery.[187]

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[180] *Id.* at 846-47.

[181] *See, e.g.*, Vaughan Mfg. Co. v. Brikam Int'l, Inc., 814 F.2d 346, 348 n.2 (7th Cir. 1987) (secondary meaning and functionality have the same meaning in both trademark and trade dress areas; courts deciding trade dress cases cite freely from trademark cases, and vice versa); *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1121 (Fed. Cir. 1985) (when analyzing the functionality issue for trademark registration of a color, the court applied the "essential to use/affects cost or quality" trade dress test from *Inwood Lab.*).

[182] *Inwood Lab.*, 456 U.S. at 853.

[183] *Id.* at 858.

[184] *Id.* at 851 n.10.

[185] *Id.* at 853.

[186] *Id.* (the Court did not identify which standard of the "essential to use/affects cost or quality" test was met).

[187] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1306 (1995).

In the case of *Deere & Co. v. Farmhand, Inc.*,[188] the court, like the lower court in *Inwood Laboratories*, based its decision to deny trademark protection on the functionality doctrine.[189] However, how the court arrived at its conclusion that the color green was functional was very different from the *Inwood Laboratories* analysis.

In this case, Deere & Co. ("Deere"), claimed that Farmhand, Inc. ("Farmhand") had infringed upon Deere's trademark in the color "John Deere Green" by copying the color and design of Deere's loader attachment for farm tractors.[190] The court entered judgment in favor of Farmhand basing its decision on the aesthetic functionality doctrine, which barred trademark protection for a feature that was an important ingredient in the commercial success of the product.[191] In other words, when goods are bought largely for their aesthetic value, their features may be functional since they contribute to the value of the goods and thus, aid in the performance of the goods.[192] The court's denial of trademark protection was based on an abundance of evidence which showed that farmers preferred to match the color of their loader attachments to the color of their tractors.[193] Thus, color was deemed an important ingredient in the commercial success of Deere's loader attachment since color, in particular "John Deere Green," was the primary reason farmers purchased the product.

c. Brunswick Corp.

The last case referred to by the *Qualitex* Court to exemplify its "essential to use/affects cost or quality" functionality doctrine was *Brunswick Corp. v. British Seagull Ltd.*.[194] In this recent Court of Appeals case, Brunswick Corp. ("Brunswick") appealed the PTO's denial of trademark registration for the color black when used on outboard motors.[195] The court, citing the "essential to use/affects cost or quality" test from *Inwood Laboratories*, found that the color black was not "func-

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[188] 560 F. Supp. 85 (S.D. Iowa 1982), *aff'd*, 721 F.2d 253 (8th Cir. 1983).

[189] *Id.* at 98.

[190] *Id.* at 88.

[191] *Id.* at 98 (citing Pagliero v. Wallace China, 198 F.2d 339, 343 (9th Cir. 1952)).

[192] RESTATEMENT (FIRST) OF TORTS § 742 cmt. a (1938).

[193] *Deere*, 560 F. Supp. at 91-92.

[194] 35 F.3d 1527 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1426 (1995).

[195] *Id.* at 1529.

tional" in this sense because the color black did not make the engine function better as an engine.[196] The court did, however, affirm the PTO's denial of trademark registration for the color black based on another type of functionality.[197]

Relying on the functionality doctrine known as "de jure functionality," the court held that the color black was not registrable since there was a competitive need in the industry for the color black in its non-trademark related function.[198] A non-trademark related function is one that does not operate as an indicator of the product's source.[199] In general, a product feature is de jure functional when it is the best or one of the few superior designs for the feature's de facto or actual purpose and there is a competitive need for the feature in the industry.[200] In other words, a color is de jure functional if it is the best or one of the few colors available to accomplish the purpose for which the color is used in the product and there is a competitive need for the color in the industry. To allow monopolization, through trademark law, of a product feature or color that is de jure functional would hinder competition and be a breach of public policy.[201]

The *Brunswick* court found that the color black's de facto and non-trademark purpose was color compatibility with a wide variety of boat colors and the ability to make objects appear smaller.[202] Since these features were important to consumers and no other color could accomplish these functions, the court ruled that there was a competitive need in the industry for the color black and that the de jure functionality doctrine barred trademark registration.[203]

d. Aesthetic functionality

The last authority cited by the *Qualitex* Court as evidence that the functionality doctrine protected competitors against an unfair disadvantage was the Restatement (Third) of Unfair Competition.[204] The section

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[196] *Id.* at 1531.

[197] *Id.* at 1532.

[198] *Id.* at 1531.

[199] *Id.* (citing *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1123 (Fed. Cir. 1985)).

[200] *Id.* (citing *In re* Bose Corp., 772 F.2d 866, 872 (Fed. Cir. 1985)).

[201] *Id.*

[202] *Id.*

[203] *Id.* at 1531-32.

[204] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S.Ct. 1300, 1306 (1995).

quoted in the Restatement deals expressly with "aesthetic" functionality.[205] The Court noted that the "'ultimate test of aesthetic functionality' . . . is whether the recognition of trademark rights would significantly hinder competition."[206] Under this test, if a product's feature "'confe[rs] a significant benefit that cannot practically be duplicated by the use of alternative designs,' then the [feature] is 'functional'" and barred from trademark protection.[207]

What the Court failed to include was the Restatement's definition of aesthetic functionality. Under the Restatement (Third) of Unfair Competition, a product's feature may be deemed functional if it substantially contributes to the aesthetic appeal of the product.[208] In other words, when a feature's aesthetic considerations play an important role in the purchasing decisions of prospective consumers, the feature may be functional.[209] Thus, this definition of aesthetic functionality differs greatly from functionality in the "essential to use/affects cost or quality" sense.

In summary, all three cases cited are, factually, very different from one another and relied on different theories of functionality. *Inwood Laboratories* utilized the "essential to use" test while *Deere* advocated the "important ingredient" test. Although both of these tests are similar in their apparent per se prohibition for color marks (once the initial standard is met neither test allows a "waiver" where there is no competitive need for the color in the industry), disparate results would occur when the tests are applied to a common set of facts. On the other hand, although the de jure functionality test relied on by the *Brunswick* court and the aesthetic functionality test under the Restatement (Third) of Unfair Competition both require an inquiry into competitive need, neither test agrees on what threshold facts are necessary to reach the competitive need issue. Lastly, the Restatement of Law cited, expressly deals with aesthetic functionality which, according to the District Court, was rejected. Thus, as is apparent, it is difficult to read the cited authority together in support of one common functionality test.

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[205] *Id.*

[206] *Id.* (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 cmt. c at 175-76 (1995)).

[207] *Id.*

[208] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 cmt. c at 175-76 (1995).

[209] *Id.*

B. The Proper Test For Functionality

It is clear from the Court's analysis that non-functionality is required for trademark protection to stem the anti-competitive consequences that occur when useful features are protected. However, what is still not clear from the Court's opinion is how functionality is to be determined. Should the lower courts simply apply the "essential to use/affects cost or quality" test as an exclusive standard, as the Court implied the District Court did in its determination of functionality, or should the lower courts extend the standards to include de jure functionality and aesthetic functionality as the section on color depletion implies? Is the competitive need test a necessary element, and should aesthetic functionality be rejected? A close inspection of the Court's opinion reveals many unanswered questions. The Court, as it did on the distinctiveness issue, missed the opportunity to clarify an issue that has confused the lower courts time and time again.

Since consistency and predictability are desirable aspects of trademark law,[210] the Court should have established a clear and concise functionality test for color per se. It is obvious from the case law that the proper test for functionality cannot be expressed in terms of one exclusive standard. Depending on the circumstances, color can function in a variety of ways - color can function in a utilitarian manner based on the product's attributes,[211] it can function in a manner based solely on the color's attributes (e.g., the color black makes things appear smaller), or it can function in an aesthetic or ornamental manner. Whether or not one or all of these color characteristics exist in any one fact pattern depends on the color and the product it is used on. Thus, the test for functionality should be flexible enough to address all of these potential functionality types.

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[210] Consistency and predictability in trademark law has been an argument used to justify decisions in prior trademark cases. *See, e.g.,* NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1027 (7th Cir. 1990) ("[c]onsistency and predictability of the law are compelling reasons for not lightly setting aside the settled principle of law" that color of a product cannot be a trade identity designation, thus it is not entitled to registration), *cert. denied,* 499 U.S. 983 (1991); Master Distributors, Inc. v. Pako Corp., 986 F.2d 219, 224 (8th Cir. 1992) ("instead of promoting consistency and predictability, we believe that establishing a per se prohibition against protection of a color mark would cause confusion and inconsistency").

[211] The "essential to use/affects cost or quality" test has been used interchangeably with the term "utilitarian" functionality. *See, e.g., Masters Distributors,* 986 F.2d at 224; Brunswick Corp. v. British Seagull Ltd. 35 F.3d 1527, 1530 (Fed. Cir. 1994), *cert. denied,* ____ U.S. ____, 115 S. Ct. 1426 (1995).

1. Utilitarian functionality

The proper functionality test should begin with the utilitarian functionality test. In other words, a functionality determination should initially analyze the "essential to use/affects cost or quality" standard. This standard has two elements both of which emphasize the way color affects the product itself. As the court in *Brunswick Corp.* noted, the color black was not utilitarian functional since it did not "make the engine function better as an engine."[212] The engine's purpose was to mechanically propel a boat, and the use of color on the exterior surfaces of the engine did not affect the engine's mechanical purpose. Thus, the first element of the test - essential to use - focuses on the useful function of the product. Phrased in the negative, a color is not essential to use if the product functions the same with or without the color.[213]

The second element of this test applies where a color is inherent in the product itself. If a color is inherent in the product, then granting trademark rights in the color would force competitors to artificially color their products.[214] Requiring this would increase the cost of the product for competitors and might even affect the quality of the product itself. In both instances, the color is utilitarian functional and barred from trademark protection. Thus, if color makes the product perform better in the product's intended purpose or if color is inherent to the product, then the color is deemed utilitarian functional and denied trademark protection.

2. De jure functionality

Once a color mark passes the utilitarian functionality test, the court should then address the de jure functionality test. An important dis-

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[212] *Brunswick*, 35 F.3d at 1531.

[213] This interpretation of the "essential to use/affects cost or quality" standard differs from the way the Court evaluated the *Inwood Lab.* case. In *Inwood Lab.*, the color characteristics noted did not make the drug perform better - once ingested, the medicine would have had the same effect on the patient regardless if the capsule were blue, red, or any other color (although one may argue that color was essential to the use of the medicine since it had a therapeutic effect on some patients). The characteristics of the color would be better analyzed under the de jure functionality doctrine discussed *infra* in Part V, Section B, Sub-section 2.

[214] *See, e.g.*, Smith, Kline & French Laboratories v. Clark & Clark, 157 F.2d 725, 730 (3d Cir.) (the color white deemed functional since the natural color of drug tablet was white), *cert. denied*, 329 U.S. 796 (1946).

tinction between utilitarian functionality and de jure functionality is that utilitarian functionality emphasizes the way color affects the product's function while de jure functionality emphasizes the way color itself functions. When a color has its own function separate from the use or purpose of the product, then the competitive needs of the industry must be examined. If there is a competitive need in the industry for that color, then the color is de jure functional and is barred from trademark protection.

Again, using *Brunswick Corp.* as an example, the court held that the color black was compatible with a wide variety of boat colors and had the ability to make objects appear smaller.[215] These inherent functions of the color black were in no way related to the utilitarian function of the product, which was an outboard engine. Since the color had its own function separate from the use or purpose of the product, the court then determined if there was a competitive need in the industry for the particular color.[216] The court found there was a competitive need for the color black since the features of the color were desired by customers and no other color could perform in the same manner as the color black.[217] Thus, to allow trademark protection for the color black would put competitors at a significant non-reputation related disadvantage.

The analysis of "competitive need" is another area in need of clarification. Some courts have relied on the size of the manufacturing industry to determine if there was a competitive need.[218] Other courts, like the *Brunswick Corp.* court, have based their decision on the availability of alternative colors.[219] Since the functionality doctrine is based on avoiding competitive disadvantages, the proper test for competitive need should be based on whether alternative means of performance are available. In *Brunswick Corp.*, the court stated that "when we consider whether a color is functional we must consider whether alternative colors are available in order to avoid the fettering of

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[215] *Brunswick*, 35 F.3d at 1531.

[216] *Id.*

[217] *Id.*

[218] *See In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1122 (Fed. Cir. 1985) (finding of no competitive need where there were only a small number of producers in the industry).

[219] *See* R.L. Winston Rod Co. v. Sage Manufacturing Co., 838 F. Supp. 1396, 1400 (D. Mont. 1993) (competitive need existed due to the extremely limited availability of colors in the manufacturing process of graphite fly fishing rods).

competition. If competition will be hindered, the color in question is de jure functional."[220]

Thus, under the competitive need test, the court will have to determine how many alternative colors are available which will perform in the same manner and quality as the color mark under consideration. Just how many alternative colors are necessary to overcome a competitive need is not clear at this point. In *R.L. Winston Rod*, the court held that there was a competitive need where there were only a "few" alternative colors due to the particular manufacturing process.[221] Just how many alternative colors are needed to exceed the "few" threshold? The answer to this question will vary from case to case. Competitive need is a question of fact to be determined by the trier of fact based on the circumstances and a preponderance of evidence.[222]

3. Aesthetic functionality

If a color is not utilitarian or de jure functional, then it has no function other than its use as an aesthetic or ornamental adornment. Where a color operates purely as an aesthetic or ornamental adornment and nothing else, it is non-functional and may be protected if all other trademark requirements are met. However, if the color's aesthetic considerations play an important role in the purchasing decisions of consumers, the color may be deemed functional and be barred from trademark protection by the aesthetic functionality doctrine. In *Qualitex*, the Court expressed aesthetic functionality by quoting the Restatement (Third) of Unfair Competition.[223] The Restatement's definition is adopted for the test proposed herein since the Restatement incorporates both an "effect on purchasers" factor and a competitive need factor. These factors are consistent with the trademark policies of competitive shopping, investment of goodwill, and fair competition.

As noted above, under the Restatement's test, where color plays an important role in the purchasing decisions of prospective consumers,

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[220] Brunswick Corp. v. British Seagull Ltd., 28 U.S.P.Q.2d 1197, 1199 (T.T.A.B. 1993), *aff'd*, 35 F.3d 1527 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1426 (1995).

[221] *Winston Rod*, 838 F. Supp. at 1400 (the natural color of graphite fly fishing rods was black, which severely restricted the use of coloring dyes to a few dark shades).

[222] Master Distributors, Inc. v. Pako Corp., 986 F.2d 219, 225 (8th Cir. 1993).

[223] Qualitex Co. v. Jacobson Products Co., Inc., ___ U.S. ___, 115 S. Ct. 1300, 1306 (1995).

the color is functional if "it confers a significant benefit that cannot practically be duplicated by the use of alternative [colors]."[224] Thus, like de jure functionality, aesthetic functionality depends on whether there is a competitive need for the color in the industry based on an alternative colors inquiry.

Applying this test to the *Deere* case, the evidence showed that the color "John Deere Green" was instrumental in the purchasing decisions of the farmers since farmers preferred to purchase loader attachments that matched the color of their tractors. Applying the second part of this test, the color "John Deere Green" would be aesthetically functional and barred from trademark protection if there was a competitive need for the color in the industry. Implied in the case was the fact that most tractors were colored "John Deere Green."[225] Since the consumer's purchasing decision of loader attachments was based on matching the "John Deere Green" color of their tractors, then there were no alternative colors available to competitors if "John Deere Green" for loader attachments was granted trademark protection. Without any alternative colors, there was a competitive need and the color "John Deere Green" was aesthetically functional.

C. Application Of The Test To Qualitex

Application of the three-step functionality test to the *Qualitex* facts begins with utilitarian functionality. The District Court's finding of non-functionality under the "essential to use/affects cost or quality" standard of the utilitarian functionality test was proper. The green-gold color of Qualitex's press pad was not essential to use since the press pad would function as a press pad with or without the use of color. The second standard, affects cost or quality, was not applicable since the green-gold color was not inherent to the press pad cover. The green-gold color was a dye that was added to the natural yellowed off-white color of the press pad material.[226] Although the use of color did make the press pad more expensive to manufacture for Qualitex, it did not force competitors to incur similar costs. Competitors still

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[224] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 cmt. c at 175-76 (1995).

[225] Deere & Co. v. Farmhand, Inc. 560 F. Supp. 85, 91 (S.D. Iowa 1982), *aff'd*, 721 F.2d 253 (8th Cir. 1983).

[226] Qualitex Co. v. Jacobson Products Co., Inc., 21 U.S.P.Q.2d 1457, 1459 (C.D. Cal. 1991), *aff'd in part, rev'd in part on other grounds, rem.*, 13 F.3d 1297 (9th Cir. 1994), *rev'd on other grounds*, ___ U.S. ___, 115 S. Ct. 1300 (1995).

had a choice to manufacture their pads without color additives or to incur additional expenses by dying the press pad material. Trademark registration is only prohibited under this phase of the test where a competitor would be forced to incur additional costs in the event a color mark is protected. Thus, as analyzed under the utilitarian functionality test, the color green-gold was not functional.

Next, the green-gold color must be analyzed under the de jure functionality test. The Court noted that the color green-gold performed the function of masking stains on the press pad cover.[227] This function of the color itself was unrelated to the use or purpose of the press pad and, therefore, was subject to the de jure functionality test. Whether the green-gold color was de jure functional and barred from trademark protection depended on whether there was a competitive need for the color. The District Court noted that there were "hundreds, if not thousands" of alternative colors available to other manufacturers to use as a stain concealer.[228] Evidence of numerous alternative colors was proof that competition would not be hindered by the exclusive use of the green-gold color by Qualitex. Thus, under the de jure functionality test, the green-gold color was non-functional since there was no competitive need for it.

Lastly, the color must be analyzed under the aesthetic functionality test. Unfortunately, the District Court did not make a determination on whether the green-gold color played an important role in the purchasing decision of consumers, therefore, an analysis of the aesthetic functionality doctrine cannot be made on the facts. However, if there was a finding that the color functioned in an aesthetic manner, the competitive need test would be applied. A finding that there was no competitive need under the de jure functionality test does not necessarily result in the same finding under the aesthetic functionality test. Whether alternative colors exist depends on how the color relates to the purchasing decision of consumers. An alternative color under the de jure functionality doctrine may or may not be an alternative color under the aesthetic functionality doctrine - i.e. if consumers purchased the green-gold press pad because it was earth-toned, then the color bright orange is not an alternative color for aesthetic functionality purposes even though it is for de jure functionality purposes (the color bright orange can mask stains). Thus, under the aesthetic functionality test,

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[227] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1305.

[228] *Qualitex*, 21 U.S.P.Q.2d at 1460.

an independent analysis of competitive need must be made when there is a showing that color plays an important part in the purchasing decision of the consumers.

In summary, the proposed test requires the court to analyze the functionality of a color mark in three steps - first, under the utilitarian functionality test, second under the de jure functionality test, and lastly, under the aesthetic functionality test. All three tests must be analyzed and a failure under any one of these tests will bar trademark protection based on the functionality doctrine.

VI. Conclusion

In the *Qualitex* case, the Supreme Court held that the "Lanham Act permits registration of a trademark that consists, purely and simply, of a color."[229] This holding is consistent with the trademark policies and the purpose of the Lanham Act. It also paves the way for other color marks meeting the trademark requirements by dismissing many of the past theoretical trademark bars. The Court clearly found that there was no statutory bar to trademark protection for color per se. More importantly, the Court dismissed the prior and significant theoretical bars of shade confusion and color depletion. Unfortunately, the Court's analysis of the traditional trademark requirements of distinctiveness and functionality left many questions unanswered. In both of these important trademark concepts, the Court failed to establish clear and concise guidelines for the lower courts to follow.

In terms of distinctiveness, since color per se required secondary meaning to acquire distinctiveness, the Court should have clarified what evidentiary test was to be used by the lower courts. As analyzed, the proper test relies on consumer survey results which reflect an association in the consumer's mind between the mark and the manufacturer. A primary reliance on any other type of evidence would fail to prove secondary meaning. Circumstantial evidence should only be used to bolster a marginal recognition rate in the consumer survey.

In terms of functionality, the anti-competitive consequences of granting trademark rights for a functional color mark need to be addressed by a test that is broader than the "essential to use/affects cost or quality" test expressed by the Court. Use of the utilitarian, de jure, and aesthetic functionality tests will ensure that functional colors are

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[229] *Qualitex*, ___ U.S. ___, 115 S. Ct. at 1301.

not granted trademark protection where competitive needs become a significant factor.

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The Proposed Limited Liability Company Act in Hawai'i

I. Introduction

This article will discuss the implications of a new corporate form, the Limited Liability Company (LLC), for the State of Hawai'i. LLCs are essentially a hybrid of corporations and partnerships which allow investors to maintain some control of the corporation while limiting their liability to the amount of their investment.[1] Close corporations, professional corporations, limited partnerships, and parties considering which form of association to employ in the formation of a business should seriously consider LLC, which offer the tax advantages of a corporation, and the control of a partnership.[2]

After legislative study,[3] initally three separate bills were introduced in 1992 proposing the enactment of a limited liability company act in the State of Hawai'i.[4] None was enacted.[5] In 1995 two significant bills

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[1] For the most current information on LLCs there is an LLC forum available online. To join the forum, send an e-mail message to listserv@usa.net with "sub Inet-llc Jane Doe", substituting the user's name for Jane Doe). *See* Section News, Probate & Property, Jan./Feb. 1995, at 15-16.

[2] H.R. Stand. Comm. Rep. No. 417, 18th Leg., Reg. Sess. (1995).

[3] S. Res. 136, 16th Leg., Reg. Sess., and S. Res. 107, 16th Leg., Reg. Sess. (1991) (introduced by D. Ikeda, requesting the Legislative Reference Bureau to study limited liability companies.)

[4] S. 3368, 16th Leg., Reg. Sess. (1992) (introduced by A. Kobayashi) [hereinafter S. 3368]; H.R. 777, 17th Leg., Reg. Sess. (1993) (introduced by R. Bunda) [hereinafter H.R. 777]; and H.R. 863, 17th Leg., Reg. Sess. (1993) (introduced by T. Tom) [hereinafter H.R. 863].

[5] S. 3368 terminated in the Senate Consumer Protection Committee, H.R. 777 passed the house, but terminated in the Senate Committee on Ways and Means, and H.R. 863 made it as far as the committees on Consumer Protection and Commerce, Judiciary, and Finance.

proposing the enabling of limitied liability corporations[6] and professional limited liability corporations[7] have been introduced.

The original concerns of the legislature centered around the potential situation where a wrongful injury could not be compensated because the LLC shielded the member[8] from liability. Although this is an important and valid concern, with which other states are currently grappling, it is not unsurmountable, and is not a reason for the wholesale rejection of LLCs in the state.

The Legislature is now considering the adoption of the Uniform Limited Liability Company Act in its most current form. It seems very likely that this bill will be enacted,[9] thereby enabling limited liability corporations in the State of Hawai'i. Enactment will belatedly bring Hawaii up to speed with the rest of the county, and will have substantial benefits for the State and the businesses operating here.

The legislature has demonstrated what may either be characterized as prudent caution or an overly cautious hesitancy to accept the inevitable. As of this writing, 47 states have enacted LLC legislation.[10] Only Massachusetts, Vermont and Hawai'i have failed to enact some form of LLC statute. This overwhelming acceptance by the other states has no doubt affected the decision to adopt LLC legislation in the State. The most prudent exercise of state sovereignty now is to determine what the Hawaii Limited Liability Corporation will look like, rather then whether this corporate form will be available to Hawai'i businesses.

Although this late arrival on the LLC scene may have caused a great deal of frustration for its supporters, while Hawai'i has been waiting on the sidelines the LLC has been fine tuned by the legislative and judicial processes of other states, and what exists now is an evolutionary representation of the first LLC act passed in Wyoming in 1977.[11] The Hawai'i Limited Liability Company Act ("proposal,"

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[6] H.R. 2093, 18th Leg., Reg. Sess. (1995) (introduced by T. Tom and is in its second draft as of this writing) [hereinafter H.R. 2093].

[7] H.R. 1315, 18th Leg., Reg. Sess. (1995) (introduced by D. Arakaki) [hereinafter H.R. 1315].

[8] LLC shareholders are called members.

[9] As of this writing H.R. 2093 has passed second reading and has been recommended for passage of third reading by the Committee on Finance. H.R. STAND. COMM. REP. No. 954, 18th Leg., Reg. Sess. *reprinted in* 1995 HOUSE J. ____.

[10] The most recent state to enact LLC legislation is Pennsylvania, which enacted Bill No. 1059 on December 7, 1994, becoming the 47th state to enact LLC legislation.

[11] Wyoming Limited Liability Company Act, WYO. STAT. §§ 17-15-101 to 17-15-144 (1995).

"Hawai'i proposal," "act," or "Hawai'i act") as proposed in H.R. 2093 will adopt the latest version of the Uniform Limited Liability Company Act with some insubstantial amendments.

A. Overview

This article will present a comparison of the proposed act with existing LLC acts in other states, along with a discussion of the appropriateness of certain provisions for the State of Hawai'i.

An important subset of the LLC, the professional limited liability company (PLLC), will also be discussed. The PLLC has proved to be a viable entity in some states, while in others it is forbidden altogether. What this bodes for the State of Hawai'i will be discussed, and some guidance will be provided for professionals who are considering organizing as a PLLC.

In order to understand the potential which LLCs hold for Hawai'i, in addition to the pitfalls, a look at the development of the LLC is necessary. The first part of the article briefly discusses this development. Following that, a discussion of the basic nature of the LLC, in the form of a comparison of the proposed Hawai'i act with existing state LLC acts, the possible issues which will arise, and the concerns which the author perceives the legislature is having with enactment of the LLC will be presented. The issues raised by PLLC legislation are also discussed. Finally, some of the potential benefits and detriments of the LLC to the State are presented.

As 47 states have enacted LLC legislation, each of which is somewhat different, a comprehensive comparison of the LLC acts of the various states is beyond the scope of this article.[12] Instead, a sampling of various states' provisions is presented for the purpose of comparison.

II. History of the Development of Limited Liability Companies in the United States

Limited Liability Companies first appeared on the American corporate scene in 1977.[13] With the intention of curtailing "potentially

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[12] *See* Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer, (Part One)*, 37 S.D. L. Rev. 44 (1992), and *(Part Two)*, 37 S.D. L. Rev. 467 (1992).

[13] Comprehensive discussions of the limited liability company can be found in Mark A. Sargent, Limited Liability Company Handbook (1993); Robert R. Keatinge, Larry E. Ribstein, Susan Pace Hamill, Michael L. Gravelle, and Sharon Connaughton, *The Limited Liability Company: A Study of the Emerging Entity*, 47 Bus. Law. 375 (1992).

crushing liability claims,"[14] Wyoming passed legislation creating this new corporate form.[15] On the international scene, however, LLCs are not new entities.[16] The concept originated in Germany with the "Gesellschaft mit berschrankter Haftung (GmbH),"[17] in 1892, and was quickly adopted by Portugal years later. Today, limited liability companies are common throughout Europe and South America.[18] This worldwide use of the LLC led Florida to adopt the LLC in an attempt to attract foreign investors.[19]

Until 1986 only Wyoming and Florida had enacted limited liability legislation.[20] The hesitancy of other states was due primarily to uncertainty about the status of the limited liability company with the Internal Revenue Service.[21] Included among the Wyoming legislature's goals in enacting the statute was the need for a business association form bearing a lower tax burden than the corporation, yet providing for more protection from liability than a limited partnership.[22] But it was not until 1988, in revenue ruling 88-76,[23] that the IRS finally determined that the Wyoming Limited Liability Corporation would be treated as a partnership for tax purposes.[24] This was the green light

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[14] Adriel Bettelheim, *New Hybrid Corporate Entity Flourishing in Colorado*, DENVER POST, Nov. 18, 1991, at C1.

[15] Wyoming Limited Liability Company Act, WYO. STAT. §§ 17-15-101 to 17-15-144 (1995).

[16] Some of the other countries having LLCs are Bermuda, France, Italy, Lebanon, Mexico, Netherlands, Nigeria, Saudi Arabia, Switzerland, and West Germany, among others. Marybeth Bosko, *The Best of Both Worlds: The Limited Liability Company*, 54 OHIO ST. L.J. 175, 198 n.2 (1993).

[17] Steven C. Bahls, *Application of Corporate Common Law Doctrines to Limited Liability Companies*, 55 MONT. L. REV., 43, 46 (1994).

[18] *Id.*

[19] In 1982 Florida enacted the Florida Limited Liability Company Act creating an entity similar to the Limitada which is familiar to South American Investors. *See*, M. Bosko, *supra* note 11, at 177.

[20] *See* Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387, 389-91 (1991).

[21] M. Bosko, *supra* note 11, at 175-81. The fact that states were concerned about tax issues is evidenced by the veritable landslide of LLC enabling acts enacted after the favorable IRS ruling which held that an LLC is taxable as a partnership.

[22] Joseph P. Fonfara and Corey R. McCool, *Comment, The Wyoming Limited Liability Company: A Viable Alternative to the S Corporation and the Limited Partnership?*, 23 LAND & WATER L. REV. 523, 523-24 (1988).

[23] Rev. Rul. 88-76, 1988-2 C.B. 360.

[24] Additionally, in announcement 88-118, 1988-38 I.R.B. 25 (Sept. 2, 1988), the

for many other states who were quick to jump on the bandwagon.[25]

But taxation was not the only source of concern. Being a new entity (at least in the United States) the true character of the LLC was, and arguably still is,[26] difficult to ascertain. The void in the common law with regard to LLCs means that issues not addressed adequately by the statutes will depend upon the courts and the individual membership agreements for resolution. This has instilled in some businesses the fear of constant litigation and uncertainty as to whether partnership or corporation law will be applied.[27] These concerns also seem to have been allayed somewhat by the IRS ruling, and subsequent favorable rulings finding that LLCs are to be taxed as partnerships.[28]

Most statutes are based on the Wyoming Limited Liability Act, with variations derived from the Uniform Partnership Act (UPA),[29] the Uniform Limited Partnership Act (ULPA), the Revised Uniform Limited Partnership Act (RULPA),[30] the Model Business Corporation Act (MBCA),[31] and the Revised Model Business Corporation Act

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results of a six year IRS study project were stated, concluding that limited liability alone should not preclude partnership classification, and more recently in Rev. Proc. 95-10, 1995-3 I.R.B. 20 (Dec. 28, 1994), the IRS has established procedures and guidelines for LLCs requesting a ruling from the Service as to partnership or corporate classification.

[25] As of this writing, only three states are without LLC acts: Vermont, Massachusetts, and Hawaii.

[26] Keatinge, *supra* note 8, at 379.

[27] Richard Johnson, *Comment, The Limited Liability Company Act*, 11 FLA. ST. U. L. REV. 387, 394 (1983).

[28] The Internal Revenue Service has issued favorable rulings for Colorado, Rev. Rul. 93-6, 1993-1 C.B. 229; Illinois, Rev. Rul. 93-49, 1993-2 C.B. 308; Nevada, Rev. Rul. 93-30, 1993-1 C.B. 231; Virginia, Rev. Rul. 93-5, 1993-1 C.B. 227; West Virginia, Rev. Rul. 93-50, 1993 -2 C.B. 310.

The IRS determined that due to ambiguities in the statutes in the following states, the LLC could be considered either a partnership or an association, depending upon the provisions adopted in the LLC's articles of organization or operating agreement: Alabama, Rev. Rul. 94-6, 1994-1 C.B. 314; Arizona, Rev. Rul. 93-93, 1993 -2 C.B. 34; Connecticut, Rev. Rul. 94-79, 1994-51 I.R.B. 7; Delaware, Rev. Rul. 93-38, 1993-1 C.B. 233; Florida, Rev. Rul. 93-53, 1993-2 C.B. 312; Kansas, Rev. Rul. 94-30, 1994-1 C.B. 316; Louisiana, Rev. Rul. 94-5, 1994-1 C.B. 312; New Jersey, Rev. Rul. 94-51, 1994-32 I.R.B. 11; Oklahoma, Rev. Rul. 93-92, 1993-2 C.B. 318; Rhode Island, Rev. Rul. 93-81, 1993- 2 C.B. 314; Utah, Rev. Rul. 93-91, 1993-2 C.B. 316.

[29] HAW. REV. STAT. §§ 425-21 to 524-52 (repealed 1989).

[30] HAW. REV. STAT. §§ 425D-101 to 425D-1108 (1994).

[31] HAW. REV. STAT. §§ 415-1 to 415-172 (1993).

(RMBCA).[32] More recently, the publication of a uniform act has brought a measure of homogeneity to the field. Although LLCs have the same basic characteristics, the statutes of the individual states vary widely on the exact nature of the business association. This variance may create problems for the individual corporations in maintaining their partnership tax status, and may also lead to conflict of law problems in states with conflicting statutes. To avoid the former, some guidance for states enacting limited liability statutes can be derived from the Internal Revenue Service code.[33]

III. Basic Characteristics of the LLC

A. Limited Liability Companies

Notwithstanding the variance between individual states' statutes, there are elements of the LLC which are common to every state. A succinct characterization is "a non-corporate business [form] that provides its members with limited liability and allows them to participate actively in the entity's management."[34] Neither the members nor the persons in charge of management are personally liable for the obligations of the LLC.[35]

For federal tax purposes, a properly structured LLC will be treated as a pass-through entity. Partnerships and S corporations are pass-through entities for tax purposes, while corporations are not. A corporation is taxable on its income first at the corporate level, then when the profits are distributed to the shareholders, a tax again is applied to the distributions. Thus, in effect, the shareholders have been taxed twice. This is known as double taxation. On the other hand, profits in partnerships and S corporations are not attributed to the entity, but rather to the individual shareholders or partners directly. This is referred to as pass-through taxation. Treatment as a pass-through entity

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[32] Keatinge, *supra* note 8, at 379.

[33] The Internal Revenue Code prescribes the characteristics of a corporation, partnership, or business trust in 26 C.F.R. § 301.7701-1(b) (as amended in 1977). The conditions under which the IRS will consider a ruling request relating to an LLC are set forth at Rev. Proc. 95-10, 1995-3 I.R.B. 20, which modified Rev. Proc. 89-12, 1989-1 C.B. 798.

[34] Keatinge, *supra* note 8, at 384.

[35] *Id.*, at 379.

is of course very desirable from the shareholders' point of view, as it avoids double taxation.

The LLC's treatment as a partnership, and therefore as a pass-through entity by the Service is due to its failure to meet the requisites for a corporation set forth in Internal Revenue Code section 7701. Specifically, the characteristics which allow classification as a partnership are the limitations on the transferability of ownership interests, the possibility of direct management by the owners, and the LLC's basically temporal nature.[36] It has these characteristics by design. However, some state statutes allow flexibility in these areas, precluding the Service from issuing blanket rulings that all LLCs in certain states will be treated as partnerships.[37]

Because the LLCs don't come under the corporation statutes, they can also avoid the various rules relating to its financial structure. This provides flexibility in management and financial planning which was previously found only in general partnerships.

Owners of an LLC are called members.[38] Unlike limited partnerships, LLCs do not require a general partner who has unlimited liability, and LLCs place no restrictions or requirements of control on the members. In that respect members are like investors in a corporation, with each member's liability being limited to the amount of his investment. Unlike limited partnerships, there are no penalties for participating in control of the business.[39]

The statutes adopt a hands off approach towards essential elements of the organizational and capital structures leaving these key aspects of the company's form to be determined by the articles of organization or the operating agreement.[40] Additionally, the mandatory hierarchy of shareholders, directors, and officers of the corporate form have been abandoned by the LLC statutes. For example, in an LLC the members can participate in the direct management of the business, whereas a

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[36] LLCs, like partnerships, are institutionally transitory and are subject to dissolution upon the occurrence of various events. *Id.*

[37] This will be discussed more thoroughly in the discussion of taxation, *infra*, at part V.A.1.

[38] *Id.*

[39] See comparison to limited partnerships *infra*, at part IV.C.2. Although there is no statutory liability for participation, perhaps the courts will use it as a criteria for piercing the corporate veil or finding individual liability. *See* discussion *infra*, at § IX.A.

[40] The operating agreement is somewhat like a partnership operating agreement. For examples, *see* Sargent, *supra* note 8, ch. 6.

corporation must have officers who are distinct from the board of directors. The financial and control structures can be determined at formation, leaving a great deal of flexibility for the members and the planners of the LLC.

In contrast to this flexibility, many statutes do place certain requirements on the LLCs. All statutes require a filing for formation.[41] Some states require fairly substantial financial disclosures upon filing.[42] Some states have chosen to expressly eliminate any question about infinite duration of the LLC by including thirty year limitations.[43] Some states also require that specified records be maintained.[44] Additionally, default provisions are contained in many of the statutes, including a provision that distributions are to be made in proportion to the contribution of the member.[45]

In addition to the limited liability of members, the attraction of the LLC is its flexibility. But this flexibility is not without cost. The IRS issues rulings on individual LLCs, and on the LLC acts of the various states. If a state receives a blanket ruling that all LLCs formed under its statutes are partnerships, planners within that state are relieved of the time and effort required to draft articles of organization which will assure partnership status, and then request a ruling from the IRS. This could amount to a substantial reduction in the administrative overhead of LLC formation.[46]

B. Professional Limited Liability Companies

Professional limited liability companies (PLLCs) are still newer entities than the LLCs from which they evolved. Most LLC acts are

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[41] H.R. 2093 § 202; COLO. REV. STAT. § 7-80-207(1)(a) (Supp. 1990); FLA. STAT. ANN. § 608.409(1) (1993); WYO. STAT. § 17-15-109 (1989).

[42] *See, e.g.*, FLA. STAT. ANN. § 608.407 (1993); WYO. STAT. § 17-15-107 (1989).

[43] *E.g.* COLO. REV. STAT. § 7-80-204(1)(b) (Supp. 1990); FLA. STAT. ANN. § 608-407(1)(b) (1993); WYO. STAT. § 17-15-107(a)(iii) (1989). However, the thirty year limit is likely to be abandoned. Sargent, *supra* note 8, at 1-11, n.42.

[44] *See, e.g.*, COLO. REV. STAT. § 7-80-411 (Supp. 1990).

[45] *See, e.g.*, WYO. STAT. 17-15-119 (1989).

[46] As discussed *infra*, determination of whether an LLC or a state's LLC act constitute a partnership or a corporation is based on the criteria set forth at IRC 7701. To obtain a ruling petitioners must comply with the conditions established at Rev. Proc. 95-10, 1995-3 IRB 1, 26 CFR 301.7701, superseding Rev. Proc. 89-12, 1989-1 C.B. 798. *See, IRS Specifies Conditions for Requesting Rulings on Classification of LLCs as Partnerships*, 94 TNT 254-2 (Dec. 29, 1994).

silent with regard to PLLCs, while some states have chosen to specifically permit or forbid PLLC formation in their jurisdictions.[47] Except for provisions limiting members and managers of PLLCs to professionals in the profession for which the PLLC is organized to practice,[48] and to members of enumerated professions under some statutory scheme, statutes authorizing PLLCs contain few provisions, and point to the LLC acts for specific details of the entity. Some states, on the other hand, have chosen to articulate more specific regulations which apply strictly to the PLLC.[49]

The Uniform Limited Liability Company Act (ULLCA) being considered by the Hawaii Legislature does not contain any provisions with regards to professional limited liability corporations. Instead, a separate act has been introduced which, if passed, will authorize the creation of PLLCs.[50]

Whether to allow PLLCs or not is a hotly debated issue in many states. The primary concern is the reduction or elimination of liability for malpractice. The authorization of PLLCs in various states, along with holdings by ethics commissions supporting PLLCs in individual professions indicates the general support of PLLC legislation.[51] Although some states have gone as far as limiting the vicarious liability

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[47] As of this writing, eighteen jurisdictions allow PLLCs. Fourteen jurisdictions have specifically authorized PLLC formation in their statutes. (Arizona, Arkansas, The District of Colombia, Florida, Iowa, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, North Dakota, South Dakota, Tennessee, Texas, and Virginia). Louisiana, Oklahoma, and Utah vicariously allow PLLCs by allowing LLCs to carry on business for any lawful purpose, and including profession in the definition of "purpose." In Colorado, the LLC act is silent, but the Supreme Court specifically authorizes the practice of Law by LLCs. *See* Colo. R. Civ. P. 265. In four other states, legislation has been introduced proposing to allow PLLC formation. (California, Kentucky, Maine, and New York.) Maryland and Rhode Island specifically prohibit formation of PLLCs in their jurisdictions. MD. CORPS. & ASS'NS. CODE ANN. § 4A-201 (Supp. 1992), R.I. GEN. LAWS § 7-16-3 (1993).

[48] *See, e.g.*, IOWA CODE § 490A.1505 (1995).

[49] *E.g.*, IOWA CODE §§ 490A.1501-1519 (1995). Curiously, while the Iowa act is detailed, it does not contain a provision limiting members' liability for the acts of other members, which would otherwise be a major point of attraction for professionals.

[50] H.R. 1315, 18th Leg., Reg. Sess. (1995).

[51] *See, e.g.*, Marcia McBrien, *Ethics Opinion OK's PLLCs for Lawyers*, MICH. LAWYERS WEEKLY, Jan. 24, 1994 at 1; Michigan State Bar Standing Comm. on Professional and Judicial Ethics, Op. RI-17 (1994) (Holding that lawyers practicing in a PLLC do not have any ethical obligations to explain the elimination of vicarious partner liability beyond the addition of the abbreviation "PLLC" to the firm name.)

of professionals for malpractice of their fellow members,[52] it is unlikely that the individual codes of ethics and rules of the regulatory bodies of each profession will allow limitations on the liability of professional members beyond that which existed prior to enactment of the PLLC statute.[53] Indeed, the proposed Hawai'i PLLC act specifically states that it does not modify any law or ethical standards which apply to the professionial's relationship with the person served.[54]

The recent heightened awareness of the extent of liability which can be imposed for the malpractice or otherwise tortious conduct of professional associates has materialized into a strong lobby among professionals in favor of PLLCs.[55] In Virginia, for example, the original LLC act did not allow PLLCs. This was changed in 1992 with PLLC enabling legislation.[56]

IV. Comparison to Other Business Organization Forms

A. Regular Corporation

Management and finance of corporations are restricted by statute.[57] Corporations are also subject to double or "two-tiered" taxation, whereas LLCs are designed to avoid this.

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[52] *See, e.g.*, Va. Code Ann. § 13.1-1109 (Michie 1950 & Supp. 1993), discussed in *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv. L. Rev. 1547, 1661 (1994).

[53] *See, e.g.*, Mary Elizabeth Matthews, *The Arkansas Limited Liability Company: A New Business Entity is Born*, 46 Ark. L. Rev. 791, 848(1994): "It appears that any advantage the LLC may enjoy over the professional corporation must be found in some attribute other than protection from liability. The professional must consider the remaining characteristics of the LLC in determining whether to utilize that vehicle for rendering services." *Id.* The Texas statute, for example, provides that it "does not alter or affect the professional relationship between a person rendering professional service and a person receiving the service. . ." Tex. Rev. Civ. Stat. art. 1528n, Art. 11.05 (1994), discussed in John D. Jackson and Alan W. Tompkins, *Corporations and Limited Liability Companies*, 47 SMU. L. Rev. 901, 931 (1994).

[54] H.R. 1315 § 7.

[55] Richard C. Reuben, *Added Protection: Law Firms are Discovering That Limited Liability Business Structures Can Shield Them From Devastating Malpractice Awards and Double Taxation*, 80 A.B.A. J., Sept. 1994, at 54.

[56] Va. Code Ann. § 13.1-1100 to -1123 (1995) *superseding* Va. Code Ann. § 13.1-1008. (Michie Supp. 1991) (Providing that professionals may not form LLCs).

[57] For provisions regarding issuance of shares, see Haw. Rev. Stat. §§ 415-15 to 415-34. For provisions addressing directors and officers, see Haw. Rev. Stat. §§ 415-35 to 415-51 (1994).

Ownership of a corporation is represented as stock.[58] Ownership of an LLC is not intended to be as freely transferable as that of a corporation,[59] therefore, ownership is not represented as shares of stock, but rather is recorded in the articles of incorporation, with the owners being recorded as members. The statutes are generally flexible on contributions sufficient to create ownership.

Like shareholders in a corporation,[60] LLC members are liable for breach of an agreement to contribute. Members may be liable to creditors who rely on these contributions.[61] The board of directors of a corporation, on the other hand, can revise the liability of a shareholder without creating a cause of action in an intermediate creditor.[62]

Withdrawal from the two enterprises also entails different procedures. To "withdraw" from a corporation, a shareholder sells his shares. In an LLC, only the ownership and not the control interest may be sold, so the ability to receive fair value for his interest, for which there is a very limited market, is a crucial factor in the withdrawal of a member. Most statutes provide for this procedure as a default, but individual operating agreements may contain procedures otherwise.[63]

B. Close Corporation

The restrictions on transferability of LLCs mean that most LLCs will be closely held. Therefore the comparison to statutory close corporations is significant. Close corporations have greater flexibility of management[64] than regular corporations, a trait they share with LLCs. There are significant differences, however. Such areas as procedural requirements, shareholder agreements, and minority protection[65] differ

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[58] HAW. REV. STAT. § 415-15 (1994).

[59] For tax classification purposes. *See infra*, part V.A.1.

[60] *See* Rev. Model Business Corp. Act § 6.22(a), HAW. REV. STAT. § 415-17 (1993).

[61] "The LLC statutes generally provide that LLC members are directly liable to relying creditors for contribution obligations, even if the obligations have been compromised among members." Keatinge, *supra* note 8, at 387.

[62] "The distinction may be based partly on the fact that some LLC statutes require disclosure of contribution obligations in the LLC's articles of organization, on which creditors may rely." *Id.*, at 388.

[63] Both the proposed LLC act and PLLC act contain provisions for purchase of a dissociated member's share. H.R. 2093 § 701, H.R. 1315 § 12.

[64] Model Statutory Close Corporation Supplement §§ 20-21 (1984).

[65] *See, e.g., Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511-21 (Mass. 1975) (holding that minority shareholders deserved special protection even without statutory authority).

significantly, with LLCs having greater flexibility and freedom.[66] Close corporations must have a board of directors, and officers, much like an ordinary corporation, while an LLC can be member managed, or can have appointed officers.

Capital stock of a close corporation has been held to be a security for Hawai'i tax purposes,[67] and therefore its transfer is governed by Article 8 of the Hawaii Uniform Commercial Code (UCC).[68] Whether an interest in an LLC will be considered to be a security still remains to be seen, and most likely will depend on the facts of each case. Based on the provisions of the UCC, and the Hawaii Intermediate Court of Appeals' interpretation of those provisions, it is likely that an interest in an LLC will be considered a security under Hawai'i law. For example, the court in *United Independent Insurance Agencies, Inc. v. Bank of Honolulu*,[69] found that an interest in a close corporation constituted a security. The court based its holding on the comments to the UCC provision defining a security.[70] Those comments state that "[i]nterests such as the stock of closely- held corporations, although they are not actually traded upon securities exchanges, are intended to be included within the definitions of both certificated and uncertificated securities by the inclusion of interests "of a type" commonly traded in those markets."[71]

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[66] Keatinge, *supra* note 8, at 396.

[67] *United Independent Insurance Agencies, Inc. v. Bank of Honolulu*, 6 Haw. App. 222, 718 P.2d. 1097 (1986) (interpreting definition of security contained in HRS § 490:8-102(1)(a)).

[68] HAW. REV. STAT. §§ 490:8-101, *et seq.* (1994).

[69] 6 Haw. App. 222, 718 P.2d 1097 (1986).

[70] HAW. REV. STAT. § 490:8-102 (1995):

Definitions and index of definitions.

(1) In this Article, unless the context otherwise requires:

(a) A 'certified security' is a share, participation, or other interest in property of or an enterprise of the issuer or an obligation of the issuer which is:

(i) Represented by an instrument issued in bearer or registered form;

(ii) Of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

(iii) Either one of a class or series or by its terms divisible into a class or series of shares, participations, interests, or obligations.

[71] *United Independent*, 6 Haw. App. at 222, 718 P.2d at 1097.

As discussed above, interests in an LLC can be sold, but only the right to receive profits can actually be transferred.[72] The original owner of the interest retains the right to vote and to exercise control of the company. This type of interest is commonly sold in securities markets, in the form of non-voting shares or bonds, and an analogy sufficient to classify LLC interests as securities can probably be made. As there is little precedent on this issue, it remains to be seen how courts of other states will interpret and apply the UCC provisions.

C. Partnerships

1. General partnership

Like partnerships, LLCs are divided into two categories, member-managed LLCs, analogous to general partnerships, and manager-managed LLCs, analogous to limited partnerships. The LLC offers significant advantages over both types of partnership. In a general partnership, all partners are jointly and severally liable for the partnership's obligations. In a limited partnership formed under the ULPA[73] or the RULPA,[74] there must be at least one partner who is liable for all of the partnership's obligations. Additionally, limited partners cannot participate fully in the management of the business.[75]

Under the UPA, in general partnerships, the right to participate in profits, distributions and governance is shared equally among the partners.[76] In LLCs, these rights are flexible, and may be allocated according to financial contributions and withdrawals, or equally among members.[77]

Although in some states one difference between general partnerships and LLCs is that the members' authority to bind the LLC in transactions with third parties is not specified, the Hawai'i LLC act specifically states that each member is an agent of the company for the

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[72] PLLCs have the added restriction of transferability only to licensed members for which the PLLC is authorized to practice.

[73] UNIFORM LTD. PARTNERSHIP ACT § 1, 6 U.L.A. 561 (1916) [hereinafter ULPA].

[74] REVISED UNIFORM LTD. PARTNERSHIP ACT § 101(7), 6 U.L.A. 449 (1985) [hereinafter RULPA].

[75] UNIFORM LTD. PARTNERSHIP ACT § 7, 6 U.L.A. 38; REVISED UNIFORM LTD. PARTNERSHIP ACT § 303, 6 U.L.A. 505.

[76] UNIFORM PARTNERSHIP ACT § 18(a), 6 U.L.A. 213 (1914) [hereinafter UPA].

[77] *See*, T. E. Geu, *(Part One)*, *supra* note 7.

purpose of its business.[78] In a general partnership, an act by a partner during the regular course of business binds the partnership.[79] In the LLC a member who participates in management is analogous to a general partner, subject to the same rules regarding authority. In manager- managed LLCs, the managers are also given authority to act as an agent of the company.[80]

How courts will interpret the nature of the fiduciary duties of the members is not clear. It seems likely, however, that a rule establishing general partnership-type duties for members in member-managed LLCs, and corporate director-type duties for managers in manager-managed LLCs will develop.[81] The Hawai'i LLC act provides for a duty of loyalty and care among members and managers, with specific limitations on both.[82]

Both general partnerships and LLCs can be dissolved upon withdrawal of members, bankruptcy, or death, among other causes. However, dissolution of the LLC differs from that of the general partnership in three substantial ways.

First, upon withdrawal of a member, LLCs may continue by agreement of the members. In some states, this agreement must be unanimous, while in others, a majority vote is sufficient.[83] Non-withdrawing partners, on the other hand, can only continue the business if the dissolution was wrongfully caused, unless there is an agreement to the contrary.[84]

Second, even if the business of the partnership is continued, withdrawal may cause technical dissolution,[85] resulting in the nullification of executory agreements.[86] Where there is an agreement to continue the LLC, however, even a technical dissolution is avoided.[87]

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[78] H.R. 1315 § 301(1).

[79] *See* UNIFORM PARTNERSHIP ACT §§ 9-14, 6 U.L.A. 132-174 (1914).

[80] H.R. 2093 § 301 (b)(2).

[81] *Id.*

[82] H.R. 2093 § 409.

[83] The Hawaii LLC act allows continuance after a majority vote of the remaining members. H.R. 2053 § 801(3)(i).

[84] *See*, UPA § 38(2).

[85] Although the members of the partnership remain substantially the same, the partnership assumes a new identity.

[86] *See, e.g.*, *Fairway Dev. Co. v. Title Ins. Co.*, 621 F.Supp. 120, 122-25 (N.D. Ohio 1985) (holding that successor partnership was not entitled to sue under a policy guaranteeing the title of the original partnership).

[87] H.R. 2093 § 801.

Finally, upon dissolution, partners may be required to contribute toward the debts of the general partnership.[88] LLC members have no such obligation. For these reasons and others, commentators conclude that the LLC will eventually replace general partnerships altogether as the preferred business form for closely held limited liability entities.[89]

2. Limited partnership

LLC statutes have their origin in limited partnerships,[90] and are similar enough that a detailed comparison is unwarranted. The significant difference between LLCs and limited partnerships is that limited partnership statutes require at least one general partner who manages and controls the partnership and is personally liable for the partnership's obligations, whereas in both member-managed and manager-managed LLCs, the liability of each member is limited to the amount of his contribution. In the manager-managed LLC, the manager's exclusive right to manage the LLC is not accompanied by greater liability than that of the other members. In addition, LLC members are not subject to the limited partnership's "control rule," which may result in the liability of limited partners who participate in control of the business.[91] The liability of the LLC member is limited by statute and by the operating agreement, and remains constant regardless of whether control is exercised or not.

D. Subchapter S[92]

Subchapter S corporations, like partnerships, are not taxed at the entity level. They are treated as "small business corporations" and

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[88] *See*, UPA § 40.

[89] This is due to the greater discontinuity in the event of dissolution, and liability issues which favor LLC members over general partners. Even the predicatbility of partnership law is in jeopardy due to the modifications to the UPA. Keatinge, *et al.*, *supra* note 8, at 396.

[90] To achieve partnership status for federal taxation purposes, LLCs must lack two of these three characteristics: free transferability of ownership interest, continuity of life, and centralized management. Therefore, for formation, finance, transfer of interests, withdrawal of members, dissolution, merger and foreign entitites, LLC statutes are based on limited partnerships, specifically the ULPA (1916) and the RULPA (1985). Keatinge, *supra* note 8, at 396.

[91] *See* UNIFORM LTD. PARTNERSHIP ACT § 7, 6 U.L.A. 38; REVISED UNIFORM LTD. PARTNERSHIP ACT § 303, 6 U.L.A. 505.

[92] A thoughtful comparison of LLCs and S corporations for federal tax purposes is

are taxed under subchapter S of the Internal Revenue Code.[93] One of the advantages of the S corporation over the LLC is that as a corporation it enjoys perpetuity of life. As discussed above in some cases LLCs must specifically relinquish this characteristic to achieve federal tax benefits. But other than this one advantage, S corporations are subject to a plethora of quirky restrictions and conditions which make them impractical or inconvenient for some businesses. For example, the S corporation cannot make special allocations of items of income and deduction, is restricted as to the number and type of owners that it may have, and can lose its classification as a pass-through entity under a variety of circumstances. These circumstances include the making of inappropriate distributions, if a shareholder transfers to or becomes an ineligible shareholder, or even if the corporation has too much of the wrong kind of stock or income.[94]

S corporations may not have more than thirty-five shareholders,[95] and nonresident aliens cannot be shareholders.[96] Additionally, with the exception of estates and trusts, only natural persons can be shareholders.[97] S corporations can only have one class of stock,[98] a limitation which "precludes the shifting of risks that certain business arrangements require."[99] It is also prohibited for S corporations to become a member of an affiliated group through ownership of interests in corporate subsidiaries,[100] and S corporations cannot own more than eighty percent of the stock of another corporation.[101]

In comparison to the burdensome restrictions of the S corporation, the LLC is relatively simple and easy to form. There are no limitations

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contained in Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part Two)*, 37 S.D. L. REV. 467 (1992). *See also* Wayne M. Gazur and Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387, 454-457. For a discussion of the various tax implications of the S corporation, *see* James S. Eustice, *Subchapter S Corporations and Partnerships: A Search for the Pass-Through Paradigm*, 39 TAX L. REV. 345 (1984).

[93] I.R.C. §§ 1361, 1366 (1982).

[94] *See generally*, I.R.C. § 1361(b)(1) (1988).

[95] I.R.C. § 1361(b)(1)(A) (1988).

[96] I.R.C. § 1361(b)(1)(C) (1988).

[97] I.R.C. § 1361(b)(1)(B) (1988).

[98] I.R.C. § 1361(b)(1)(D) (1988). Stock class differentiation is not made based solely on voting rights, however. *See* I.R.C. § 1361(c)(4) (1988).

[99] Gazur and Goff, *supra* note 81, at 456.

[100] I.R.C. § 1361(b)(2)(A) (1988).

[101] *Id.*

on the maximum number of members,[102] both individuals and corporations can be members, and members can participate in the business to various degrees, simulating the creation of various classes of stock. And LLCs can be formed to become shareholders or members of other corporations or LLCs.

Compared with the relative flexibility of the LLC, the S corporation is a highly restricted and inflexible entity, for which the rise of the LLC may sound the death knell. However, the familiarity of the S corporation and its useful application in certain situations may keep it alive for the time being.[103]

V. Potential Benefits of Limited Liability Company Enactment

A. Benefits to Corporation

1. Taxation

In states where LLC statutes exist, corporate planners have a clear taxation option. They can choose either pass-through taxation or entity-level taxation.[104] Thus the restrictions and hoops to be jumped through of the S corporation or limited partnership can be avoided. The LLC may therefore bring "some rationality to a disordered situation."[105] However, there is no specific provision in the acts which allows the LLC preferential tax treatment in the states, nor could the state statute purport to affect federal tax liability. Additionally, there is no Internal Revenue Code on point.[106] It is this lack of regulation by the IRS

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[102] The IRS requires that an LLC have at least two members to achieve partnership status. Rev. Proc. 95-10 § 4.01, but the Uniform Limited Liability Company Act which is due out this year may contain a provision for a sole-member LLC which will be suitable for sole-propietorships. *See* Ripley Hotch, "The latest on LLCs: Uniform Law Advances", Nation's Business, 8, Nov. 1994.

[103] *See*, Gazur and Goff, *supra* note 81, at 457: "for transactions involving little property, but for which limited liability is desired, the S corporation is attractive because it involves only one entity." *Id.* As opposed to a limited partnership, which has two, for example. *Id.*

[104] A concise explanation of the difference between these two corporate forms can be found in Robert W. Hamilton, Fundamentals of Modern Business 284-96 (1989).

[105] Sargent, *supra* note 8, at 1-1.

[106] Rev. Proc. 95-10, 1995-3 I.R.B. 20 sets forth the procedural guidelines and the conditions which must be met for an LLC to request a ruling as to whether it is a partnership or a corporation for tax purposes.

which allows the LLC to avoid being taxed as what it is not, a corporation.

The LLC statutes create a tenuous basis for beneficial taxation status. Initially, the Service was concerned with the absence of an individual who would be liable for the LLC's debts. This resulted in hesitancy to classify the entity as a partnership. But in 1988 with revenue ruling 88-76, the Service determined that because the Wyoming LLC lacked the primary characteristics of the corporate form, it was to be treated as a partnership for tax purposes.

The IRS divides taxable business entities into partnerships and associations taxable as corporations.[107] The Service uses a set of six characteristics to determine which category an entity falls into. The six attributes of a corporation are (1) associations, (2) an objective to carry on business for profit and divide the gains, (3) continuity of life, (4) centralization of management, (5) limited liability, and (6) free transferability of interests.[108] If an entity contains four or more corporate attributes, it is considered to be a corporation. Because the first, second, and fifth criteria are automatically satisfied for LLCs, the significant characteristics for LLC Federal Tax analysis are centralization of management, continuity of life, and transferability of interests.[109] In *Larson v. Commissioner*,[110] the Tax Court concluded that equal weight must be given to each characteristic.

In states which do not have a blanket ruling that all LLCs incorporated under the state's statute will be treated as a partnership, the LLC may have to request a ruling from the service to determine if it qualifies to be taxed as a partnership. The LLC must conform its request to the conditions set forth at Rev. Proc. 95-10.[111] That procedure contains guidelines both as to the form of the application, for example it requires the submittal of the articles of organization and the operating agreement of the LLC,[112] and as to the substantive guidelines for determination of whether an LLC lacks continuity of life, free transferability of interests, centralization of management, and limited liability.[113]

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[107] Treas. Reg. § 301.7701-1(c) (as amended in 1983).

[108] *Id.*

[109] Rev. Proc. 95-10 § 5.01-.03 discuss the Service's standards with regards to these attributes.

[110] 66 T.C. 159 (1976).

[111] 1995-3 I.R.B. 1.

[112] Rev. Proc. 95-10 § 3.04(1),(2).

[113] Rev. Proc. 95-10 § 5.01-.04.

Duration has been an important issue in the Service's analysis. There is nothing in the basic definition of an LLC which either provides for or restricts its duration, so the provisions of the statutes and the individual operating agreements will be determinative. Under the so-called "bullet-proof" statutes,[114] an LLC will dissolve upon the death, retirement, resignation, bankruptcy, or any other event which terminates membership, unless all of the remaining members agree to continue the business, and a right to do so is included in the operating agreement. This "unanimous consent rule," requiring the consent of all remaining members to the continuation of the business upon the departure of a member, is generally sufficient under Revenue Ruling 95-10 to establish a lack of continuity of life.[115]

The Hawai'i LLC act requires that the company set forth in the articles of organization whether the company is to be a "term company and, if so, the duration of the term" must be set forth.[116] A LLC which is not a term-company is an "at-will" company, with potentially infinite duration.[117]

Many states have traded the security of the unanimous consent rule for the flexibility of allowing the creators of the corporation to determine whether a unanimous vote is required for the corporation to continue its existence.[118] The Hawai'i proposal is flexible, allowing the percentage of members whose vote is required for dissolution of an at-will company to be specified in the operating agreement.[119]

The element of free transferability also raises some important issues. Free transferability exists when substantially all of the owners have the

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[114] *E.g.*, WYO. STAT. Ann. § 17-15-123 (1995); COLO. REV. STAT. § 7-80-801 (1995); VA. CODE ANN. § 13.1-1046(3) (1995); NEV. REV. STAT. ANN. § 86.491 (1993). They're called "bullet-proof" because the corporations formed under the statute have no opportunity to opt in or opt out of the key elements of the LLC form which make it more like a partnership and less like a corporation in the eyes of the IRS.

[115] Rev. Proc. 95-10 § 5.01.

[116] H.R. 2093 § 203(a)(5). Note however, that even if the company is a term company, it can be continued after the expiration of the term as an at-will company, upon the unanimous consent of the members. H.R. 2093 § 802.

[117] H.R. 2093 § 801. lists the events which will cause an at- will LLC to terminate. These events include consent of the members, dissociation of a member, the company's business becoming illegal, or other events as specified in the operating agreement.

[118] *See e.g.*, FLA. STAT. ANN. § 608.441(c) (1994); KAN. STAT. ANN. § 17-7622 (1994); TEX. REV. CIV. STAT. ANN. Art. 1528 n, art. 6.01(4) (1995); UTAH CODE ANN. § 48-2b-137 (1995).

[119] H.R. 2093 § 801(2), 18th Leg. Reg. Sess. (1995).

power to transfer, without any other owner's consent, all of the attributes of ownership to a person not a member of the organization.[120] Free transferability does not exist, in a general partnership, for example, where the ownership interest can be transferred without consent, but the management interest cannot.[121] The Wyoming statute, like the majority of statutes and the Hawai'i proposal, restrict a transferee's right to participate in management or become a member, requiring the consent of all other members.[122] As Revenue Ruling 88-76 and Revenue Procedure 95-10 indicate, this means that there is no free transferability of interest.[123]

In practice, the limits on transferability may not be very significant for other than tax considerations, because the LLC will face the same difficulties, including for example a limited market for the LLC's interests, as are involved with transferring interests of a close corporation.

The Service determines on a state by state basis whether LLCs formed under the statutes of a particular state are a partnership for tax purposes. If the state act's guidelines are not sufficiently restrictive, contrary rulings may be had in the same state.[124]

To take advantage of the pass through taxation, it is important that the Hawai'i statute contain provisions which limit how the LLCs will be organized. As it stands, the act may be too flexible to allow the I.R.S. to make a blanket ruling on whether Hawai'i LLCs will be taxed as partnerships of corporations. It is probably better to sacrifice some flexibility for the sake of administrative convenience, and to prevent unfamiliar LLC organizers from inadvertently winding up with double-taxation. To that end, restrictions on at least two of the cor-

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[120] Treas. Reg. § 301.7701-2(e) (as amended in 1983).

[121] UPA § 18(g), 6 U.L.A. 213.

[122] The Colorado, Florida, Kansas, Nevada, and Virginia statutes are similar. COLO. REV. STAT. § 7-80-702 (1995); FLA. STAT. ANN. § 608.432 (1994); KAN. STAT. ANN. § 117-7618 (1994); NEV. REV. STAT. ANN. § 86.351 (1993); VA. CODE ANN. § 13.1-1039, -1040 (1995).

[123] Rev. Proc. 95-10 § 5.02(4) provides that "The Service will not rule that the LLC lacks free transferability of interests unless the power to withhold consent to the transfer constitutes a meaningful restriction on the transfer of the interests." *Id.* § 5.02(1) and (2) set forth the unanimous consent rule with regard to transferability of interests.

[124] *E.g.*, Rev. Rul. 93-98, 1993-21 I.R.B. 4 (granting partnership tax status to one Delaware LLC, and denying it to another).

porate characteristics[125] not inherent in the LLC should be solidified in the statute.

2. Business combinations

Joint ventures generally have two or more corporate partners which share liability for the debts and obligations of the joint venture. By using corporations in joint ventures, the liability is limited to the assets of the corporation. Limted liability companies could conceivably replace this form of business, by performing the same function as a partnership of corporations. Each investor's liability will be limited to the amount of his contribution, so the same result will be obtained.

Additionally, LLCs can be owners or members of other organizations, and can have other organizations as members. Conceivably, one could even form an LLC as a partnership of S Corporations.[126]

3. Flexibility

As in a general partnership, the LLC allows a great deal of freedom to shape the company to fit the owner's needs. Structures which are appropriate for a closely held enterprise can be created, and the inflexible mandatory provisions of the S corporation, close corporation and the limited partnership can be avoided.

VI. A Comparative Overview of Other States and the Proposed Hawaii Legislation

A. Formation

Generally, the statutes require that two or more persons organize an LLC,[127] but some states allow organization by one or more per-

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[125] In Rev. Rul. 88-76, the Service stated that to not be an association for tax purpose, the entity must lack two of the following: continuity of life, free transferability of interests, centralization of management, and limited liability. Since limited liability cannot be eliminated, there are only three characteristics on which restrictions can be placed. See discussion infra, at part V.A.1.

[126] *See* E. J. Roche, Jr., R. R. Keatinge and B. C. Spudis, *Limited Liability Companies Offer Pass-Through Benefits Without S Corporation Restrictions*, 74 J. Tax'n, n.3 (1991). Note that an S Corporation cannot hold more than 85 percent ownership of another corporation. *See* discussion of S corporations, *supra*, at part IV.D.

[127] The Colorado and Virginia statutes allow an LLC to be organized by one person. Colo. Rev. Stat. § 7-80-203 (1995); Va. Code Ann. § 13.1-1010 (1995).

sons.[128] Whether the company may be created by a single person, most require that two or more members comprise the LLC.[129] Some statutes require that the organizers be members, while others are more flexible.[130] Where the statute allows creation by one person, and does not require that an LLC contain at least two members, theoretically, a one person LLC could be formed.[131] This could create problems for tax classifications.[132] The provisions contained in the 1992 Hawai'i proposal are probably the most practical, and least problematic. They allow for one or more organizers who are not members, while requiring explicitly that the LLC have two or more members.[133]

The 1995 proposed act allows maximum flexibility, but contains a potential pitfall. It allows formation by one or more persons, who need not be members, of an LLC which may consist of one or more members.[134] Because the IRS requires that an LLC have at least two members to be considered a partnership,[135] a person organizing a one

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[128] The 1992 proposed bill allowed for formation by "One or more individuals. . . ." S.R. 3368 Pt. II, § 8. The 1993 proposals contained differing provisions. H.R. 777 stated that "Two or more persons may form a limited liability company. . . ." H.R. 777 P. II, § 11, 17th Leg., Reg. Sess. (1993), while H.R. 863, 17th Leg., Reg. Sess. (1993) mimics the 1992 proposal.

[129] *See, e.g.*, COLO. REV. STAT. § 7-80-203 (1995); VA. CODE ANN. § 13.1-1002 (1995). The original Hawaii proposals vary on this point. While both the 1992 proposal, S. 3368 and the first 1993 bill, H.R. 777 require that there be two or more members, H.R. 863 is silent on the subject, and allows for formation by one or more persons, presumably allowing the formation of a one member LLC.

[130] H.R. 777 states that "[The organizers] shall be members of the limited liability corporation at the time of formation." H.R. 777 § 11. Both the 1992 proposal, and the second 1993 proposal do not require that the organizer of the LLC become a member. S. 3368 § 8; H.R. 863 § 11.

[131] For example, the Utah act requires that two or more persons form the LLC, but does not require that the LLC have more than one member, or that the organizers be members. UTAH CODE ANN. § 48-2b-103 (1995).

[132] The IRS requires that an LLC have at least two members to be classified as a partnership. *See* Rev. Proc. 95-10 § 4.01.

[133] S.R. 3368 states:

> Formation. (a) One or more individuals may organize a limited liability company by signing and delivering articles of organization to the director. Such individuals need not be members of the limited liability company after formation has occurred. (b) A limited liability company shall have two or more members at the time of its formation.

[134] H.R. 2093 § 202 reads "Organization. (a) One or more persons may organize a limited liability company, consisting of one or more members, by delivering articles of organization to the office of the director for filing."

[135] Rev. Proc. 95-10 § 4.01.

member LLC is automatically opting to be treated as a corporation for tax purposes. By giving LLC organizers flexibility, the 1995 act allows them to weigh the merits of various structural possibilities. For the diligent this will no doubt be an appreciated element of the act. For the occasional organzier who is not so diligent, however, it could lead to a great deal of taxation headaches.[136]

1. Articles of organization

In each state, the organizer of an LLC must file articles of organization in a similar manner to that of the filing of a corporation's articles of incorporation.[137] Some statutes state that parties who act as an LLC "without authority to do so and without a good faith belief that they have such authority shall be jointly and severally liable for all debts and liabilities incurred. . . ."[138] In the 1995 Hawai'i act, no such provision can be found. Presumably, in Hawai'i and other states where this liability is not expressly established, analogies to corporate case law and statutes will be drawn by the courts to find this liability.

The information to be set forth in the articles of organization varies from state to state, but there are certain recurring provisions among the various LLC statutes. These include the requirement of the disclosure of the LLC's name, suffixed with "Limited Liability Company,"

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[136] Unlike the Uniform Commercial Code, for example, the Uniform Limited Liability Company act is not accompanied by comments in its current proposed form. If it were, it would be extremely valuable to the practitioner to include information about how various elements will affect taxation treatment at the state and federal levels.

[137] H.R. 2093 § 202 provides that an LLC may be organized "by delivering articles of organization to the office of the director for filing."

[138] S. 3368 § 5; The 1995 bill is conspicuously silent on this issue. Two related provisions which may be relevant are H.R. 2093 § 303(b):

> The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company;

a section no doubt included to address issues of piercing the corporate veil, and H.R. 2093 § 303(c):

> All or specified members of a limited liability company are liable in their capacity as members for all or specified debts or other obligations of the company if:
> (1) A provision to this effect is included in the articles of organization; and
> (2) A member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

or "LLC,"[139] its period of duration,[140] the LLC's purpose,[141] the name and address of its initial resident agent in the state, and the address, if any, of the LLC's initial principal office in the state.[142] Some states require that the name and business addresses of the LLC's initial managers also be disclosed. Under the Hawai'i act, if the company is manager managed, then the name and address of the initial managers is required.[143]

The extent of disclosure varies, and in states requiring slightly more information, who will govern the LLC, be they managers or members, and the names and addresses of these individuals must also be stated.[144] Hawai'i follows these states,[145] and also requires that the articles state "[w]hether the members of the company are to be liable for its debts and obligations under § 303(c)."[146] In the states requiring the most disclosure, Wyoming and Florida, the total cash or other property contributes to the LLC, as well as the agreed upon future contributions of the members, in addition to other financial information, must also be disclosed.[147] These items are not required by the Hawai'i act, but may be set forth along with other matters that are "not inconsistent with law."[148]

As discussed in section V.A.1., a requirement of an absolute date for dissolution of the LLC is fundamental to the entity's classification as a partnership for federal taxation purposes, and as such, an absolute limit is probably preferable over the flexibility of the 1995 Hawai'i

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[139] H.R. 2093 § 105(a) reads

> Name. (a) The name of a limited liability company must contain the words "limited liability company" or "limited company", the abbreviation "L.L.C.", "LLC", "L.C.", or "LC". The word "limited" may be abbreviated as "Ltd.", and the word "company" may be abbreviated as "Co."

[140] To achieve partnership status for federal taxation purposes, limited duration is a critical element. *See* discussion of taxation, *infra*, at part V.A.1. The 1995 Hawaii statute gives the organizer the flexibility to determine "[w]hether the company is to be a term company and, if so, the duration of the term." H.R. 2093 § 203(5). This is another potential pitfall for the unwary organizer.

[141] This is optional in the Hawaii act. H.R. 2093 § 203(b).

[142] H.R. 2093 § 203 sets forth the required contents of the articles of organization.

[143] H.R. 2093 § 203(a)(6).

[144] *See, e.g.*, KAN. STAT. ANN. § 17-7607(a)(7) (1994); TEX. REV. CIV. STAT. ANN. art. 1528n, art. 3.02 (1995); UTAH CODE ANN. § 48- 2b-116 (1995).

[145] H.R. 2093 § 203(a)(6).

[146] H.R. 2093 § 203(a)(7). Section 303(c) is contained in note 138, *supra*.

[147] FLA. STAT. ANN. § 608.407 (1994); WYO. STAT. § 17-15-107 (1994).

[148] H.R. 2093 § 203(b)(2).

proposed act. To the extent that the individual LLC has the statutory ability to determine the date of dissolution, the I.R.S. is less likely to award a blanket determination that all LLCs formed under this statute are to be considered partnerships. Instead, case by case rulings will be required, and may result in increased litigation costs, as well as making the LLC less attractive to prospective businesses. At the very least, the majority consent requirement for continuation upon an event of dissolution, as set forth in Revenue Procedure 95-10 should be mandatory if a state wishes to obtain a blanket ruling that its LLCs will be treated as partnerships by the IRS.[149] The Hawai'i act contains such a provision.[150]

As in a corporation, there must be an agent of the LLC for service of process.[151] The Hawai'i proposal requires that the articles set forth the name and business address of the registered agent, and the business address of the LLC.[152]

Because the articles of organization are available for viewing by the public, creditors will likely use them to obtain information about the LLC.[153] It can be argued that organizers of an LLC who do not foresee great interaction with creditors will not be concerned with including detailed information in the articles, and may want to maintain privacy. The 1995 Hawai'i proposed act allows this flexibility by only requiring certain essential information while giving the organizers the option to include further, more detalied information, such as the names and addresses of the members or other similar information.[154]

Of course the organizers can also include any other relevant provisions, including for example, the value of the contributions of the

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[149] Rev. Proc. 95-10 § 5.01.

[150] H.R. 2093 § 802(b):

> At any time after the dissolution of a limited liability company and before the winding up of its business is completed, the members, including a dissociating member whose dissociation caused the dissolution, may unanimously waive the right to have the company's business wound up and the company terminated.

[151] H.R. 2093 § 108(2) requires that the LLC designate and continuously maintain an office in the state, and:

> An agent and street address of that agent for service of process on the company. The agent must be an individual resident of this State, a domestic corporation, another limited liability company, or a foreign corporation or foreign company authorized to do business in this State.

[152] *Id.*; H.R. 2093 § 203(3).

[153] Keatinge, *supra* note 8, at 410.

[154] *See* disscussion at part VI.A.1., *supra*.

members,[155] and other profit sharing agreements, depending upon the individual circumstances.

2. Amendment of the articles of organization

Amendment of the articles of organization is provided for in all LLC statutes.[156] The Hawai'i proposal contains procedures for filing of amended or restated articles.[157] The 1992 proposed LLC act requires written notice of proposed amendments to all members eligible to vote, who must ratify the amendment with a majority vote.[158] The 1995 proposal, however, is quiet on the issue, giving the organizers flexibility to determine the procedure, but providing little guidance.

Many states specifically require that false or erroneous statements, changes in the members, a change in the predetermined date of dissolution, or any other substantial change[159] in the articles of organization requires filing of amended articles.[160] Because the required contents of the articles of organization mandated by the 1995 act are not as detailed as those of other states, it is predictable that the act does not demand the filing of amended articles.[161]

3. Operating agreement

All of the statutes refer to an operating agreement[162] An operating agreement is essentially a contract, and creates contractual rights among the members. As a contract, it is a private document, and unlike the

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[155] Because the default provisions of most LLC statutes provide that profits are to be distributed according to the value of the members' contribution, this information will probably be disclosed in most LLC articles of incorporation.

[156] Keatinge, *supra* note 8, at 411.

[157] H.R. 2093 § 204.

[158] S. 3368 § 15, 16th Leg., Reg. Sess. (1992).

[159] *See, e.g.*, KAN. STAT. ANN. § 17-7610 (1994) (Articles must be amended when there is a disassociated member if the LLC is member-managed, or if new managers are chosen).

[160] *See, e.g.*, COLO. REV. STAT. § 7-80-209 (1995); FLA. STAT. ANN. § 6-8.411 (1994); KAN. STAT. ANN. § 17-7610 (1994); NEV. REV. STAT. ANN. § 86.221 (1993); UTAH CODE ANN. § 48-2b-121(1995); WYO. STAT. § 17-15-129(b) (1994).

[161] If the designated office or agent changes, a statement of change must be filed. H.R. 2093 § 109.

[162] *See* COLO. REV. STAT. §§ 7-80-101 to -913 (1995); FLA. STAT. ANN. §§ 608.401-.471 (1994); KAN. STAT. ANN. §§ 17-7601 to -7650 (1993); NEV. REV. STAT. ANN. §§ 86.011- .571 (1993); UTAH CODE ANN. §§ 48-2b-101 to -156 (1995).

articles of incorporation is not available to creditors or to the public in general. The 1995 Hawai'i act allows, but does not require the members to enter into an oral or written operating agreement.[163] The act provides that it governs "relations among the members, managers, and the limited liability company," to the extent that the operating agreement does not otherwise provide.[164]

4. Capital structure

The first LLC statutes in Florida and Wyoming did not allow services to be contributed in exchange for a membership interest.[165] More recent statutes generally do allow "nearly anything of value"[166] to be contributed in exchange for a membership interest.[167] The Hawai'i act comports with this.[168]

Some LLC statutes allow the compromise of a promise to contribute only upon the consent of a majority of members. The Hawaii act does not allow for the compromise of a promise to contribute, but instead gives the company the option to require the contribution of money equal to the value of the unmet contribution. Like some statutes from other states, the Hawai'i act contains a provision establishing a cause of action for creditors who rely on promises of contribution by members.[169]

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[163] H.R. 2093 § 103:

> Effect of operating agreement; nonwaivable provisions. (a) Except as provided in subsection (b), all the members of a limited liability company may enter into an operating agreement, which need not be in writing, to provide for the regulation of the affairs of the company, the conduct of its business, and governing the relations among the members, managers and the limited liability company. . .

[164] *Id.*

[165] FLA. STAT. ANN. § 608.4211 (1994); WYO. STAT. § 17-15-115 (1994).

[166] Keatinge, *supra* note 8, at 412.

[167] COLO. REV. STAT. § 7-80-102(4)(1995); NEV. REV. STAT. ANN. § 86.041 (1993); TEX. REV. CIV. STAT. ANN. art. 1528n, art. 5.01 (1995) (But the Texas statute does not allow a promise of services as a contribution for membership); UTAH CODE ANN. § 48-2b- 124 (1995); VA. CODE ANN. § 13.1-1002 (1995).

[168] H.R. 2093 § 401 states that:

> A contribution of a member . . . may consist of tangible or intangible property or other benefit to the company, including money, promissory notes, services performed, or other obligations to contribute cash or property, or contracts for services to be performed.

[169] H.R. 2093 § 403.

LLC statutes usually allow the organizers to establish in the articles of organization how profits will be shared among the members, while including default provisions which apply if the articles are silent. Unlike general partnerships, which allocate profits equally among partners, and similar to corporations, most LLC statutes' default provisions allocate profits according to the value of each members' contribution. Even in statutes where the net profits are shared equally among the members, the members are entitled to a return of their contributions before profits are so distributed.[170] The 1995 proposed act provides only that distributions are to be made in equal shares, except upon dissolution and winding up of the business.[171]

The statutes allow a member to resign at any time, provided that he does not breach an agreement in the articles of organization.[172] If there is a breach, then the LLC may be entitled to damages against the member.[173] These will be offset against his distribution.[174] Members are entitled to receive, if there is no agreement otherwise, the fair value of their membership interest, as well as any distribution to which they would otherwise be entitled.[175] Members are entitled to distributions in cash only, unless the operating agreement specifically authorizes distributions in kind.[176]

B. Members' Liabilities

Because the basic nature of an LLC is that of a corporation, contributors should not be liable for more than the value of their contribution. To that end, every state's statutes expressly limit members' personal liability by precluding liability for the debts of the LLC.[177] The Hawai'i act limits the liability of the members to the amount of their contributions unless articles of organization specify otherwise, or the member consents in writing to be liable for the

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[170] The 1993 proposals both use this formula. H.R. 777 § 43, H.R. 863 § 43. The 1995 proposed act, however, does not.

[171] H.R. 2093 § 405(a).

[172] H.R. 2093 § 601(1), 602(a).

[173] H.R. 2093 § 602(c).

[174] H.R. 2093 § 602(d).

[175] H.R. 2093 § 701(a).

[176] "A member has no right to receive, and may not be required to accept, a distribution in kind." H.R. 2093 § 405(b).

[177] *See, e.g.*, COLO. REV. STAT. § 7-80-705 (1995); FLA. STAT. ANN. § 608.436 (1994); WYO. STAT. § 17-15-113 (1994).

debts.[178] However, members are personally liable to other members, and to creditors, for failing to make agreed upon contributions.[179] Additionally members are liable for disributions wrongfully made to them, and members and managers are personally liable for wrongful distributions which they approve.[180] In addition, a member of a manager-managed LLC who has knowledge of an illegal distribution is personally liable to the company for the unauthorized amount of the distribution.[181]

Unlike the Hawai'i act, most states distinguish between unlwaful distributions and wrongfully returned contributions. The treatment of members' liability for returned contributions varies among the states. Some states follow the RULPA to a certain extent, providing that an obligation of a member may only be waived or compromised upon consent of the other members.[182] Some statutes follow the earlier[183] version of the RULPA which makes compromises against creditors ineffective in some situations,[184] while others follow the 1985 version which only protects creditors who have relied upon the obligation.[185] Evidently the Uniform Limited Liability Company Act intends that wrongfully returned contributions be treated as unlawful distributions.

Members who act as an LLC without authority to do so will also incur personal liability. Additionally, members are liable for their individual torts, and for breach of fiduciary duty.[186]

1. Right to indemnification

Many LLC statutes state that unless an object of a proceeding is to enforce a right of or against a member, a member is not a proper

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[178] H.R. 2093 § 303(c).

[179] H.R. 2093 § 402.

[180] H.R. 2093 § 407.

[181] H.R. 2093 § 407(b).

[182] REVISED UNIFORM LIMITED PARTNERSHIP ACT § 502(c), 6 U.L.A. 545.

[183] RULPA, 6 U.L.A. 447 (1976).

[184] FLA. STAT. ANN. § 608.435(3) (1994); KAN. STAT. ANN. § 17- 7619(c) (1994); NEV. REV. STAT. ANN. § 86.391(3) (1993); UTAH CODE ANN. § 48-2b-133(3) (1995); WYO. STAT. § 17-15-121(c) (1994).

[185] COLO. REV. STAT. § 7-80-502(2) (1995); TEX. REV. CIV. STAT. ANN. art. 1528n, art. 5.02(d) (1995), VA. CODE ANN. § 13.1- 1027(C)(1995). The 1992 Hawaii proposal uses this rule. S. 3368 § 33(b).

[186] *See* discussion at part VI.C.3.

party.[187] The Hawai'i act accomplishes this by limiting the liability of the member for "the debts, obligations, and liabilities . . . whether arising in contract, tort, or otherwise. . ."[188] In the event that a member does represent an LLC in a proceeding, he is entitled to indemnification for the costs of the suit.[189] The statutes also contain provisions regarding the standard of care of the member or manager to the LLC,[190] and some allow the LLC articles to waive the right to monetary damages for breach of these duties.[191]

C. Rights and Duties of the Members and Managers

1. Fiduciary duties

The standard of care created by the fiduciary duty of officers to the corporation or partners to other partners is well defined in the common law, and in the statutes. In contrast with the early statutes, the Uniform Limited Liability Act describes and limits the fiduciary duties of members and managers.[192] Specifically, the member of a member-managed LLC must account to the company and hold as trustee for it any company property. The member must refrain from dealing with the company on behalf of a party with conflicting interests, and must refrain from competing with the company.[193] The business judgment rule is codified there as well, making the member liable for "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."[194] The member is obliged to use good faith and is

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[187] FLA. STAT. ANN. § 608.462 (1994); KAN. STAT. ANN. § 17-7631 (1994) (The 1991 amendments added managers to those who are not proper parties); WYO. STAT. § 17-15-130 (1994).

[188] H.R. 2093 § 303(a).

[189] COLO. REV. STAT. § 7-80-104(1)(k) (1995); FLA. STAT. ANN. § 608.404(11) (1994); WYO. STAT. § 17-15-104 (a)(xi) (1994). The statutes all treat members as officers of corporations would be treated in the same situation, except for Utah which treats them as partners would be treated. H.R. 2093 provides that "[a] limited liability company shall reimburse a member for payments made and indeminfiy a member for liabilities incuured by the member in the ordinary course of the business of the company or for presevation of its business property."

[190] H.R. 2093 § 409.

[191] The Hawaii proposal, however, is silent.

[192] H.R. 2093 § 409.

[193] *Id.*

[194] H.R. 2093 § 409(c).

not liable "merely because the member's conduct furthers the member's own interest."[195] In manager-managed companies "[a] member who is not also a manager has no duties to the company or to the other members solely by reason of being a member,"[196] while managers and members who act as a manager share the same liability as members in member-managed LLCs.[197]

Applying the same standard to both members and managers makes sense, because it will preclude litigation on the issue of what level of participation results in one's classification as a manager. Instead, the member who acts as a manager in a manager- managed company is liable "to the extent that the member exercises the managerial authority vested in a manager. . ."[198]

2. Management of the company

Generally, an LLC is managed by the members, unless the organization agreement states otherwise. Of course members can serve as managers as well. Where the managers are members, generally voting authority is apportioned according to the size of the contribution.[199] The Hawai'i act, however, gives each member of a member-managed LLC "equal rights in the management and conduct of the company business."[200] The apportionment of voting rights in a manager-managed LLC is not specified in the statue. Presumably the articles of organization or the operating agreement will fill in this gap in the statute.

The statutes contain few requirements as to annual meetings, or other corporate formalities, leaving the day-to-day workings of the LLC to the organizers.[201]

3. Authority of members to bind the LLC

Members' power to bind the LLC is sometimes predicated upon whether the LLC is managed by managers.[202] Other states require that

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[195] H.R. 2093 § 409(d),(e).

[196] H.R. 2093 § 409(h)(1).

[197] H.R. 2093 § 409(h)(2),(3).

[198] H.R. 2093 § 409(h)(3).

[199] *See, e.g.*, FLA. STAT. ANN. § 608.422 (1994); NEV. REV. STAT. ANN. § 86.291 (1993); UTAH CODE ANN. § 48-2b-125 (1995); VA. CODE ANN. § 13.1-1022 (1995).

[200] H.R. 2093 § 404(1).

[201] This may present some interesting issues in such areas as piercing the corporate veil, discussed *infra* at IX.

[202] *See, e.g.*, WYO. STAT. § 17-15-117 (1994), which provides that members automatically have this power, unless the firm is manager-managed.

the members' authority be stated in the operating agreement or articles of organization,[203] while some make no provision on the point at all.[204]

The 1995 Hawai'i proposed act provides that each member of the LLC is an agent for the purpose of its business, and that acts of members are binding on the company unless the member had no authority to act and the person with whom the member was dealing was aware that he had no authority.[205] To be binding on the company the act in question must be "apparently for carrying on in the ordinary course the company business."[206] If it is not it only binds the company if it is authorized by the other members.[207]

Where the firms are managed by elected managers, unless stated otherwise in the articles of organization or the operating agreement, members have no automatic power to bind the corporation.[208] The Hawaii act is in accord.[209] Most states allow management by elected members.[210] The procedures for electing managers are often stated in the statutes.[211] The Hawai'i act requires that managers must be "designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority of the members."[212] Some statutes contain detailed provisions on classification, vacancies, removal and duties of managers.[213] The Hawai'i act, however, limits its regulation of managers to a provision for the length of the manager's term, which is "until a successor has been elected and qualified, unless sooner removed."[214]

Before the promulgation of the Uniform Act, whether, as in a partnership, management power would be equated with power to bind the LLC or, as in a corporation, agency and management would be

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[203] NEV. REV. STAT. ANN. § 86.301 (1993).

[204] *E.g.*, VA. CODE ANN. § 13.1-1022 (1995).

[205] H.R. 2093 § 301(1),(2).

[206] *Id.*

[207] H.R. 2093 § 301(3). What percentage of other members is required for authorization is not specified.

[208] *See, e.g.*, WYO. STAT. § 17-15-117 (1994).

[209] In a manager managed company, "[a] member is not an agent of the company for the purpose of its business solely by reason of being a member." H.R. 2093 § 301(b)(1).

[210] *E.g.*, WYO. STAT. § 17-15-116 (1994).

[211] *E.g.*, COLO. REV. STAT. § 7-80-401 (1995).

[212] H.R. 2093 § 404(b)(3(1).

[213] *E.g.*, Colorado, Texas, and Virginia. COLO. REV. STAT. § 7- 80-401 to -411 (1995); TEX. REV. CIV. STAT. ANN. art. 1528n, arts. 2.12-.21 (1995); VA. CODE ANN. § 13.1-1024 (1995).

[214] H.R. 2093 § 404(b)(3)(ii).

separate, was an unresolved issue.[215] By clearly establishing the agency authority of the members and managers, reliance on the common law concepts of agency has been avoided in Hawai'i, perhaps limiting the potential for litigation.

D. Relationship of Members

In general, the relationship among members as delineated in the 1995 Hawai'i act is quite democratic. Both voting rights and rights to distributions are shared equally among the members. This contrasts with some states in which a member's rights ar proportional to his contribution.

Some statutes allow members to be divided into classes.[216] The 1992 Hawai'i proposal followed this model.[217] However, the 1993 proposals elimenated such provisions, and the 1995 act has followed suit. In the 1995 bill, voting is *per capita*,[218] in contrast with states such as Florida and Utah, which apportion votes according to contribution.[219] Except in states where voting provisions are mandatory, LLCs are free to apportion votes in any manner they wish.

1. Derivative suits

Few statutes establish the right of a member to initiate a derivative suit.[220] It is likely, however, that in states without such provisions the courts will imply such a right by application of corporate law principles. The original Hawai'i proposals did not address the topic, but the 1992 proposal did have a provision for information and accounting. That provision allows members to obtain an information and accounting

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[215] Keatinge, *supra* note 8 at 415.

[216] *E.g.*, COLO. REV. STAT. § 7-80-503 (1995); TEX. REV. CIV. STAT. ANN. art. 1528n, art. 4.02 (1995); VA. CODE ANN. § 13.1-1029 to -1030 (1995).

[217] Organizers can state in the articles of organization if the members are to be divided into classes. S. 3368 § 9(5).

[218] H.R. 2093 § 404(1) provides that in a member-managed LLC "[e]ach member has equal rights in the management and conduct of the company business." This is in accord with the Kansas statute. KAN. STAT. ANN. § 17-7612 (1994).

[219] The Florida statute makes this a mandatory provision, while the Utah statute makes it a default provision which can be opted out of in the articles of organization. FLA. STAT. ANN. § 608.422 (1994); UTAH CODE ANN. § 48-2b-125 (1995).

[220] The ones that do include Utah and Virginia. UTAH CODE ANN. § 48-2b-150 (1995); VA. CODE ANN. § 13.1-1042 (1995).

from the members "from time to time,"[221] or "whenever circumstances render it just and reasonable."[222] The right to information is also established in the 1995 act.[223]

The 1995 act contains a section on derivative actions which is substantially the same as that contained in the Hawaii Limited Partnership Act.[224] This similarity will allow the courts to apply the common law with regards to limited partnerships to analogous LLC situations. In addition to the requirement that the plaintiff must have been a member at the time of the action which gave rise to the complaint, the plaintiff must also plead with particularity his efforts to cause the management to bring the action, and can only maintain the action if "members or managers with authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed."[225]

2. Transfer of interests

A member's interest in the LLC is characterized as personal property by all of the statutes, including the Hawai'i proposal.[226] For federal tax classification as a partnership, it is important that interests in the LLC not be freely transferable, as that is a characteristic of a corporation.[227] Recognizing this, many states allow assignment of the member's pecuniary interest, but do not allow transfer of the right to participate in the operation of the business.[228] The majority of the states and the 1995 Hawai'i proposal allow transferal of the right to participate in management only upon approval of the transfer by all

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[221] S. 3368 § 54(b).

[222] *Id.*, § 54(c).

[223] H.R. 2093 § 408.

[224] H.R. 2093 art. 11 appears to be an adoption of HAW. REV. STAT. § 425D art. 10 (1993). The only substantive difference is that in the event of the plaintiff's success the LLC act allows for expenses including attorney's fees, whereas the Limited Partnership Act only allows for attorney's fees.

[225] H.R. 2093 § 1101. This wording is also substantially the same as rule 23.1 of the Hawaii Rules of Civil Procedure which applies to derivative actions in corporations and partnerships.

[226] H.R. 2093 § 501(b)

[227] *See* discussion infra at part V.A.1.

[228] *E.g.*, COLO. REV. STAT. § 7-80-702(1) (1995).

remaining members.[229] This should constitute a sufficient restriction to prevent the I.R.S. from finding free transferability.[230]

Once all of the member's interest has been transferred he ceases to be a member.[231] Therefore, if a member transfers all of his interest, but the remaining members do not unanimously consent to the admission of the transferee as a new member, the effective control membership will decrease by one member. If, however, the transferor keeps even a small portion of his membership interest, he will maintain equal control of the company with other members. This could lead to some potentially ackward situations. LLC organizers may wish to restrict this scenario by requiring that the members remain in posession of a minimum percentage of their original interest in order to exercise control of the company.[232]

3. Member withdrawal

The statutes make various provisions for withdrawal from the LLC. Some require six months written notice,[233] while others, including the 1995 Hawaii proposal, allow withdrawal at any time, provided that there is no breach of the operating agreement.[234] When a member becomes dissociated the company must tender a purchase offer for the fair market value of the member's interest within thirty days.[235] The

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[229] H.R. 2093 § 502 allows the transfer of a member's interest. The transfer entitles the transferee "to recieve, to the extent transferred, only distributions to which the transferor would be entitled." It "does not entitle the transferee to become or to exercise any rights of a member." To become a member, unanimous consent is required under § 404(c)(7).

[230] Rev. Proc. 95-10 § 5.02. See discussion of Revenue Ruling 95-10 below, indicating that this is sufficient to find no free transferability of interest.

[231] H.R. 2093 § 502.

[232] The other members do have the power to expel a member if "[t]here has been a transfer of substantially all of the member's company interest, other than a transfer for security purposes, or a court order charging the member's company interest, which has not been foreclosed." H.R. 2093 § 601 (5)(ii).

[233] FLA. STAT. ANN. § 608.427(1) (1995); KAN. STAT. ANN. § 17- 7616(b)(3) (1994); NEV. REV. STAT. ANN. § 86.331(2)(b) (1993); UTAH CODE ANN. § 48-2b-132(2)(c) (1995); VA. CODE ANN. § 13.1-1032 (1995); WYO. STAT. § 17-15-120(b)(ii) (1994).

[234] H.R. 2093 § 601(1) Provides that a member is dissociated upon "[t]he company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member." § 602(b) discusses what constitutes a wrongful dissociation, and § 701(f) allows the company to offset damages for wrongful dissociation against the purchase price of the dissociated member's interest.

[235] H.R. 2093 § 701(b).

offer must be accompanied by a statement of the company's assets and liabilities, the latest available balance sheet and income statement, and an explanation of how the estimated amount of the purchase price was calculated.[236]

4. Dissolution

For federal tax classification purposes, one characteristic of a corporation is unlimited duration. Dissolution provisions are therefore significant. Most states[237] limit an LLC's existence to thirty years. The 1992 proposal and H.R. 777 included this limitation.[238] The second 1993 proposal allowed any term, as long as a final date of existence is established.[239] The 1995 proposal is the most liberal, however, allowing the organizers to chose whether the company is to be a term company, and if so, to specify what the term will be.[240] The majority thirty-year restriction is probably the most prudent and least likely to result in scrutiny by the I.R.S., because it is an absolute limitation, but note that the IRS also considers a majority consent requirement for continuation as a sufficient limitation on duration.[241] This may be the saving grace for the Hawai'i act, which has such a requirement.[242]

In addition to the fixed period of existence, other events can trigger dissolution. When a member is dissociated by death, retirement, resignation, expulsion, bankruptcy, or any other event which terminates the continued membership of a member in the limited liability company dissolution is triggered.[243] This dissolution can be prevented by the unanimous consent of all of the remaining members.[244]

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[236] *Id.*

[237] Except, for example, Kansas, Utah and Virginia, which require that the articles of organization set forth the latest date on which the LLC is to dissolve. KAN. STAT. ANN. § 17- 7607(2) (1994); UTAH CODE ANN. § 48-2b-116(1)(b) (1995); VA. CODE ANN. § 13.1-1011.A.4. (1995).

[238] "The articles of organization shall set forth; . . . the period of its duration which may not exceed thirty years from the date of filing with the director." S. 3368 § 9(2), *accord*, H.R. 777 § 12(4).

[239] "The articles of organization shall set forth; the latest date upon which the limited liability company is to dissolve." H.R. 863 § 12(3).

[240] H.R. 2093 § 203.

[241] *See*, discussion, *infra* at part V.A.1.

[242] H.R. 2093 §§ 801(3)(i) and 802.

[243] H.R. 2093 § 801 specifies events which will cause dissolution. Generally they include events specified in the operating agreement, consent of the members, dissoci-

The statutes also provide for involuntary dissolution by a court or by the state corporate director. Generally this involuntary dissolution can be initiated by a member if it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.[245] In addition, a dissociated member whose interest has not been purchased can also bring a judicial action to dissolve the company, as can a member of a company whose managers or members "have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioning member."[246]

The director may also bring an action for administrative dissolution under certain circumstances. If an LLC has not paid its franchise taxes or other penalties within sixty days, or has failed to file its annual report withiin sixty days of the due date, such an action can be commenced.[247] The company has sixty days from the receipt of notice of administrative dissolution to correct deficiencies addressed by the director.[248]

Dissolution is completed by filing articles of termination.[249] Before these can be filed, the statute requires that debts be discharged and distributions of the remaining assets be made.[250] The 1992 Hawai'i proposal required that a statement of intent to dissolve be filed prior to winding up of the business. This would put creditors on notice of the pending dissolution, and may also serve to nip potential litigation in the bud. However, for better or for worse this provision has been left out of the 1995 act.

VII. Professional Limited Liability Companies[251]

There is an increasing trend toward enactment of provisions allowing professional associations, such as law partnerships, to organize as LLCs.

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ation of a member, the compan's business becoming unlawful, of entry of a judicial decree. Events which will cause a member to be dissociated are listed in § 601(6) through (10).

[244] H.R. 2093 §§ 801(3)(i) and 802.

[245] H.R. 2093 § 801(5); *accord* Colo. Rev. Stat. § 7-80-808 (1995).

[246] H.R. 2093 § 801(5)(iv),(v).

[247] H.R. 2093 § 809.

[248] H.R. 2093 § 810(b).

[249] H.R. 2093 § 805. Some states refer to these as articles of dissolution.

[250] H.R. 2093 § 805(a); *see also*, Colo. Rev. Stat. § 7-80-805. (1995).

[251] For an analysis of one state's PLLC act, *see* Curt C. Brewer, IV, *North Carolina's*

Professional Limited Liability Companies (PLLCs) are specifically authorized in some states, while most states are still silent on the issue. Two states specifically forbid formation of PLLCs.[252] In Hawai'i a PLLC act has been introduced in conjunction with, but separate from the Uniform Limited Liability Act.[253]

It is likely that the professional trade associations' strong interest in the PLLC will lead to an increase in the number of states in which they are authorized. The benefits which these professionals seek is a reduction and simplification of tax payment,[254] in addition to a relief from the ever-increasing burden of vicarious liability for partners' and associates' wrongdoings.

The current corporate and partnership forms available to professionals through professional corporation statutes[255] are either cumbersome, restrictive, or too costly. Taxation as a C corporation results in double taxation and a high, corporate tax rate. Zeroing the corporation's income by distributing the profits as salaries is one way to avoid this double tax burden, but is not always practical or effective. S corporations, on the other hand, have substantial limitations, which decrease their attractiveness to many professionals.[256]

On the litigation front, escalating damage awards against professionals have created a heightened urgency for the enactment of some sort of limitation on vicarious liability for the acts of associates.[257] Indeed, due to the changeable nature of the Service's corporate taxation policy,[258] limiting liability is probably the greatest incentive to organize as a PLLC.

Limited Liability Company Act: A Legislative Mandate for Limited Liability, 29 WAKE FOREST L. REV. 857 (1994). For a discussion of the considerations involved in deciding whether to incorporate as a PLLC, *see* Brian L. Schorr, *Limited Liability Companies: Considerations in Choosing a Business Entity*, 836 PLI / CORP 171 (1994).

[252] Maryland's act prohibits "acting as an insurer." MD. CORPS. & ASS'NS. CODE ANN. § 4A-201 (Supp 1992). Rhode Island prohibits PLLCs generally. R.I. GEN. LAWS § 7-16-3 (1993).

[253] H.R. 1315, 18th Leg., Reg. Sess. (1995).

[254] Tax issues for PLLCs are essentially the same as those for LLCs, discussed at § V.A.1.

[255] Hawaii Professional Corporation Act, HAW. REV. STAT. 415A-1 *et. seq.*

[256] *See* discussion *infra*, at part IV.D.

[257] *See*, Richard C. Reuben, *Added Protection: Law Firms Are Discovering That Limited Liability Business Structures Can Shield Them From Devastating Malpractice Awards and Double Taxation*, 80 A.B.A. J., Sept. 1994, at 54.

[258] One of the original reasons for enacting the Professional Corporation Act in

A. Vicarious Liability of Members of Professional Corporations

Professional corporations are regulated by statute and in the case of law corporations, by the rules of the supreme court.[259] Regardless of the LLC legislation, if these statutes are not amended, the realization of the benefits of the LLC organization by lawyers, architects, doctors, and accountants will be impossible.[260] To that end, proposals which would modify the public accountancy law to allow for limited liability accounting corporations were introduced.[261] Neither of these proposals were enacted, however.

Perhaps the single largest concern of both the judiciary and the legislature with enactment of LLC legislation is the issue of vicarious liability in professional corporations. In *In re Bar Association*,[262] the supreme court articulated its position that vicarious liability of lawyers for the malpractice of their partners was not to be limited in any way. The Hawaii Supreme Court has the implied and express authority to regulate the practice of law in the state. This is derived both from the

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Hawai'i was tax advantages. *See In re Bar Ass'n.*, 55 Haw. 121, 516 P.2d 1267 (1973). These advantages have since been erased by the IRS via the 1982 Tax and Fiscal Responsibility Act.

[259] The Hawaii Professional Corporation Act, HAW. REV. STAT. § 415A-1 provides for liability of professional corporations. For example, § 415A-11 states:

> (a) Every individual who renders professional services . . . shall be liable for any negligent or wrongful act or omission . . . to the same extent as if the individual rendered the service as a sole practitioner. An employee of a professional corporation shall not be liable for the conduct of other employees unless the employee is at fault in appointing, supervising, or cooperating with the other employees.
>
> (b) Every corporation whose employees perform professional services within the scope of their employment or of their apparent authority to act for the corporation shall be liable to the same extent as its employees.
>
> (c) Except as otherwise provided by statute, if any corporation is liable under subsection (b), every shareholder of that corporation shall be liable to the same extent as though the shareholder were a partner is a partnership . . . unless the corporation has provided security for professional responsibility . . . and the liability is satisfied to the extent contemplated by the insurance or bond which effectuates the security."

[260] The 1995 Hawai'i PLLC bill states that it "does not modify any law applicable to the relationship between an individual practicing a profession and a person receiving professional services. . ." H.R. 1315 § 7.

[261] H.R. 2430, 17th Leg., Reg. Sess. (1993), S. 2193, 17th Leg., Reg. Sess. (1993).

[262] 55 Haw. 121, 516 P.2d 1267 (1973).

constitution[263] and the Hawaii Revised Statutes.[264] In *Bar Association*, the court exercised this authority to prevent professional law corporations from limiting their liability to clients in anyway, holding instead, that any increased liability would be "in the best interests of the legal profession."[265]

The court also cited the Code of Professional Responsibility, which has since been revised, bit still contains similar provisions regarding a lawyer's duty to his client. The canons contained there contain many specific provisions about this duty. EC 6-6 states, "[a] lawyer should not seek, by contract or other means, to limit his individual liability to his client for malpractice. . ."[266] And DR 6-102 states, "[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for malpractice."[267]

Although these individual canons do not make specific provisions for lawyers operating as a corporation, the joint and several liability of partners contained in the Hawaii Partnership Act[268] which the Bar Association sought to eliminate from the proposed professional corporation enabling rule was mandated to be included in those rules by the supreme court. The court in *Bar Ass'n.* stated that such a rule "would not provide adequate protection to client's claims against a law corporation.[269]

Even if LLC legislation enables professional corporations to operate as LLCs, without the blessings of the supreme court and the legislature, members of the individual professions will be unable to operate as LLCs.

B. Limitations on Liability

Parties who fall onto either side of the proponent/opponent fence are probably primarily concerned with liability issues. It is instructive to observe how other states have addressed these concerns. Some states have simply slammed the door, and do not allow PLLCs at all.[270]

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[263] HAW. CONST. art. V, § 1.
[264] HAW. REV. STAT. §§ 416-141 through 154 (1994).
[265] 55 Haw. at 122, 516 P.2d at 1268.
[266] HAW. CODE OF PROF. RESP., EC 6-6 (Supp. 1995).
[267] HAW. CODE OF PROF. RESP., DR 6-102 (Supp. 1995).
[268] HAW. REV. STAT. § 425-115 (1994).
[269] 55 Haw. at 122, 516 P.2d at 1268.
[270] *See* note 218, *supra*.

Many states which have LLC enabling acts are silent on this issue. As of this writing, there are fifteen states, in addition to the District of Columbia, which specifically authorize PLLCs, three states which indirectly authorize PLLCs, and four with proposed legislation.[271]

The major point of divergence, and contention among the states' statutes is the mater of vicarious liability. One approach, as represented by Arizona, provides for the vicarious liability for the acts of others within the PLLC, only if that "member, manager or employee was acting under his direct supervision and control while performing professional services on behalf of the limited liability company."[272] This raises the issue of how "acting under direct supervision and control" will be interpreted by the courts. Another approach is found in the Montana Code, which provides that individuals are liable "to the same extent as if they had rendered the services as a sole practitioner.[273] It goes on to limit the liability of other employees, unless they are "at fault in appointing, supervising, or cooperating with [the tort feasor]."[274] The Texas act makes the corporation itself, but not other members or employees, jointly and severally liable for the acts of a member who is rendering professional service.[275] Perhaps the most

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[271] PLLCs are authorized in: Arizona, ARIZ. REV. STAT. ANN. § 29-841 (1994); Arkansas, ARK. CODE ANN. § 4-32-103 (1993); District of Columbia, D.C. CODE. § 29-1301 (1995), Florida, FLA. STAT. ANN. § 621.01 (1993); Iowa, IOWA CODE § 490A.1501 (1992); Kentucky, KY. REV. STAT. ANN. § 275-010 (Michie 1995); Maine, 31 MAINE REV. STAT. ANN. § 611 (1994); Minnesota, MINN. STAT. § 319A.03 (1993); Mississippi, 1994 Miss. Laws 402; Montana, MONT. CODE ANN. § 35-8-102 (1993); New Hampshire, N.H. REV. STAT. ANN. 304-D:1 (1993); New York, N.Y. LLC LAW § 1212 (Consol. 1994); North Carolina, N.C. GEN. STAT. § 57c-2-01 (1994); North Dakota, N.D. CENT. CODE § 10-31-01 (1993); South Carolina, 1994 S.C. Acts 448; South Dakota, S.D. CODIFIED LAWS § 47-11-1 (1994); Tennessee, TENN. CODE ANN. § 48-248-101 (1994); Texas, TEX. REV. CIV. STAT. art. 1528n (1994) art. 11.01.A.(1); and Virginia, VA. CODE ANN. § 13.1- 1011 (1994).

[272] ARIZ. REV. STAT. ANN. § 29-846 (Supp. 1993).

[273] MONT. CODE. ANN. § 35-8-1306(1) (1993).

[274] *Id.* Note that the Montana Code uses the same wording as the Hawaii Professional Corporation Act, HAW. REV. STAT. § 415A-11 (1994):

> (a) Every individual who renders professional services as an employee of a professional corporation shall be liable for any negligent or wrongful act or omission in which the individual personally participates to the same extent as if the individual rendered the services as a sole practitioner. An employee of a professional corporation shall not be liable for the conduct of other employees unless the employee is at fault in appointing, supervising, or cooperating with the other employees.

[275] TEX. REV. CIV. STAT. ANN. art. 1528n art. 11.05 (West Supp. 1994).

acceptable statute from the perspective of the supreme court and the occupational regulatory bodies is that of Iowa, which does not specifically describe members' liability, but states that its provisions do "not modify or affect the ethical standards or standards of conduct of any profession."[276] The Hawai'i PLLC bill is is the same as the Iowa statute, and should therefore not encounter opposition on this point.[277]

The Hawaii Supreme Court has said in no uncertain terms that limiting the vicarious liability of attorneys for the acts of their associates would "not provide adequate protection to a client's claims against a law corporation."[278] This concern is probably held by the regulative bodies of the other various professions, as well. But it is important to distinguish the types of liability to which the member might be subject. The liability limited by the PLLC form is not only liability for malpractice or other tortious conduct, but also includes contract and business liability.[279] The policy reasons for not allowing limitations on those forms of liability are weaker, as parties who knowingly enter into business arrangements are generally assumed to have enough business knowledge to be able to fend for themselves. Additionally, the suffix "PLLC" or "PLC" which must be attached to the title of a PLLC puts the would-be creditor or business associate on notice of the organization's nature.[280]

Perhaps it is time for the supreme court and the legislature to rethink its policy regarding vicarious liability of professionals. For example, it has been over twenty years since the supreme court authorized

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[276] IOWA CODE ANN. § 490A.1507 (West Supp. 1994).

[277] H.R. 1315 § 7.

[278] *In re Bar Ass'n*, 55 Haw. 121, 516 P.2d 1267 (1973).

[279] Hawaii Supreme Court Rule 24(5)(d) covers financial responsibility, and holds that "the liability of shareholders, officers and directors, for the acts errors and omissions of the shareholders, officers, directors, or other employees of the corporation arising out of the performance of professional services by the corporation while they are shareholders, officers or directors, is joint and several to the same extent as if the shareholders, officers or directors were general partners engaged in the practice of law."

[280] In Michigan, the state Ethics commission ruled that a PLLC did not have to disclose the limitations on the liability of its members unless asked by a client, as long as the corporation's name contained "PLLC" in it. Michigan Comm. on Ethics and Professional Responsibility, Op. 23 (1993). *See* Marcia M. McBrien, *Ethics Opinion OK's PLLCS for Lawyers*, MICHIGAN LAWYERS WEEKLY, Jan. 24, 1994, at 1. The Hawaii bill requires that a PLLC include the abbreviation "PLC", or some other specified indicator in its name. H.R. 1315 § 3.

lawyers to act as professional corporations.[281] A historical review of the ethical conduct of professionals in this state to determine if the concerns of the legislature and the supreme court indeed have foundation would be timely. But even without such an evaluation, it can be argued that vicarious liability is not predicated on the firm foundation that it may have been at one time.

When a client employing a solo practitioner is injured, that client must rely on malpractice insurance for recovery above and beyond the assets of the solo practitioner. Where professionals choose to make more efficient use of resources by forming a partnership, why should their potential liability increase? It appears that the co-practitioners vicarious liability for the conduct of their associates, although solo practitioners share liability with no one, is based on three assumptions.

The first assumption is that when one associates, one's assets decline, and thus the injured party is less able to recover. Second, the potential for and the scale of injury which associated practitioners can incur is larger than that of individuals, and therefore greater protection is needed. And third, individuals in a corporation are more likely to be negligent, or to otherwise act tortiously, due to increased loyalty to the corporation and decreased concern for the client. The argument is that in addition to allowing a recovery, the increased pressure on associates brought about by vicarious liability is necessary to maintain ethical and professional standards.

These presumptions warrant individual scrutiny. The first presumption is that an injured party will be less able to obtain a satisfactory recovery from an individual who is a member of a corporation because the individual's assets will be less. In fact, by joining together to form a corporation, duplicity of resources is avoided, resulting in a decrease in overhead. Consequentially, net income as well as corporate assets should increase. Moreover, even if the ability to recover from the individual professional had decreased, the potential recovery will actually increase even without vicarious member liability because the PLLC is jointly and severally liable for the members' tortious conduct.[282]

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[281] *In re Bar Ass'n.*, 55 Haw. 121, 516 P.2d 1267.

[282] The Hawaii Professional Corporation Act provides for joint and several liability of the corporation. HAW. REV. STAT. § 415A-11(b) (1993): "Every corporation whose employees perform professional services within the scope of their employment or of their apparent authority to act for the corporation shall be liable to the same extent as its employees."

Second is the presumption that the potential for injury is greater, and therefore the amount of protection needed is proportionately larger. While it may be true that larger corporations handle clients with higher stakes than solo practitioners, this does not necessarily mandate vicarious member liability. As stated *supra*, as PLLCs increase in size, the aggregate assets of the corporation will also increase. As long as the PLLC is jointly and severally liable, there will be a deeper pocket to satisfy claims out of. Also, as a PLLC's size and income increases, the amount of malpractice insurance coverage it can afford will also increase. Finally, it is likely that clients' business savvy is proportional to the value of their interaction with the corporation. For example, banks and insurance companies who do large transactions with the corporation should also have the knowledge and ability to pick a reliable company. In a free market economy it is axiomatic that companies with good reputations who are able to attract clients will survive, and those without will fail.

Third is the fear that ethical standards will decrease proportionately as the size of the corporation increases. This assumes that individual professionals have no interest in maintaining their own personal reputation, or that of the company they work for. Obviously, particularly in a small professional community such as that of Hawaii, they do. To the extent that damage awards will be paid out of assets of the PLLC, the members also have a pecuniary interest in acting ethically and in a non- negligent manner.

The fear that PLLC enactment will result in professionals running roughshod over clients is a stumbling block for enactment of an LLC act. But this fear is unfounded. Regardless of what the enactment statute says, it will not automatically result in the authorization of LLCs for all professions.[283] Professionals are always subject to their own licensing organizations.[284] Even if a PLLC statute were enacted, lawyers, for example, would still be subject to rule 24(5)(d) of the Supreme Court Rules, which provides for vicarious liability.

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[283] For example, HAW. REV. STAT. § 605-6 (1994) states: "The Supreme Court may prescribe qualifications for admission to practice and rules for the government of practitioners." And, HAW. REV. STAT. § 415A-2 defines "professional service" as "any service which lawfully may be rendered only by persons licensed under chapters 442, 448, 453, 455, 459, 460, 461, 465, 471, 554- 2, and 605 and may not lawfully be rendered by a corporation organized under the Hawaii Business Corporation Act, chapter 415.

[284] H.R. 1315 § 7.

C. Professionals' Incentives to Form PLLCs

There are legitimate and compelling business reasons why professionals will want to incorporate as PLLCs. The threat of huge malpractice awards is not their only attraction. For the state to disallow any PLLC formation due to fears of injured plaintiffs unable to recover is to throw the baby out with the bath water. How then can professionals take advantage of at least some of the benefits of the PLLC while allaying the fears of the legislature and the regulatory bodies?

As discussed in the previous section, even if PLLCs are authorized, it is unlikely that professionals will be able to take advantage of this corporate form without authorization of the licensing or regulatory agency governing that profession.[285]

The primary attraction of the PLLC is its flexibility. Unlike partnerships, PLLCs do not require that members have an equal say in the daily management of the corporation.[286] This freedom alone may be a relief to many non-managerial types.[287] Additionally, in a general partnership, contributions are usually equal.[288] Take for example a pension fund. A new partner may be required to contribute as much as a partner who has been working for many years. This may pose an inordinate burden on the new partner. Depending upon the articles of organization, this sort of per capita contribution is not mandated in the PLLC form.

Another significant benefit of the PLLC is in the area of taxation. As long as the organization meets the IRS criteria for a pass through entity, the PLLC will be taxed as a partnership. There was some concern among professionals about being able to continue accounting based on the cash method after converting to a PLLC because the Internal Revenue Code prohibits the cash method of accounting for corporations.[289] The IRS has ruled favorably for professionals under certain circumstances.[290]

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[285] *See also* Keatinge, *supra* note 8, at 458.

[286] Under the UPA § 18(e) all partners have equal rights to management of the business.

[287] Most states require that all members be licensed in the profession for which the PLLC is organized, but managers need not be.

[288] UPA § 40(d) gives the partners the right to compel contributions from the partnership.

[289] 26 U.S.C. § 448 (1994).

[290] IRS Private Letter Rulings 9321047 (Feb. 25, 1993) and 9328005 (Dec. 21, 1992).

From another angle, the PLLC is attractive for what it is not. As discussed above, it is not as demanding on the individual as a general partnership. Unlike a limited partnership, there need not be one or more general partners who absorb all of the liability, an unattractive prospect for many professionals. PLLCs do not have the plethora of limitations of the S corporation which make it a stifling alternative.

The hallmark of the LLC, its flexibility, in addition to the potential to limit the liability of members to their contributions and their own acts, in addition to the potential tax advantages also make the PLLC attractive to the professional. However, since the PLLC was probably the straw that was breaking the camel's back, it was probably wise to remove the PLLC enabling legislation, and introduce it seprately, in order to get the LLC itself off the ground in Hawai'i. The LLC enabling legislation is currently in its fourth manifestation. The PLLC act is in its first. It has taken time to become accustomed to the LLC form. As with the LLC, once the legislature and the community have time to become comfortable with this new entity, it is possible that they will see the PLLC in a new light.[291] It may be prudent, therefore, for professionals to be patient in the short run, and allow the LLC act to run its course before pushing for a PLLC enabling act.

VIII. Unresolved Issues

A. Whether Limited Liability Company Interests Will Be Treated As Securities Under the Federal and State Securities Laws[292]

Limited liability companies are not included in the laundry list of investment vehicles set forth in the securities acts.[293] To be considered

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[291] This appears to be what happened in Arizona and Virginia, which originally forbade PLLCs, but now specifically allow them. The Arizona code enabling PLLCs is Ariz. Rev. Stat. Ann. § 29-846 (Supp. 1993), Va. Stat. Ann. 13.1-1008 (1991) was superseded by Va. Code Ann. § 1.1-1011 (1994).

[292] For an in depth discussion of this discussion, *see* Mark A. Sargent, *Symposium Issue On Current Trends In Securities Regulation: Are Limited Liability Company Interests Securities?*, 19 Pepp. L. Rev. 1069 (1992). (concluding that under both the *Howey* Control and Common Trading Tests, and the Risk Capital Test that LLCs are not securities).

[293] *See, e.g.*, 15 U.S.C.S. § 77b (1994):

"(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-

a security, therefore, they will have to be found to be investment contracts. That determination is based on the test outlined by the Supreme Court in *SEC v. W.A. Howey Co.*[294] According to the *Howey* court, an investment contract "means a transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of a promoter or third party."[295] Under this test, the first three criteria are satisfied for the LLC. The crucial issue is whether the profits result solely from the efforts of a third party. Arguably, where a member has sold their interest, and the transferee receives the right to receive profits, but not the right to participate in the management of the business, all four of these criteria have been satisfied.

In Hawai'i, the Risk Captial test of *State v. Hawaii Market Center, Inc.*[296] is applied. This test provides that

> [A]n investment contract is created whenever: (1) [a]n offeree furnishes initial value to an offeror, and (2) a portion of this initial value is subjected to the risks of the enterprise, (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.[297]

The Hawaii Supreme Court formulated its own test because it found that "[t]he test embodied in the Howey Case is too mechanical to protect the investing public adequately."[298] In Hawai'i, therefore, both the *Howey* test and the *Hawaii Market Center* test can apply, depending upon whether an issue of federal or state law is raised.

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sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call straddle, option, ..., or in general any interest or instrument commonly known as a 'security[.]'"

[294] 328 U.S. 293 (1946).

[295] *Id.* at 298-99.

[296] 52 Haw. 642, 648-49, 485 P.2d 105, 108 (1971).

[297] *Id.* at 648-49, 485 P.2d at 109.

[298] *Id.* at 645, 485 P.2d at 107. "The Supreme Court in the Howey case was interpreting a federal statute. Although the language of that statute is similar to our own securities law, we are not, contrary to the assertions of the appellants, bound to follow blindly the federal interpretation." 52 Haw. at 647, 485 P.2d at 108, n.2.

The important issues which arise upon application of either of these tests to the circumstances of the LLC are whether the member-owner has a right or a potential right of participation in the management or control of the enterprise, whether there is horizontal commonality, and what degree of risk is incurred by the investor.

An important consideration for many corporate planners of close corporations is whether the owners' interest will be classified as a security. Based on the application of the standard federal and state tests, and with regard to the proposed bills, it seems unlikely that they will. Even though all members do not always execute control over the corporation, they have the latent authority to do so, and therefore the fourth criteria is not satisfied in the either test.

The first SEC case challenging the sales of interests in an LLC, *SEC v. Vision Communications, Inc.*[299] resulted in a holding favoring the SEC. The ruling concluded that the sales of securities in a cable television LLC did constitute sales of a security. The organizers there offered unregistered interests in the LLC which they called "membership units," using "high pressure and harassing telephone techniques[.]"[300] Additionally, the organizers made numerous false statements to potential investors.

The circumstances of that case do not require any stretch of the rules to find that a security transaction had occurred. The organizers were trying to sell interests in the corporation for which the investor could expect profits exclusively from the efforts of others. The use of the LLC form there was inappropriate, as what the organizers were trying to create resembled a publicly held corporation.

The egregious and extreme circumstances in *Vision Communications* are unlikely to arise in the standard LLC situation, but those who stretch the use of an LLC to a similar extent could find themselves across the table from the SEC. It is important to keep the *Howey* and *Hawaii Market Center* cases in mind when forming an LLC. As the SEC has not brought an action on a more "standard" LLC incarnation, the issue still remains unsettled. Generally, notwithstanding the scholarly opinions to the contrary,[301] it seems likely that the lower level of liability, and consequentially decreased incentive to get involved in the

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[299] D.C. Civil Action No. 94-0615, Litigation Release No. 14081 (May 11, 1994).

[300] Id.

[301] *See, e.g.*, Mark. A. Sargent, *Are Limited Liability Company Interests Securities?*, 19 PEPP. L. REV. 1069 (1992) (concluding that they are not).

management of the LLC will result in a higher likelihood that a membership in an LLC will be treated as a security interest, than for example a general partnership is.[302]

B. Treatment Under the Bankruptcy Code

The IRS has clarified its position with regard to LLCs. If they lack certain corporate characteristics, then they will not be treated as a corporation. However, whether an LLC is a corporation or a partnership under the Bankruptcy Code (Code) remains unsettled.[303] As partnerships and corporations receive different treatment under the Code, this is an important issue which remains to be resolved. Limited partnerships are not considered corporations under the code. Notwithstanding their strong resemblance to limited partnerships, LLCs fit the definition of corporation better than that of partnership in the Code. The LLC's limited liability is a "power or privilege" of a private corporation,[304] and the lack of any definition in the code means that the UPA's definition of a partnership which excludes firms "formed under any other statute"[305] should apply.

Regardless of the inconsistency that will arise between the IRS classification and bankruptcy treatment, commentators argue that an LLC should be treated as a corporation for policy reasons.[306]

An important issue which has yet to be addressed in this area, is how a bankruptcy proceeding will be initiated. Whether member approval to initiate a voluntary proceeding is required, and if it must be unanimous is unclear. Differences may arise between member-managed and manager-managed LLCs, the former being treated like a general partnership, in which a non-unanimous proceeding will be

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[302] Keatinge, *supra* note 8 at 404.

[303] To be a corporation under the Code, a business organization must have an: "(i) association having a power or privilege a private corporation, but not an individual or partnership, possesses; (ii) partnership association organized under a law that makes the capital subscribed responsible for the debts of such association; (iii) joint-stock company; (iv) unincorporated company or association; or (v) business trust." 11 U.S.C. § 101(9) (1988).

[304] *Id.*

[305] UPA § 6(1) (1914).

[306] "From a policy standpoint, LLCs should be considered corporations for bankruptcy purposes because the special bankruptcy provisions that apply to partnerships primarily relate to the general partners' duty to contribute to payment of the firm's debts." Keatinge, *supra* note 8 at 405.

treated as involuntary, or the latter, in which only general partner approval is required.[307]

LLCs are dissolved upon the bankruptcy of a member, unless there is an agreement or a provision otherwise. This automatic dissolution is necessary to maintain partnership status for Federal tax purposes,[308] but is problematic and impractical because the costs of dissolution may exceed the benefits of compelling such dissolution.[309]

C. Whether an LLC is an Entity

Absent a statutory definition,[310] the issue of whether an LLC is an entity remains unresolved. The implication of this is that there is some ambiguity in areas such as property ownership. Whether LLC property belongs to the association, or to the individual members may present a problem for courts, who will have to determine if, as in general partnerships, the property belongs to the individual members, or if ownership analogous to corporate ownership will exist.

IX. Common Law Doctrines in Hawai'i Which Affect LLCS: Piercing of the Corporate Veil[311]

Situations may arise where creditors, contractees, or tort victims of the LLC will want to find individual liability of a member to satisfy a claim arising from member malfeasance or misfeasance. The state legislature's reluctance to adopt LLC legislation stems at least partially from the fear of uncompensated tort victims or contractees. Determining how the courts will apply common law doctrines to claims by these injured parties is imperative to the peace of mind of both the legislature and the business community of the state.

Because there are no cases which deal with this issue, the manner in which courts will address such problems must be surmised from

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[307] *Id.* at 405.

[308] *See* tax discussion *supra* at § V.A.1.

[309] Keatinge, *supra* note 8 at 406.

[310] *E.g.*, Virginia, which defines an LLC as "an entity that is an unincorporated association," Va. Code Ann. § 13.1-1002 (1993), and Kansas, "[a] limited liability company formed under this act shall be a separate legal entity and shall not be construed as a corporation. Kan. Stat. Ann. 117-7603(b) (1994).

[311] For a complete discussion of common law doctrines as they apply to LLCs, see Steven C. Bahls, *Application of Corporate Common Law Doctrines to Limited Liability Companies*, 55 Mont. L. Rev. 43 (1994).

current corporate and partnership common law. LLCs borrow the essence of the corporate entity from corporate law, which provides for limited liability of the shareholder.[312] It is clear from all of the statutes that members are not liable for the obligations of the LLC.[313] Of course they are liable for their individual torts, as well as certain specific situations, such as when the LLC acts without authority and injures a third party.

Absent statutory provisions, the courts will have to disregard the limited liability entity to find individual liability of the members. The common law doctrine of piercing the corporate veil will be the tool that plaintiffs will employ.

The law of piercing the corporate veil can be broken down into three major subgroups. These are the "instrumentality" doctrine, the "alter ego" doctrine, and the "identity" doctrine.[314] The "instrumentality" doctrine requires proof of excessive control by a shareholder which leads to inequitable consequences for a third party. The "alter ego" doctrine is applicable when there is such unity of ownership and interest between the shareholder and the corporation that the corporation's separate existence has cease, and recognition of it would result in an inequity. The "identity" doctrine applies when there is such a unity of interest and ownership that the independence of the corporation has in effect ceased or has never begun, and adherence to the fiction of the separate entity would only serve to defeat justice by permitting the economic entity to escape liability arising from one corporation for the benefit of the whole enterprise.[315]

These tests overlap, and whether they are in fact different at all is questionable. They all require a showing of domination, misuse, or abuse of the corporate form, and an injustice or inequity resulting from recognition of the separate corporate entity. "In spite of different formulations, the doctrines are essentially the same, and most courts

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[312] Non-liability of shareholders for the acts of the corporation is established in the Hawaii Business Corporation Act. "A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to the shares other than the obligation to pay to the corporation the full consideration for which the shares were issued or are to be issued." HAW. REV. STAT. § 415-25 (1993).

[313] H.R. 2093 § 303. *See, e.g.*, COLO. REV. STAT. § 7-80-705 (1995); WYO. STAT. § 17-15-113 (1994).

[314] PHILIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS, 111 (1987).

[315] *Id.* at 122.

generally regard the doctrines as interchangeable."[316] These two overriding concepts are often articulated as a two-pronged test: "First, there must be 'such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.' Second, it must be true that, 'if the acts are treated as those of the corporation alone, an inequitable result will follow.'"[317]

Application of the classic tests for piercing of the corporate veil is problematic in the LLC context. First, the traditional tests assume that business organizations should have management that is separate from ownership.[318] In the traditional corporate form, the entity is governed by a board of directors.[319] The LLC form, by contrast, contemplates management by owners of the LLCs. In addition, the statutes specifically mandate that members exercise the same control over the corporation that principles have over agents.[320] Where the LLC is member-managed, the unity of interest prong of the traditional test is automatically satisfied. Another way of showing the unity of interest is to

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[316] *Id.* at 111.

[317] *Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854 (1982); *see also*, 1 FLETCHER CYCLOPEDIA OF CORPORATIONS § 41.30 at 662 (1984 Rev. Ed.).

The factors most cited by the court for determining unity of identity of subsidiary and parent corporations were first set forth in Frederick J. Powell, PARENT AND SUBSIDIARY CORPORATIONS §§ 5- 6, at 9 (1931):

(a) The parent corporation owns all or most of the capital stock of the subsidiary.

(b) The parent and subsidiary corporations have common directors or officers.

(c) The parent corporation finances the subsidiary.

(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

(e) The subsidiary has grossly inadequate capital.

(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.

(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

(h) In the papers of the parent corporation or the statements of its officers, the subsidiary is described as a department or division of the parent corporation.

(i) The parent corporation uses the property of the subsidiary as its own.

(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders form the parent corporation in the latter's interest.

(k) The formal legal requirements of the subsidiary are not observed.

[318] Bahls, *Supra* note 12, at 59.

[319] HAW. REV. STAT. § 415-35 (1993).

[320] Bahls, *supra*, note 12, at 117.

demonstrate that the corporate formalities were disregarded by the shareholders. Because there are much less corporate formalities contained in the LLC statutes than in those for corporations, courts seeking to apply that test should "not consider whether members disregard corporate formalities. Instead, courts should examine whether members disregard limited liability company formalities."[321] The Uniform Limited Liability Act, as it is being considered in Hawai'i, follows this school of thought providing specifically that

> The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or managment of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.[322]

The second prong of the test will pose no problems for courts, because on its face, it only requires a balancing of the equities. It is the first prong, determination of whether the LLC is an instrumentality or the alter ego of its members, that may be problematic. Toward this end, one commentator has proposed a list of circumstances which courts might apply.[323]

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[321] *Id.* at 59. Bahls cites the Comments of the Limited Liability Company Subcommittee of Montana:

> The failure of a limited liability company to observe the formalities customarily followed by business corporations or requirements relating to the exercise of its powers or management of its business and affairs is not a ground for courts disregarding the separate entity status of [a limited liability company] or for imposing personal liability on the members for liabilities of the limited liability company. Courts should not pierce the limited liability company "veil" merely as a result of failure to follow normal formalities required of a corporation. Limited Liability Company Subcommittee of the State Bar of Mont., *Comments to the Montana Limited Liability Company Act § 23*, at 1 (1993).

[322] H.R. 2093 § 302(b).

[323] These circumstances are elaborated in Bahls, *supra* note 12, at 62:

> (1) Whether the members fail to comply with the formalities required by the limited liability company statutes. These formalities typically include maintaining a registered agent, acting only within its business purpose, maintaining required books and records, making only those distributions statutorily permitted by statute, and filing required annual reports.
>
> (2) Whether one member manages the limited liability company without consultation with other members.
>
> (3) Whether the members and managers failed to keep business funds and accounts separate from the funds and accounts of members. Just as a corporation must keep accounts separate from its shareholders, a limited liability company is a separate legal entity and should do the same.

In Hawai'i, the courts have been reluctant to pierce the corporate veil, choosing instead to uphold the corporate entity except in the most extreme cases. There are only two appellate cases where the corporate veil has been pierced. One is *Ulrich v. Hite*,[324] where the court in essence pierced the corporate veil of the defendant's corporation, finding that the defendant had carried out an auction in bad faith by selling the plaintiff's assets to himself.[325] Notably, the cause of action there was one in tort, whereas in all subsequent cases it has been in contract. Both the unity of interest test and perpetration of a wrong not redress-

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(4) Whether the members fail to keep their personal books and financial accounts and records separate from the books and financial accounts and records of limited liability companies, as required by state statute.
(5) Whether the limited liability company was originally grossly undercapitalized to meet the reasonably anticipated capital requirements, as determined at the date of organization of the business.
(6) Whether the members of the limited liability companies fail to hold the business out as a separate legal entity. Statutes governing limited liability company generally require that the members of limited liability companies hold their businesses out as limited liability companies by using the proper designation in the name of the businesses.
(7) If the articles of organization require management by managers, whether the members make corporate decisions, thereby usurping the power of the managers. If those organizing the limited liability company choose to separate management and ownership, limited liability company statutes require such separation to be respected.
(8) If the limited liability company is owned by another business entity, whether the managers of the limited liability company consist of directors, officers, or managers of the other entity.
(9) Whether the members of the limited liability company otherwise fail to respect the separate legal entity of the limited liability company. Evidence of failure to do so might include using the limited liability company's credit to secure loans to members, distributing earnings to members through means other than authorized distributions, or members using limited liability company property as if it were their own.

[324] 35 Haw. 158 (1939).

[325] The court stated:
Where, as here, the fairness and good faith of those conducting a foreclosure sale are subject to review, the cloak of corporate entity will not be permitted to obscure the facts. Ulrich's creditor was not the Security Investment Company, Limited, but his law partner Hite, and while the note and mortgage were nominally in the name of the Security Investment Company, Limited, as payee and mortgage, respectively, the real party in interest was Hite. . . . In the light of all of the facts, the acts performed in the name of the Security Investment Company, Limited, must be regarded as the acts of Mr. Hite. 35 Haw. at 181.

able by corporate remedy test were satisfied in the court's view. Subsequently, the Hawaii Supreme Court pierced the corporate veil in *Kahili v. Yamamoto*,[326] based on undercapitalization of the corporation. There, the court pierced the veil of a corporation which was to be the assignee of a sublease. The corporation was capitalized at only $2,000, while the promissory note on the sublease option was worth $25,000. The court found that refusal to assign the lease to this corporation was sound business policy, because the corporation was in fact the alter ego of the shareholders, and thus did not exist. So holding, the court denied a cause of action to the plaintiff, would-be transferee.

In all other cases, the Hawai'i courts have upheld the corporate entity. In a contract action,[327] the court held that since the parties entered with knowledge of the other parties' financial positions, there must be some injustice or extenuating circumstances other than undercapitalization to warrant piercing of the corporate veil. The plaintiffs in *Tropic Builders, Ltd. v. Naval Ammunition Depot Lualualei Quarters, Inc.* wanted the court to disregard the corporate entity, and thereby nullify a contract, allowing an action against the corporate shareholder. The court upheld the contract, stating that the veil will not be pierced where there is no injustice,[328] and all of the other available remedies have not been exhausted.[329]

The Hawai'i courts have supported the reliability of contracts, and have not pierced of the corporate veil except where it was clearly the equitable course of action. In *Ulrich*, the one tort case before the court, however, the Court did pierce the corporate veil, and although this case has not been cited to heavily by subsequent courts, no appellate case since has dealt with piercing in the tort context. As the court's goal in denying piercing in *Tropic Builders* seemed to be upholding the reliability of contracts, rather than just the sanctity of the corporate entity, it would be hasty and probably erroneous to conclude that the

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[326] 54 Haw. 267, 506 P.2d 9 (1973).

[327] *Tropic Builders, Ltd. v. Naval Ammunition Depot Lualualei Quarters, Inc.*, 48 Haw. 306, 402 P.2d 440 (1965).

[328] The court upheld the contract, stating that the
> [p]laintiff must abide by the bargain made and has no right to rely on the credit of one for whose liability plaintiff did not contract," and that "[d]isregard of the corporate entity is for the purpose of remedying injustice but here plaintiff sustained none. 48 Haw. at 326, 402 P.2d at 452.

[329] *Id.* at 324, 402 P.2d at 451.

courts would hesitate to pierce the veil where the equities of the situation so warranted. The Hawai'i appellate courts have made it clear in these cases that the corporate entity is not to be disregarded without valid equitable justification. On the other hand, it is clear that where a wrong has been perpetrated, and the proper tests have been satisfied, piercing of the corporate veil is available to the injured parties in Hawaii.

The 1992 and 1993 LLC proposals for the Hawaii LLC Act contained specific reference to the piercing of the corporate veil.[330] Other statutes, and the 1995 proposal, however, while specifying that common law doctrines should be applied in appropriate circumstances to find member liability,[331] do not specifically mention piercing of the corporate veil. Because the doctrine of piercing the corporate veil is a common law judicial remedy, it is available to the injured parties regardless of its inclusion in the statutes. To the extent that inclusion may provide reassurance to skeptics of the LLC form that injured parties will achieve justice, their inclusion is recommended.

X. Conclusion

Even after jumping through all of the hoops presented in the Service's regulations to insure that all LLCs formed under Hawai'i statutes, or that individual LLCs structured within the limits of the statutes will be treated as a partnership, there is no guarantee that Congress will not enact legislation declaring LLCs to be corporations for tax purposes. If the migration to LLCs results in a substantial loss of tax revenue, this exact scenario could result. It is important, therefore, for individuals and entities considering LLCs to carefully weigh their advantages and disadvantages.

The proposed LLC act provides an opportunity for Hawai'i's businesses and professionals to get a tax break while organizing in a format conducive to enterprise. To allay the concerns of the legislature and other parties, it is probably best that the LLC act does not contain a PLLC provision. Even without PLLCs in the short run, the LLC will

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[330] "In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Hawaii Law." S.R. 3368 § 7; *accord* H.R. 777 § 143.

[331] H.R. 2093 § 104 provides: "Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter."

be a viable and healthy enterprise, and will add a boost to Hawai'i's economy, simultaneously relieving the federal tax burden and allowing enterprise capital some breathing room.

The increasing widespread enactment of LLC statutes, even in states which were staunchly anti-LLC is encouraging, and should provide some coal for the LLC fire. As of this writing, only Hawai'i, Vermont, and Massachussets are without LLC legislation. With the forthcoming publication of the Uniform Limited Liability Company Act, and the IRS guidelines contained in Revenue Procedure 95-10, LLCs have entered the mainstream.

As a fourth-quarter player, Hawai'i has had the luxury of observing the interplay between the various states' LLC statutes and their treatment by the IRS. The time has come to venture out of the sidelines and onto the playing field. An increasing number of companies are utilizing the LLC form and Hawai'i's companies as well are no doubt eager to enter the fray.

The current proposed act allows flexibility, but may create some administrative headaches for the organizer who is not tax saavy. Because of this flexibility, each LLC will require a ruling by the IRS that it is a partnership for tax purposes. This administrative cost, however, is well worth the range of options and freedom which the organizers have under this act.

Since its adoption by Wyoming over fifteen years ago, many rough edges of the LLC have been polished away. The Uniform Act being considered by the Hawaii Legislature incorporates those improvements, but is not by any means a foolproof plan. Nonetheless, it is time for Hawai'i to keep up with the ever- changing world of business by embracing and welcoming this new entity and making it Hawai'i's own.

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Deregulation and Liberalization of Air Transport in the Pacific Rim: Are They Ready for America's "Open Skies"?

I. Introduction

On Friday, November 22, 1935, at 3:46 PM, a Martin M-130 seaplane of Pan American World Airways, christened the *China Clipper*, floated into the open waters of San Francisco Bay. With a prevailing wind coming from the direction of the Golden Gate Bridge, it accelerated over the whitecapped waters until it rose, climbing to the west over the yet-to-be-finished Oakland-San Francisco Bay Bridge and toward the Pacific Ocean. The *China Clipper* arrived in Honolulu late the next morning and would eventually reach Manila on November 29, 1935, the final destination of a historic inaugural flight in commercial aviation.[1]

Sixty years after this widely heralded first commercial trans-Pacific flight, air travel between the United States and the nations of the Pacific Rim and within the Pacific Rim itself has expanded immensely. With economic growth expected to rise seven to eight percent for the rest of the decade, airlines operating in Asia and the Pacific have enjoyed record growth and profits.[2] The Asia region alone accounts for seven of the world's ten most profitable air carriers, an envious statistic that seems well entrenched given that intra-Asian travel is expected to grow 9.1% annually through 1999.[3]

With such rosy forecasts, U.S. airlines are seeking ways to bolster their already significant presence in the region. Traditionally, U.S. air

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[1] *See generally* R.E.G. Davies, Pan Am: An Airline and Its Aircraft 38 (1987); Ronald W. Jackson, China Clipper 131-49 (1980).

[2] Michael Mecham, *Asian Boom Continues, But Profits Under Pressure*, Aviation Wk. & Space Technology, Nov. 22, 1993, at 77.

[3] *Id.*

carriers have enjoyed a healthy share of the Asian and Pacific markets due to favorable bilateral agreements often made decades ago between the United States and individual countries in the region.[4] According to the Orient Airline Association, an organization comprised of fifteen Asian air carriers, these "outdated and lopsided bilateral air traffic rights" have created a market overly advantageous to the United States—an assertion they support by the fact that U.S. carriers have rights to twenty-one gateway airports in Asia, while Asian carriers have access to the U.S. only through nine.[5]

With Asian and Pacific nations becoming increasingly concerned about the ability of their air carriers—often seen as national resources—to maintain their competitiveness in their region's growing and lucrative market, leaders of these nations and of their airlines have become increasingly vocal in their insistence that the United States renegotiate bilateral air carrier agreements to provide a more equitable distribution of air carrier rights between parties.[6] This dissatisfaction has resulted in a very public dispute between the U.S. and Japan over bilateral treaty rights[7] and even an outright abrogation by Thailand of its bilateral agreement with the United States.[8]

Ironically, it has been the United States that has openly promoted, at least with its European trading partners, a policy of "open skies," which seeks to replace bilateral air transport treaties with a true multilateral framework that would remove restrictions on air routes, frequency of flights, access to cities, and capacity.[9] The U.S. asserts that an "open skies" framework would allow free market forces and competition to determine the best mix of air services for participating nations.[10] Yet, Asian nations are hesitant to embrace this proposed

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[4] Barry Porter, *Orient Airline Group Prepares to Face the U.S. Bully-Boy Challenge*, S. CHINA MORNING POST, Sept. 22, 1993, at 6; *see also Economics Propels Liberalization, Bilaterals Key in Asia/Pacific*, ASIAN AVIATION NEWS, Aug. 11, 1995.

[5] Michael Mecham, *Asian Airlines Protest U.S. Bilateral Edge*, AVIATION WK. & SPACE TECHNOLOGY, June 28, 1993, at 31.

[6] *Id.*

[7] *Japan Won't Grant New Flights to U.S.*, ASIAN WALL ST. J., Jan. 16, 1995, at 3.

[8] *Air Wars: The President Flies Right*, BUS. WK., Mar. 29, 1993, at 106.

[9] James Ott, *Pena Vows Support For Liberalization*, AVIATION WK. & SPACE TECHNOLOGY, Nov. 8, 1993, at 31.

[10] U.S. Department of Transportation News Release, *Pena Sets Out New Aviation Policy; U.S. to Begin Free Trade Aviation Talks with Nine European Countries*, DOT 156-94, 1994 WL 593753 (Nov. 1, 1994).

framework because of fears that such an arrangement would allow large and aggressive U.S. and European carriers to control the lucrative Pacific Rim air transport market, placing into question the survival of smaller Asian carriers, especially those in developing nations.[11]

In this light, the United States' insistence that its outdated bilateral air transport agreements with its Pacific Rim trading partners be maintained despite its pronouncements elsewhere in the world extolling the virtues of a global multilateral "open skies" framework is untenable. With or without U.S. approval, Pacific Rim nations should begin exploring the arguably necessary steps toward the liberalization and deregulation of their air transport industries, including the implementation of regional multilateral arrangements. Such measures are necessary for these nations to realize the benefits of a rapidly growing Pacific Rim air transport market without the exploitative market advantages the United States currently enjoys through its long ago-crafted bilateral air transport structure. Undeniably, these developments will change significantly the core of the current international air transport agreement framework in the region, perhaps even in ways that the region's major trading partner, the United States, may disapprove.

Following this introduction, Part II provides a historical review of the establishment of international standards regulating air transport, the evolution of the bilateral air transport agreement as the standard for air carrier rights between two nations, and the emergence of the United States' "open skies" policy as a culmination of steps that nation has taken in deregulating and liberalizing its air transport industry. Part III addresses the dissatisfaction of many Asian nations with current U.S. bilateral agreements and the steps these nations have taken to persuade the U.S. to renegotiate the agreements. The development of various forms of multilateral agreements and arrangements in the international air transport market, including its implications on the United States' own multilateral "open skies" proposal, will be discussed in Part IV. Part V presents the possible difficulties that the provisions of the General Agreements on Trade in Services could impose on bilateral and multilateral air transport agreements alike should it be decided that these provisions encompass air transport services. Part VI concludes with thoughts as to how the Pacific Rim may choose to utilize the policies and purposes of "open skies" in a manner best suited to the unique air transport markets of the region.

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[11] *See Step Toward Multilateral Pacts Urged For Asia*, AVIATION WK. & SPACE TECHNOLOGY, Mar. 7, 1994, at 37 [hereinafter *Multilateral Pacts*].

II. The Development of Present International Air Transport Agreements

A. *The Chicago Convention of 1944*

The first attempt by world nations to agree on standards of international aircraft operations took place in Paris in 1910, where representatives of eighteen countries argued the principle of "freedom of the air" versus state sovereignty of airspace located above a state's territory.[12] This "Paris Conference" did not lead to a formal agreement because the participants were unable to resolve the debate over aircraft rights with respect to overflight of sovereign territory.[13]

Soon thereafter, however, the opening of scheduled air service between Paris and London and the concerns of peacetime international aviation regulation in a post-war Europe necessitated the creation of the first legal international agreement in air law, now referred to as the Paris Convention of 1919.[14] Signed by thirty-two nations, this agreement, limited in scope to definitions and standards of aircraft operations and dissemination of necessary aviation information, soon became obsolete.[15] Indeed, the requirement for a more comprehensive international aviation agreement became pressing as, at the end of a subsequent world war that saw the extensive use of aviation in virtually all facets of military operations, it quickly became evident that the commercial air transport industry was to greatly expand.[16]

In response to a British proposal to create an international body to coordinate and organize air transport and commercial air navigation, President Franklin D. Roosevelt invited fifty-five neutral and allied nations to meet in Chicago in late 1944 for what has now become

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[12] Christer Jönsson, International Aviation and the Politics of Regime Change 27 (1987).

[13] I.H.Ph. Diederiks-Verschoor, An Introduction to Air Law 2 (5th rev. ed. 1993) (noting that the only beneficial result was that "states had an opportunity [to exchange] views on this new area of law").

[14] Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173; Jönsson, *supra* note 12, at 28; Diederiks-Verschoor, *supra* note 13, at 4.

[15] Diederiks-Verschoor, *supra* note 13, at 5.

[16] *Global Pact Embraces the Future*, S. China Morning Post, Dec. 7, 1994, at 23 [hereinafter *Global Pact*].

known as the Conference on International Civil Aviation.[17] Again, the old debate of "freedom of the skies" versus state sovereignty of airspace dominated, with the United States promoting the adoption of a multilateral "open skies" agreement in which complete freedom of civil air transport competition would be the norm.[18]

With the exception of the Netherlands and other Scandinavian countries that supported the United States, most other nations followed the lead of Great Britain which feared the domination of the world's airline market by the powerful U.S. air carriers. Unlike the United States, whose air transport industry was robust and mature after four years of supporting the war effort, these European nations faced the prospect of the massive rebuilding of their air transport industries in the wake of their war-devastated economies.[19] Thus, they preferred instead the established standard of state sovereign air rights and regulations to protect and foster the development of their own fledgling airlines.[20] Consequently, the signing by the fifty-two nations of the Convention on International Air Services Transit Agreement (Chicago Convention) on December 7, 1944,[21] did not adopt what would have been a revolutionary multilateral agreement of "open skies" as was hoped by the host nation, the United States.

The Chicago Convention is considered very significant for, among other accomplishments such as establishing the International Civil Aviation Organization (ICAO) (now an agency of the United Nations), delineating the "five freedoms" of the sky. Two of these freedoms were described in a since widely adopted agreement annexed to the Chicago Convention called the International Air Services Transit Agreement (Transit Agreement).[22] As described in this document, the first freedom is the privilege of a state's airline to overfly another state in order to arrive at a third, and the second freedom is the privilege

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[17] James Ott, *Open Skies Haunts Chicago Convention*, AVIATION WK. & SPACE TECHNOLOGY, Oct. 31, 1994, at 46.

[18] *Global Pact*, *supra* note 16, at 23.

[19] *Id.*

[20] GEORGE WILLIAMS, THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION 70 (1993).

[21] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. Of the original fifty-five invitees, fifty signed the Chicago Convention. The present number of signatories to this Convention is presently 186. *See* DIEDERIKS-VERSCHOOR, *supra* note 13, at 10.

[22] International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, 84 U.N.T.S. 389 [hereinafter Transit Agreement].

of a state's airline whose destination is a third state to land in a second state for fuel and maintenance, but not to embark or disembark cargo or passengers.[23]

Another annex agreement, the International Air Transport Agreement,[24] added three additional "freedoms" to the two of the Transit Agreement: the privilege of an airline of any signatory state to deliver cargo and passengers from that state to any other signatory state, the privilege of a state's airline to fly into another state in order to pick up cargo and passengers to return to the first state, and the privilege of a state's airline to fly into another state for the purpose of taking on cargo and passengers to transport to a third state.[25] However, this latter U.S.-promoted five-"freedom" agreement, in contrast to the Transit Agreement, received little support in Chicago due to its unpopular multilateral arrangement.[26]

Consequently, the first two "freedoms" became established as fundamental privileges for a nation's air carriers with respect to the sovereign airspace rights of another, and the third, fourth, and fifth "freedoms" became terms to be negotiated between nations in the creation of bilateral air transport agreements.[27] Indeed, it is these last three of the five "freedoms" that encompasses the carriage of cargo and passengers, the revenue source of the air carrier industry.[28]

In addition to the recognition of the five freedoms, the articles of the Chicago Convention have come to represent the current understanding of fundamental rights of civil air transport between nations. Articles 1 and 2 reflect the prevailing principle of state sovereignty of airspace over the U.S. position of complete "freedom of the skies." They provide that every contracting state has "complete and exclusive sovereignty" over the airspace directly above all territorial land areas and waters.[29] Article 3 restricts the principles of the agreement to a

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[23] *Id.*; *see also* JÖNSSON, *supra* note 12, at 33 (fig. 2).

[24] International Air Transport Agreement, Dec. 7, 1944, 59 Stat. 1701.

[25] *Id.*; *see also* JÖNSSON, *supra* note 12, at 33 (fig. 2).

[26] JÖNSSON, *supra* note 12, at 32.

[27] ETHAN WEISMAN, TRADE IN SERVICES AND IMPERFECT COMPETITION: APPLICATION TO INTERNATIONAL AVIATION 14 (1990). In addition to these five "freedoms", there is an occasional reference to a sixth freedom. This is the freedom of a state's air carrier to pick up cargo and passengers in one state, transport them on a route through the air carrier's flag state, and eventually bring the cargo and passengers to a third state. JÖNSSON, *supra* note 12, at 32.

[28] JÖNSSON, *supra* note 12, at 32.

[29] Chicago Convention, *supra* note 21, art. 1 and 2.

state's civil aircraft only, excluding what it refers to as "state aircraft"—aircraft used by a state's military or police services.[30]

Articles 5 and 6 differentiate the degree of regulation to be applied to scheduled and non-scheduled aircraft. Article 6 requires that scheduled aircraft, which differ from non-scheduled aircraft by operating on a regular timetable and being subject to rates and tariffs imposed on regularly scheduled air traffic,[31] must first receive permission or authorization from a state before it may operate over or into the territory of that state.[32] The necessity for states to comply with Article 6 by negotiating reciprocal air traffic rights with regard to their respective territorial airspaces forms the underlying framework of the bilateral air transport agreement.[33]

In contrast, Article 5 gives non-scheduled aircraft overflight and landing rights in a contracting state without requiring prior permission or authorization from that state.[34] A proffered explanation for the differentiation between scheduled and non-scheduled aircraft was that there was a much increased demand for charter and other non-scheduled flights after the Second World War due to disrupted channels of communication, and thus preferable treatment for these aircraft was included to facilitate such movements.[35] Although the Chicago Convention drafted Article 5 for the purpose of giving non-scheduled civil aircraft greater flexibility and freedom of movement, in reality, states have been permitted "the possibility of subjecting this freedom to certain restrictions."[36]

Article 7 addresses the issue of cabotage. With origins in maritime law,[37] cabotage, as it is applied in Article 7, allows a contracting state to deny an air carrier of another state the right to carry passengers or cargo between two points in its own territory.[38]

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[30] *Id.*, art. 3.

[31] DIEDERIKS-VERSCHOOR, *supra* note 13, at 15 (citing the definition of scheduled and non-scheduled air traffic from DEFINITION OF A SCHEDULED INTERNATIONAL AIR SERVICE, ICAO Doc. 7278-C/841 (1952)).

[32] Chicago Convention, *supra* note 21, art. 6.

[33] DIEDERIKS-VERSCHOOR, *supra* note 13, at 49.

[34] Chicago Convention, *supra* note 21, art. 5.

[35] DIEDERIKS-VERSCHOOR, *supra* note 13, at 15. The author notes that the increasing market for charter flights for recreational and leisure travel have necessitated a stricter definition of the relationship between scheduled and non-scheduled air traffic. *Id.*

[36] *Id.*

[37] The term "cabotage" is traditionally defined as a state reserving for its citizens the exclusive right to coastal navigation between points within its territory. *Id.* at 18.

[38] Chicago Convention, *supra* note 21, art. 7.

Other articles of the Chicago Convention relate to the requirement that various aircraft operations comply with the regulations of the contracting state in which it happens to enter or traverse.[39] This adheres to the principle of state sovereignty and control which the majority of signatory nations favored in Chicago.[40]

B. Bermuda I

Two years after the Chicago Convention, the United States and the United Kingdom met in Bermuda to sign a bilateral air transport agreement that would come to serve as the world model for all bilateral air transport agreements through the mid-1970s.[41] This 1946 agreement, known as "Bermuda I,"[42] incorporated many of the articles contained in the Chicago Convention.[43]

The United States and the United Kingdom had long taken opposing sides on the argument for and against multilateral and open air transport rights. Both parties had compromised their positions to reach an agreement. As one commentator described the impact of this far-reaching document, "[t]he spectacular success of the . . . Bermuda Agreement is due to its conciliatory nature and somewhat vaguely worded rules."[44]

The agreement reflected the two nations' opposing views of bilateralism. Routes and cities to be used as gateways and destinations were specifically designated as such in the agreement, as would become typical with bilateral air transport negotiations.[45] In contrast, the two nations provided for more flexibility in other parts of the agreement, exemplified by provisions that allowed the International Air Transport Association (IATA) to determine fares and tariffs[46] and that allowed

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[39] *See id.*, art. 8 to 13.

[40] *See id.*

[41] DIEDERIKS-VERSCHOOR, *supra* note 13, at 49.

[42] Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, Feb. 11, 1946, U.S.-U.K., 60 Stat. 1499 [hereinafter Bermuda I].

[43] DIEDERIKS-VERSCHOOR, *supra* note 13, at 49.

[44] *Id.*

[45] JÖNSSON, *supra* note 12, at 34.

[46] The International Air Transport Association was formed on August 28, 1919 as the "International Air Traffic Association". DIEDERIKS-VERSCHOOR, *supra* note 13, at 41. Its goals were to promote air transport throughout the world, to facilitate cooperation among the various airlines and air transport enterprises servicing the international market, and to foster cooperation with international organizations set up to govern international aviation. *Id.*

air carriers themselves to pre-determine capacity and frequency levels of operation.[47] These concessions to multilateralism also included an agreement on fifth-freedom rights, which would have allowed an airline of either nation to enter the territory of the other to onload passengers and cargo and fly them to a third nation.[48] The United Kingdom would later raise the issue of fifth-freedom rights as a reason to denounce the Bermuda I agreement on June 22, 1976, claiming an inequity of these rights between the two nations.[49]

Nonetheless, Bermuda I is notable not only for its role as the model for the modern bilateral air transport agreement, but for its larger meaning as "a general philosophy on the way in which the economic regulation of the industry should be achieved."[50]

C. Liberalization and Deregulation Since the 1970s

The United Kingdom's denunciation of Bermuda I signaled the end of this form of bilateral air transport agreement, but not the essence of the bilateral agreement itself. After quickly negotiating and ratifying the "Bermuda II" bilateral agreement on July 23, 1977[51] which simply limited the fifth-freedom rights of U.S. air carriers and renegotiated new routes to the British carriers,[52] the United States took steps to again reassert its long held position that market forces and freedom of the skies should guide international air carrier agreements.[53] Having reassessed the air transport industry by taking into consideration the oil crises and economic recessions of the period, the United States

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[47] *Id.* at 50.

[48] Bermuda I, *supra* note 42, at annex III(b).

[49] JÖNSSON, *supra* note 12, at 36. The United Kingdom denounced Bermuda I, claiming that the United States benefited more in its fifth-freedom rights to "fly traffic beyond London to almost every city of importance." *Id. See also* Bermuda I, *supra* note 42, at annex IV(b) (detailing the course of action to be taken if a party finds that the interests of its air carriers are "prejudiced" by certain fifth-freedom rights held by the other).

[50] JÖNSSON, *supra* note 12, at 34 (quoting S. WHEATCROFT, AIR TRANSPORT POLICY (1964)).

[51] Agreement Between the Government of the United States of America and the Government of the United Kingdom and Northern Ireland Concerning Air Services, July 23, 1977, U.S.-U.K., 28 U.S.T. 5367 [hereinafter Bermuda II].

[52] JÖNSSON, *supra* note 12, at 36. The author notes that Bermuda II was considered in many ways more restrictive than Bermuda I.

[53] *Id.*

passed the Airline Deregulation Act of 1978 to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services."[54] To further its challenge against international air transport regulation, the U.S. Civil Aeronautics Board (CAB) issued a Show Cause Order on June 9, 1978 which directed the IATA to demonstrate why U.S. antitrust immunity should be continued with respect to IATA's fare-establishing process, a process that the U.S. had originally acceded to in Bermuda I.[55] Although strong opposition by IATA and U.S. air carriers forced the CAB to moderate its position to one of allowing antitrust immunity to IATA for all international routes outside the lucrative North Atlantic corridors,[56] the stage was nevertheless set for liberalization of air transport regulation.

The effects of liberalization and deregulation in the United States soon reached the bilateral air transport agreement itself. In 1978, the United States joined with the Netherlands in signing a bilateral agreement entitled Protocol Relating to the United States-Netherlands Air Transport Agreement of 1957 (Netherlands Protocol).[57] Reflecting the ideals of "open skies" as well as open market competition, this new agreement gave air carriers the flexibility to fix their fares and rates as they deemed competitive and allowed them greater flexibility in route choices.[58] An example of this modern flexibility was the Protocol's use of the term "designated airlines," which did not differentiate between scheduled and non-scheduled airlines as had the Chicago Convention in providing for separate treatment of the two.[59] Thus, each nation in this agreement could now designate both scheduled and non-scheduled airlines for access to cities of its choosing in the other.[60]

D. Open Skies

On March 31, 1992, President Bush's Secretary of Transportation, Andrew H. Card, Jr., announced his department's initiative to nego-

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[54] Pub. L. No. 95-504, 92 Stat. 1705 (1978).

[55] JÖNSSON, *supra* note 12, at 37.

[56] *Id.* at 37-38.

[57] Protocol Relating to United States-Netherlands Air Transport Agreement of 1957, Mar. 31, 1978, U.S.-Neth., 29 U.S.T. 3089 [hereinafter Netherlands Protocol].

[58] DIEDERIKS-VERSCHOOR, *supra* note 13, at 52.

[59] Netherlands Protocol, *supra* note 57, art. 2; DIEDERIKS-VERSCHOOR, *supra* note 13, at 52. *Contra* Chicago Convention, *supra* note 21, art. 5 & 6.

[60] Netherlands Protocol, *supra* note 57, art. 3.

tiate "open skies" agreements with all European countries "willing to permit U.S. carriers essentially free access to their markets."[61] In addition, Secretary Card stated that although talks were aimed at Europe due to its favorable policies toward free international flow of passengers and cargo, the United States hoped that "other regions of the world [would] soon be ready join us in similar talks" in order to establish a world regime of "open skies".[62] Specifically, "open skies" would permit:

1) open entry to all routes;

2) unrestricted capacity and frequency on all routes;

3) unrestricted route and traffic rights that would allow "the right to operate service between any point in the United States and any point in the European country, including no restrictions as to intermediate and beyond points, . . . or the right to carry fifth-freedom traffic[;]"

4) double-disapproval pricing in third and fourth-freedom markets (which would allow disapproval of tariffs originating out of one state only if the other state also assents to the disapproval as well);

5) liberal charter arrangements;

and a number of very liberal allowances in areas such as cargo rights, reservations and booking, self-maintenance rights in foreign countries, monetary conversion, and free rights to capitalize on commercial opportunities associated with an air transport service.[63] As to unrestricted route/traffic rights, an "open skies" agreement would allow an airline to carry traffic between any point in the country of origin and any point—intermediate, destination, or beyond—within the participating country. Such an arrangement would stand in direct contrast to the rigid pre-negotiated routings and carriage rights normally associated with bilateral agreements.[64]

The "open skies" air transport agreement would represent a broad step away from the bilateral standard. Central to "open skies" is the principle that free and competitive market forces should stand above

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[61] Department of Transportation Order Defining "Open Skies" and Requesting Comments, Order 92-4-53, 57 Fed.Reg. 19323-01 (May 5, 1992) (explaining in detail Secretary Card's announcement on March 31, 1992, regarding the implementation of the U.S. "open skies" policy). *See also* Department of Transportation Final Order Defining "Open Skies", Order 92-8-13, 1992 DOT Av. LEXIS 568 (Aug. 5, 1992).

[62] Department of Transportation Order 92-4-53, *supra* note 61.

[63] *Id.*

[64] *Id.*

sovereign state airspace rights, an idea which the United States has espoused for over sixty years. An "open skies" agreement would certainly be less painful to negotiate; no longer would specific route and landing points need to be specifically agreed upon, only to be renegotiated should market or national preferences change.

The first agreement under the new "open skies" bilateral format was one signed between the United States and the Netherlands on October 14, 1992.[65] This agreement, which amended the original Netherlands Protocol of 1957, allows unprecedented access by the Netherlands' national airline, KLM, to any city in the United States without restriction on capacity, fares, and frequency. Likewise, an American flag carrier would have access to any Dutch city free of government restriction.[66]

III. Bilateral Air Transport Agreements in Asia

As with much of the world, international relationships between the air carriers of Asia and the United States has been governed by bilateral air transport agreements.[67] However, despite the recent pronouncements by the United States for an "open skies" policy that would allow free market forces and competition to dictate the makeup of international air transport agreements,[68] many Asian nations believe that the U.S. has maintained its old restrictive bilateral air transport agreements with them in order to reap the rewards of the agreements' disproportionate terms. Noting that the majority of U.S. - Asian bilateral agreements were agreed upon in the 1950s and 1960s, the Orient Airlines Association believes that the present imbalance of frequency allocation and gateway airport accessibility has created a "distorting effect" that "ensures that U.S. carriers enjoy a substantial market share advantage on transpacific services."[69] As previously noted, the most public debate over U.S. policy concerning its Asian bilateral

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[65] Agreement Between the United States of America and the Netherlands Amending the Agreement of April 3, 1957, as Amended and the Protocol of March 31, 1978, as Amended, Oct. 14, 1992, U.S.-Neth., T.I.A.S. 11976 [hereinafter U.S.-Netherlands Agreement].

[66] *See* Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 Emory Int'l L. Rev. 435, 450 (1994).

[67] Porter, *supra* note 4, at 6.

[68] *See* Ott, *supra* note 9, at 31.

[69] Chris Chapel, *Asian Airlines Cry Foul Over Curbs on Access to Gateways*, S. China Morning Post, June 24, 1993, at 1.

air transport agreements has taken place between Japan and the United States.

A. *Japan's Dissatisfaction*

Japan has argued since the 1950s that its bilateral agreement with the United States has favored U.S. air carriers.[70] Indeed, the 1952 Air Transport Agreement between the United States and Japan (1952 Agreement)[71] permits a larger number of airlines, greater capacity, and more expansive fifth-freedom rights to the U.S.[72]

With Japan's two major airlines, Japan Airlines and All Nippon Airlines, currently competing against the lower-fare U.S. carriers made comparatively more efficient by two decades of deregulation,[73] the Japanese government has sought a renegotiation of their bilateral agreement with the United States. Concerned that U.S. carriers presently carry sixty to seventy percent of flight capacity into and out of Japan and that Japanese passengers outnumber Americans by seven to one in the U.S.-Japan market,[74] the Japanese government has made negotiation of bilateral rights a priority before it grants additional air routes to U.S. airlines.[75]

In what has become a major point of contention, Japan claims that the present agreement heavily favors U.S. carriers in "fifth-freedom" rights, allowing the U.S. carriers to fill eighty to ninety percent of their capacity with passengers originating from Japan and destined for a third country after initially disembarking their original passengers in Japan.[76] It has even been asserted that U.S. carriers take full advantage of their favorable fifth-freedom rights by ensuring that flights to Asia make an intermediate stop in Japan to carry Japan-originating passen-

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[70] DANIEL M. KASPER, DEREGULATION AND GLOBALIZATION: LIBERALIZING INTERNATIONAL TRADE IN AIR SERVICES 82 (1988).

[71] Civil Air Transport Agreement Between the United States of America and Japan, Aug. 11, 1952, U.S.-Japan, 4 U.S.T. 1949 [hereinafter 1952 Agreement].

[72] KASPER, *supra* note 70, at 83.

[73] Jennifer Cody, *U.S., Tokyo Hit Turbulence Over Japan's Ailing Airlines*, ASIAN WALL ST. J., June 1, 1994, at 4 (commenting that more efficient U.S. carriers generally offer fares twenty percent lower than their Japanese rivals).

[74] Richard G. O'Lone, *Open Skies Holds Promise for Pacific*, AVIATION WK. & SPACE TECHNOLOGY, Oct. 5, 1992, at 34.

[75] *Japan Won't Grant New Flights to U.S.*, ASIAN WALL ST. J., Jan. 16, 1995, at 3.

[76] Michael Mecham, *Japan, U.S. View Bilateral Through Different Prisms*, AVIATION WK. & SPACE TECHNOLOGY, Jan. 23, 1995, at 42.

gers into other points in Asia.[77] Japan claims that this imbalance violates Article 12 of the 1952 agreement[78] and that the imposition of a fifty percent limit on the number of "fifth-freedom" passengers that either country could carry from the other to a third nation would help alleviate the disparity.[79] This claimed violation is most likely based on Japan's interpretation of subdivisions (a) and (c) of Article 12, which dictate that the capacity of an air carrier should be based on the traffic requirements between the carrier's flag nation and the country of ultimate destination, and on the traffic requirement of the area of the country that the air carrier passes through after taking into account the available local and regional services.[80] Indeed, Japan has stated that it will no longer grant routes to U.S. air carriers unless the 1952 Agreement is renegotiated.[81]

In response, the U.S. argues that Article 12 does not require that a percentage cap be agreed upon for the purposes of determining capacity for fifth-freedom passengers.[82] Rather, the U.S. asserts that Japan seeks to change the terms of the 1952 Agreement because of the increasing inability of its airlines to compete in a growing and competitive market.[83] To counter the fact that U.S. carriers transport 1.5 million

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[77] *JAL Wants Overhaul of U.S.-Japan Bilateral*, AVIATION DAILY, May 25, 1993, at 305 [hereinafter *JAL Wants Overhaul*].

[78] Article 12 of the 1952 Agreement provides that:

> The agreed services available hereunder to the public shall bear a close relationship to their requirements of the public for such services and shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which the airline providing such services is a national and the countries of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the specified routes shall be applied in accordance with the general principles of orderly development to which both Contracting Parties subscribe and shall be subject to the general principle that capacity should be related:
>
> (a) To traffic requirements between the country of which the airline is a national and the countries of ultimate destination of the traffic;
>
> (b) To the requirements of through airline operation; and
>
> (c) To the traffic requirements of the area through which the airline passes after taking account of local and regional services.

1952 Agreement, *supra* note 71.

[79] Mecham, *supra* note 76, at 42.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

fifth-freedom passengers a year from two Japanese airports to cities throughout Asia, compared to a restriction of three thousand fifth-freedom passengers that Japan's carriers are allowed to transport (all from Los Angeles to Sao Paolo, Brazil),[84] it has been suggested that Japan would realistically have no other fifth-freedom market in which it could be competitive.[85]

Japan's simmering distaste for the 1952 Agreement reached full boil during negotiations over U.S. air cargo rights during the late spring and summer of 1995. When Japan refused to approve a request from Federal Express, a U.S. air cargo carrier, for seven new air cargo routes into Japan from the Philippines, the U.S. threatened to impose trade and other sanctions.[86] The U.S. claimed that the proposed new air cargo routes were authorized under the 1952 Agreement.[87] In response, Japan threatened counter-sanctions, resulting in a "full-scale bilateral dispute" between the two nations over the 1952 Agreement.[88]

After high-level negotiations between headed by the two nations' top transportation officials, U.S. Transportation Secretary Federico F. Pena and Japan's Transport Minister Shizuka Kamei, agreement was eventually reached, with Japan allowing the seven proposed air cargo routes and the U.S. approving new cargo routes into the United States along with a promise for future negotiations on passenger air services, the heart of the two nations' dispute.[89]

For the United States to argue that Japan's concerns stem not from a bilateral agreement which unfairly restricts Japanese carriers from a fair share of the market, but simply from Japan's inability to compete seems contrary to the much promoted U.S. policy of "open skies." Indeed, this argument belies the fact that the 1952 agreement between the two nations represents the rigid bilateralism that "open skies" was intended to displace in favor of free market forces. In this regard, the United States' position appears protectionist and adverse to the principles of "open skies."

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[84] *Id.*

[85] *Id.* (stating that Brazilians of Japanese descent make up the bulk of Japanese fifth-freedom passengers in the United States).

[86] Michiyo Nakamoto, *Asia's Air Cargo Market Starting to Take Off*, FIN. POST, Aug. 8, 1995, at 14.

[87] *Id.*

[88] James Ott & Michael Mecham, *FedEx Dispute Raises U.S.-Japan Tensions*, AVIATION WK. & SPACE TECHNOLOGY, June 26, 1995, at 27.

[89] *U.S., Japan Avert Air War Over FedEx Subic Rights*, AVIATION WK. & SPACE TECHNOLOGY, July 31, 1995, at 32.

For Japan and its airlines, however, the United States' "open skies" policy is as undesirable as the current bilateral agreement.[90] They assert that "open skies" would simply allow U.S. carriers to oversaturate the market with excess flights and capacity, driving fares lower.[91] Japan's preferred solution is a renegotiated bilateral treaty that would more accurately reflect the present state of the their air transport market, thereby allowing Japanese airlines to gain a larger share of both the U.S.-Japan and beyond Japan markets.[92]

Under an "open skies" agreement, U.S. carriers would no longer have rights to reserved routes, capacity, and airline access to Japanese cities.[93] With such an agreement, Japanese carriers would theoretically be able to compete on an equal level with the U.S. carriers. However, the reason behind Japan's dissatisfaction over "open skies" may be that Japanese airlines are not profitable in their international operations.[94] This is despite the fact that the Japanese government mandates very high fares for domestic market travel to allow its airlines to alleviate inefficiencies abroad.[95] Thus, protectionist interests on both sides of the argument may explain the reluctance of either side to implement an "open skies" agreement.

B. Asia's Response

In recent times, Asian nations, acting either individually or through such organizations as the Orient Airlines Association, have called upon the United States to renegotiate present bilateral air transport agreements.[96] Like Japan, Asian nations perceive their bilateral agreements with the United States to be obsolete and one-sided.[97] Indeed, for this reason, Thailand canceled its bilateral agreement with the United States in November of 1990.[98]

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[90] *JAL Wants Overhaul*, *supra* note 77, at 305.

[91] *Id.*

[92] *Id.*

[93] *See* Department of Transportation Order 92-4-53, *supra* note 61.

[94] *Foreign Airlines in Japan*, ECONOMIST, Nov. 28, 1992, at 79.

[95] *Id.*

[96] Porter, *supra* note 4, at 6.

[97] *Id.*

[98] Air Transport Agreement Between the Government of the United States of America and the Government of the Kingdom of Thailand, Dec. 7, 1979, U.S.-Thail., 32 U.S.T. 335. Notification of termination given by Thailand, effective Nov. 2, 1990.

Finding it difficult to persuade the United States to renegotiate, many Asian nations have begun to look to new ways of overcoming what is perceived to be unfair advantages to U.S. carriers inherent within these agreements.[99] In recent years, Asian nations and their air carriers have discussed the possibility of forming regional multilateral treaties and international alliances in an effort to capture a larger share of the booming Asian air carrier market.[100] The ideas behind multilateralism and alliances are not new—indeed, the United States has successfully promoted "open skies" multilateralism in Europe with the very recent signings of preliminary "open skies" treaties with Switzerland, Austria, Belgium, Iceland, and Luxembourg.[101] However, the United States' seeming reluctance to similarly endorse "open skies" in Asia,[102] coupled with traditional Asian attitudes against multilateralism and alliances, creates unique circumstances that must be overcome before this new framework can succeed.[103]

IV. "OPEN SKIES" AND MULTILATERALISM

The Chicago Convention and annexes were arguably the last multilateral air transport agreements made on a world-wide scale. But even with the recent "open skies" initiative by the United States in 1992 and a subsequent similar pronouncement by President Clinton's Transportation Secretary, Federico F. Pena, in 1993,[104] it is doubtful that a fully international multilateral agreement will be realized soon. At a December 1994 ICAO meeting in Montreal which served in part to commemorate the Fiftieth anniversary of the Chicago Convention and the forming of ICAO, the United States once again promoted its initiative for world liberalization and deregulation of commercial air transport.[105] Like the Chicago Convention of fifty years ago, however, the United States received little support, with opposition coming from nations and regional blocs in Africa, Latin America, the Caribbean, and Pacific powers Japan, Australia, and China.[106]

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[99] Porter, *supra* note 4, at 6.

[100] David Knibb, *Reluctant Allies*, AIRLINE BUS., Mar. 1994, at 40.

[101] Stewart Toy et al., *'Psst, Little Airline-Have I Got a Deal for You: Washington's New Gambit for Opening Europe's Skies*, BUS. WK., Apr. 17, 1995, at 92E6.

[102] Mecham, *supra* note 76, at 42.

[103] Knibb, *supra* note 100, at 40.

[104] D.O.T. News Release, *supra* note 10.

[105] David Hughes, *ICAO Delegates Shun U.S. Free-Market Stance*, AVIATION WK. & SPACE TECHNOLOGY, Jan. 2, 1995, at 37.

[106] *Id.*

The concept of regional multilateralism has generally had more success. Currently, there are regional multilateral arrangements in South America and Europe, with several African states considering them.[107] A highly developed example of these developments is the multilateral agreement among the coalition of European states known as the European Community, or EC.

A. The EC

The development of multilateralism was a very gradual one, starting with the creation of a European Civil Aviation Conference in 1955.[108] Over the years since then, the European Community has agreed multilaterally to remove restrictions on tariffs and fares, capacity, and scheduled traffic.[109] With European Court of Justice rulings finding that the Treaty of Rome, which established the European Community and which prohibited agreements within the Community that enforced price fixing and controls on markets, applied to aviation and that bilateral agreements that attempted to limit the "freedom to provide services" were in violation of the Treaty,[110] the EC has been able to fashion a strong regional multilateral agreement that includes full fifth-freedom rights for EC members and full cabotage for members by April 1, 1997.[111] Indeed, the EC has gone to some lengths to distance its multilateral framework from "U.S.-style deregulation," favoring instead what it terms an "evolutionary change in the bilateral regulatory system."[112] This attitude is reflected in the EC's preference in renegotiating bilateral agreements before considering sweeping regulatory changes.[113]

The attractiveness of regional multilateral arrangements over global ones is primarily protectionist.[114] Small, developing nations prefer to develop their air carrier industry with their neighbors, giving them an opportunity to experience multilateralism on a small scale without what

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[107] *Id.*

[108] DIEDERIKS-VERSCHOOR, *supra* note 13, at 43.

[109] WILLIAMS, *supra* note 20, at 76-77.

[110] WEISMAN, *supra* note 27, at 30.

[111] Seth M. Warner, Comment, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 298 (1993).

[112] WEISMAN, *supra* note 27, at 30.

[113] *Id.*

[114] Hughes, *supra* note 105, at 37.

could become a viciously competitive market should large U.S. "megacarriers" be permitted entry.[115] A completely open regulatory framework would disrupt these nations' economies. The ideal arrangement for these nations would be a regional multilateral agreement with continued reliance on bilateral treaties with other world nations or regional blocs.[116]

However, even this established multilateral framework has not been without its problems. Planned goals for full air transport multilateralism in the EC is slow, and the original 1992 target for "complete EC competition in air transport services . . . remains a distant goal."[117] The reasons behind the difficulty in achieving full multilateralism in the EC are the familiar concerns of an unpredictable commercial air market and protection of smaller carriers which have struggled in recent years to stay profitable.[118] Soon after the Gulf War, the EC formed a 12-member *Comite des Sages*, or Wise Men Committee, to study the financial difficulties of European airlines and to facilitate the implementation of full multilateralism in the Community.[119] Although the Wise Men Committee hearings brought out the fact that many EC members were still reluctant about air transport deregulation, the Committee's final report presented on February 1, 1994 and entitled "Expanding Horizons" has helped to re-focus the EC towards timely implementation of its planned multilateral policies.[120]

B. Multilateralism in the Pacific Rim

The negotiation of regional multilateral arrangements in the Pacific Rim could be a solution for the current impasse with the United States over its bilateral treaties with the region. The remedy would not be a complete one as the inequities of existing bilateral agreements would still exist. Nevertheless, advantages would spring from the flexibility and efficiency of a open regional market and the improved bargaining position that such an arrangement would offer.

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[115] *Id.*

[116] *See id.*

[117] WEISMAN, *supra* note 27, at 30.

[118] Pierre Sparaco, *E.C. "Wise Men" Debate Airline Crisis Remedies*, AVIATION WK. & SPACE TECHNOLOGY, Oct. 4, 1993, at 28.

[119] *'94 Aerospace Laureates*, AVIATION WK. & SPACE TECHNOLOGY, Jan. 23, 1995, at 13.

[120] *Id.*

Asian nations have traditionally been reluctant to form even regional groups to promote a freer air carrier market, their reasons being the disparity of economic development among the Asian nations, widespread government ownership of airlines, protectionist concerns of domestic markets, and nationalism.[121] However, the realization of fierce international competition has left many Asian nations with the conflicting policies of the need to consider liberalized multilateral arrangements and the comfort of the stability of the bilateral agreement.[122]

In fact, Asian nations have used some of their bilateral agreements with nations other than the United States to their benefit and would be reluctant to abandon these for the sake of multilateralism.[123] Indeed, disagreements driven by protectionist interests over fifth-freedom rights have created significant problems for Pacific Rim neighbors Hong Kong and Australia, with the former restricting the latter's access to its territory and passengers after unproductive (and often un-diplomatic) negotiations over these rights and other aspects of their bilateral agreement failed.[124]

One solution to the region's conservatism towards the concept of multilateralism could be the so-called "plurilateral" agreement.[125] Offered by the president of the Orient Airlines Association in a speech given in a commercial aviation conference in Singapore in February of 1994, such an agreement would create a regional "open skies" arrangement in which member nations would allow free access to other member nations while still maintaining existing air transport agreements with nations outside of the region.[126] Thus, a plurilateral relationship would allow participating Asian and Pacific nations to develop their airline industries to the extent necessary to fairly compete with the large U.S. and European carriers looking to capitalize on the booming Pacific Rim air transport market.[127] The end result would be much like a multilateral agreement, although a longer period of time

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[121] Knibb, *supra* note 100, at 40.

[122] *Asia-Pacific Airlines Must Face Challenge of Foreign Megacarriers*, AVIATION WK. & SPACE TECHNOLOGY, Mar. 2, 1992, at 22 [hereinafter *Asia-Pacific Airlines*].

[123] *Australian Government Warns Against Aggressive Deregulation*, AVIATION DAILY, June 1, 1994, at 348.

[124] Nicholas Ionides, *Airlines in Row on Rights*, S. CHINA MORNING POST, April 7, 1995, at 2; Miriam Jordan, *Hong Kong Will Restrict Qantas's Pick-Up Rights*, ASIAN WALL ST. J., Apr. 21, 1995, at 3.

[125] *Multilateral Pacts*, *supra* note 11, at 37.

[126] *Id.*

[127] *Id.*

would be needed to await the outcome since signatories to a "plurilateral" agreement would have the privilege of choosing the time when it would be in their best interests to join.[128]

A 1992 memorandum of understanding between Australia and New Zealand is yet another twist in the search for a suitable multilateral framework. This agreement allows the national airlines of Australia and New Zealand to have free access to the other's country in flights to and from the U.S. and Canada, as well as the rest of Asia.[129] Such an agreement could also serve as a vehicle to establish a negotiating bloc for the two nations in making bilateral air transport treaties with other nations.[130]

With much discontent in Asia over present bilateral agreements which the United States is reluctant to address, many industry observers and leaders feel that Asian nations have no choice but to consider multilateralism in order to assure their air carriers of survival in their own markets.[131]

But is this fair? Should small, fledgling airlines of developing Asian nations be subjected to the same market forces that arduously drive the larger, ultracompetitive airlines of the U.S., and to a lesser degree, the airlines of more prosperous Asian neighbors? Should Pacific Rim nations adopt multilateralism, a concept the United States champions elsewhere as "open skies," despite the unwillingness of the U.S. to liberalize its own decades-old bilateral agreements with nations of the Pacific Rim?

"Plurilateralism," or regional multilateralism, is a promising solution. As a compromise to a complete "open skies" philosophy, it provides neighboring nations with the means to avail themselves of those market forces produced on a much smaller level, and in a much more familiar environment. "Plurilateralism" also allows government controls, negotiated in the interest of both competition and industry development, on outside competitors that threaten to dominate a market with sheer size and efficiency developed from competition of a much larger scale.

Given the stubborn reluctance of the United States to alter its long established framework of bilateral agreements in the Pacific Rim, the

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[128] *See id.*

[129] *Australia, New Zealand Reach Accord on Common Aviation Market*, AVIATION DAILY, Aug. 7, 1992, at 234.

[130] *Id.*

[131] *Asia-Pacific Airlines*, *supra* note 122, at 22.

"plurilateral" solution would entitle Pacific Rim nations to both reap the benefits of market competition and to much more fairly compete with dominant nations in the air carrier market like the United States. Optimistically, the long-term results of a "plurilateral" relationship could place these Pacific Rim nations in a more favorable negotiating position with the United States to finally discard the old bilateral agreements.

C. Alliances, Foreign Ownership, and Pooling Arrangements

As vehicles to circumvent bilateral agreements, many nations have resorted to alliances and the "pooling" of commercial resources. In Asia, marketing alliances and joint service have become very popular, allowing airlines to adapt to and enter new and changing markets rapidly without the investment that would be traditionally required to expand airline operations.[132] Alliances based on so-called "non-equity" exchanges, involving the sharing of computerized reservations systems, maintenance operations, cargo, and other non-core activities, have made up the bulk of Asian air alliances.[133]

However, the competitiveness of the market has forced conservative Asian carriers to enter alliances based on core activities as well. Joint flights and route sharing have become necessary to offer increased services while keeping costs low.[134] And these alliances are now often made with airlines from the U.S. and Europe, which as of late were the focal points of the argument behind Asian deregulation and multilateralism.[135]

Indeed, at the February 1995 American Bar Association forum on air and space law, the Department of Transportation (D.O.T.) Acting Assistant Secretary for International Aviation Affairs, Patrick Murphy, highlighted the new U.S. policy supporting "open skies" in conjunction with the concept of "code sharing."[136] Code sharing is an alliance in which air carriers of different nations agree to carry passengers for

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[132] Paul Proctor, *Marketing Alliances, Joint Services Help Asian Airlines Extend Reach*, AVIATION WK. & SPACE TECHNOLOGY, Nov. 26, 1990, at 74.

[133] Knibb, *supra* note 100, at 40.

[134] Michael Richardson, *Global Alliances Offer Air Travelers One-Stop Ease*, INT'L HERALD TRIB., Feb. 20, 1995.

[135] *Id.*

[136] *ABA International Issues Panel Weighs U.S. Policy*, AVIATION DAILY, Feb. 9, 1995, at 221.

other allied carriers on a shared route network—that is, an air carrier will operate on a route identified by another air carrier's code.[137] Although supported by air carriers like Northwest Airlines that currently engage in code-sharing alliances, the Orient Airline Association argues that such a policy would have little strength in the negotiation of new agreements with Asian nations unless the U.S. first comes to terms with the inequities of its current outdated bilateral agreements with these nations.[138]

The combination of alliances with "open skies" agreements could become very attractive for air carriers.[139] The recent alliance of Northwest Airlines and the Netherlands' KLM is an excellent example,[140] with both carriers able to fly without restriction into the other's markets, as provided in the 1992 U.S.-Netherlands "open skies" agreement,[141] and with both also sharing the benefits of the alliance in jointly setting prices and market strategy (with help from an exemption from U.S. antitrust laws).[142]

Alliances with major international air carriers often involve an investment in equity. Once "unthinkable" in Asia due to national pride or government ownership,[143] equity alliances are now seen as opportunities by Asian carriers to increase their share of passenger traffic in the region.[144] Asian carriers are willing to take the risks of joint marketing and route sharing, knowing that their American or European partners are anxious to claim a piece of the Asia-Pacific market—"the fastest growing aviation market in the world."[145] Indeed, Japan has recently switched its position on the debate to one favoring air carrier alliances, and has permitted an alliance agreement between American Airlines and Japan Airlines.[146]

With U.S. and European air carriers purchasing minority interests in Asian airlines, the Asian airlines, in turn, are eager to do the same in the interest of furthering their stakes in equity alliances. They have

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[137] *Id.*

[138] *Id.*

[139] Stewart Toy et al., *Why KLM's Global Strategy is Working*, BUS. WK., Feb. 27, 1995, at 90.

[140] *Id.*

[141] U.S.-Netherlands Agreement, *supra* note 65.

[142] Toy, *supra* note 139, at 90.

[143] Knibb, *supra* note 100, at 40.

[144] Richardson, *supra* note 134.

[145] *Id.*

[146] Tom Ballantyne, *Asia's Revival*, AIRLINE BUS., Feb. 1995, at 29.

been successful in purchasing stakes in European airlines, but only partially so with U.S. carriers.[147] Essentially, Asian carriers believe that they can shift the imbalance of profits U.S. carriers make in their domestic market in addition to that made in the penetration of the Asian market by purchasing interests in the U.S. carriers.[148]

However, U.S. law currently restricts foreign ownership of American air carriers. Under current law,[149] foreign ownership of equity voting rights constituting greater than twenty-five percent of an American airline is prohibited.[150] In addition, the air carrier must be under direct or indirect control of U.S. citizens.[151]

In 1991, the D.O.T. issued an order detailing its findings regarding the proposed major acquisition of Northwest Airlines by KLM. In this order, In re the Acquisition of Northwest Airlines by Wings Holdings, Inc.,[152] the D.O.T. decided that foreign equity ownership in a U.S. airline could be as much as forty-nine percent so long as the foreign voting shares did not exceed twenty-five percent.[153] On the issue of control, the D.O.T. set forth a case-by-case standard that considered several factors, including the relationship between the airline and the foreign purchaser.[154]

The latter consideration has implications in bilateral air transport agreements. In considering the degree of possible foreign control, the D.O.T. would necessarily look in part to the bilateral treaty to determine whether its terms would give a foreign owner control over the U.S. carrier.[155] In denying British Airways' proposed twenty-five percent purchase of USAir, the D.O.T. noted that had the United Kingdom acceded to an "open skies" air transport agreement, it would probably have found that British Airways would not have controlled

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[147] Mecham, *supra* note 5, at 31.

[148] *Id.*

[149] Pub. L. No. 103-272, 108 Stat. 745 (1994) (codified at 49 U.S.C. §§ 40101 to 49105 (1995)). This act revised and recodified without substantive change the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (originally codified at 49 U.S.C. app. §§ 1301 to 1542 (repealed 1994)).

[150] 49 U.S.C. § 40102(a)(15) (1995).

[151] 49 U.S.C. §§ 40102(a)(2), 40102(b) (1995).

[152] *In re* Acquisition of Northwest Airlines by Wings Holdings, Inc., D.O.T. Order No. 91-1-41, 1991 WL 247884 (Jan. 23, 1991).

[153] *Id.* at *5.

[154] *Id.*; *see also* Schless, *supra* note 66, at 455; Warner, *supra* note 111, at 307-10.

[155] James Ott, *U.S. Sets Litmus Test for Foreign Investments*, AVIATION WK. & SPACE TECHNOLOGY, Jan. 4, 1993, at 30.

USAir.[156] In fact, the U.S. has now made an "open skies" agreement a condition of any proposed foreign purchase of an airline in its determination of foreign control.[157]

Aside from the small holdings that Asian airlines have in U.S. carriers as part of their stakes in equity alliances, Asian air carriers appear to be limited in making major purchases of U.S. air carriers unless they also agree to "open skies" agreements that the U.S. has conditioned on any foreign purchase. Of course, the Asian position has been firmly against any such agreement with the U.S. Thus, for the time being, minority purchases of U.S. air carriers are not a realistic approach that Asian carriers or nations can use to compensate for inequitable bilateral agreements.

Generally speaking, alternatives to bilateral and multilateral agreements such as market alliances, pooling arrangements, and foreign ownership are tools to restore market imbalances, but perhaps these are helpful only to a point. Like multilateral arrangements, these alternatives are market-driven: they are initiated on hopes of profit and increased market share and on risk of failure and loss. For smaller, less developed nations of the Pacific Rim, a misstep in market strategy could be disastrous for their comparatively small air carriers. Therefore, the right proportion of government control and regulation is necessary for alliances to achieve balanced and equitable shares of their market.

V. The General Agreement on Tariffs and Trade and the General Agreement on Trade in Services

At the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), air transport agreements were largely excluded from the General Agreement on Trade in Services (GATS) directives (which fall under the auspices of GATT),[158] due to strong U.S. objection.[159] However, there are worries from ICAO and member nations that the GATS may eventually cover civil aviation, because GATS requires that a council for trade in services be called every five years to review

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[156] *Id.*

[157] Schless, *supra* note 66, at 460.

[158] General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 [hereinafter GATS].

[159] Daniel C. Hedlund, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 Minn. J. Global Trade 259, 294 (1994).

air transport agreements to determine whether GATS agreements should be extended to encompass air transport services.[160] Because existing bilateral agreements would probably not be in compliance with GATS provisions calling for removal of trade barriers (i.e., the U.S. would have to allow Asian carriers access to its domestic market equivalent to the access that American carriers have of the Asian regional market), GATS could raise some significant implications for both bilateral and multilateral agreements.[161]

A. Transparency

Because the discouragement and removal of trade barriers are a main focus of GATT and GATS, signatory states must make any trade barrier "transparent," or obvious, to the world.[162] Thus, any bilateral agreement that allows greater access for one nation's air carriers compared with that allowed for the other would have to be explained. The U.S. position on "open skies" would appear not to be affected by this provision, but its older bilateral treaties in regions such as Asia may not stand up to this scrutiny.

B. Most Favored Nation Status

GATS provides that signatories with unconditional "most favored nation" (MFN) status must treat all trading partners equally and without discrimination regarding their "imports", in this case, air carrier services.[163] If MFN were to apply to air transport agreements, then a nation would have to provide equivalent access to its market to all nations that it has agreements with, regardless of whether other nations provide the same degree of access.[164] The argument of concern is that with the application of MFN principles, a nation would not be able to effectively negotiate its bilateral air transport treaties or multilateral agreements with its neighbors in the interest of open markets because it would have no bargaining position.[165] An opposing nation

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[160] Hughes, *supra* note 105, at 37; GATS, *supra* note 158, at 76-77 (titled Annex on Air Transport Services).

[161] *See* KASPER, *supra* note 70, at 93-111.

[162] *Id.* at 94.

[163] *Id.* at 95.

[164] *Id.*

[165] *Id.* at 96.

with MFN status need only point out that it should have the equivalent air carrier access rights that every other nation would.

Thus, MFN provisions of GATS could be troubling if made to apply to the negotiation of air transport agreements. However, it has been suggested that should MFN be made applicable, nations could develop a conditional MFN agreement that would provide certain commercial air access or trade in air services to other nations only if these nations comply with the terms of the agreement.[166]

C. *National Treatment*

This GATS provision directs that a nation treat its foreign services and suppliers as it would comparable domestic services and suppliers.[167] Thus, a nation complying with GATS provisions with respect to air services could not discriminate against a foreign air carrier by giving preferences to domestic carriers, or charging higher tariffs to foreign carriers than it does to domestic ones. Note that this provision does not apply to air routes, meaning that the U.S. would not have to provide an Asian air carrier with the same route as a domestic carrier simply because the domestic carrier uses it.[168]

The implications of this provision would also adversely affect negotiations of international air transport agreements.[169] For example, under this provision the United States would have to allow a Japanese airline the same right to establish itself and have complete access to the U.S. domestic air carrier market as it would for American air carriers. However, a U.S. carrier establishing itself similarly in the Japanese air carrier market would not nearly benefit economically from the comparatively minor Japanese domestic market as the Japanese carrier would in the lucrative U.S. domestic market.[170] Furthermore, many nations impose high entry fees for all foreign air carriers that seek to enter their domestic market, an action which is legal under national treatment because it applies equally to all nations.[171] It is argued that even if GATS is able to provide institutional measures to impose concessions intended to balance possible economic inequities, there

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[166] *Id.* at 108-09.
[167] *Id.* at 100.
[168] *Id.* at 101.
[169] *Id.*
[170] *Id.* at 102.
[171] *See id.* at 103.

would still be nations that stand to benefit over other trading partners in the air transport market.[172]

ICAO's believes that the possibility of GATS controls on air transport agreements are made even more problematic if GATS's five-year review were to require that GATT trade negotiators be given charge of the economic regulation of aviation instead of ICAO' aviation specialists.[173]

ICAO's worries of GATS controls are very valid ones. Although the goals of GATS are to bring down trade barriers and to encourage the consideration of free market forces and competition in international trade relations, its provisions would have an opposite effect on the unique aspects of air transport agreements.

VI. Conclusion

In the fifty years since the Chicago Convention, the air transport industry has grown tremendously, playing a vital role in international communications, business, and travel. In 1993, civil aircraft carried 1.17 billion passengers, compared to just nine million in 1945, a one hundred thirty-fold increase.[174] Yet, the articles of the Chicago Convention have generally thrived and adapted, especially in providing for international technical and safety agreements.[175]

However, with a world more dependent than ever on free market forces and competitive trade, the days have become numbered for the bilateral air transport agreement. The bilateral agreement has become too rigid and too dependent on government controls to be flexible enough to accommodate the needs of the world's air carrier industry. And it certainly should not be used as an implement by the United States to exploit a nation's air transport market that has become vastly different from the one that existed when the agreement was crafted.

Optimally, the best answer to the needs of air transport market of the Pacific Rim may be a combination of alliances and multilateral arrangements like "plurilateralism." As in the case of the Northwest-KLM alliance, the added advantage of a working "open skies" agreement in conjunction with an alliance could allow a smaller international

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[172] *Id.*

[173] Hughes, *supra* note 105, at 37.

[174] Ott, *supra* note 17, at 46.

[175] Id.

air carrier to profit immensely.[176] The alliance of Northwest and KLM has made these carriers, in effect, the world's third-largest airline in revenues after the two giant U.S. air carriers, American and United.[177]

Although Asian/Pacific nations and air carriers may not necessarily want to expand a possible alliance to global proportions, the formation of an alliance in conjunction with a smaller "plurilateral" framework could allow smaller carriers to establish themselves in a regional market without the concern of cutthroat competition with global "megacarriers." Once established and strengthened, the participating nations could then decide to elevate their multilateral framework to the next level, opening their skies a little wider to accommodate other world regions.

The arrangement of regional multilateralism and alliances, however, would probably only partially satisfy the United States. It envisions the formation of an "open skies" framework on a global scale. Unfortunately, for a region like the Pacific Rim only a very few air carriers are up to the task of competing against U.S. carriers in such an unrestricted market environment, even on their respective "home turf." For many nations, an American-styled "open skies" arrangement is suspect because of the belief that only the U.S., whose carriers are considered the world's most efficient, could fully benefit from such an arrangement, and that it would probably do so at the expense of others.[178] If true, the protection against unfairly aggressive competition found in a regional multilateral or "plurilateral" plan are even more attractive, especially if applied in conjunction with a well-negotiated air carrier alliance.

There is no turning back to the days of strict government regulation and traditional bilateral air transport agreements. A truly international, "open skies" framework in air transport is eventually achievable, if not inevitable. However, international acceptance will come only if the participants realize the inequities of competition and efficiencies among regional markets and proceed accordingly with patience and good faith, avoiding the pitfalls of overly protectionist controls or, on the flip side of the coin, overly expansionist goals.

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[176] Toy, *supra* note 139, at 90.

[177] *Id.*

[178] Toy, *supra* note 101, at 92E6.

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