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THE APPLICATION OF THE CONSTITUTION IN UNITED STATES TERRITORIES: AMERICAN SAMOA, A CASE STUDY

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It might seem an obvious desideratum that all persons subject to United States jurisdiction enjoy constitutional rights equal to those of United States citizens living in the States. One might assume that the Constitution means the same thing in Pago Pago, American Samoa, as it does in Columbus, Ohio. There is room for legitimate concern, however, that an inflexible interpretation of the Constitution as applied to territories could destroy their unique social and cultural systems, systems that may be worthy of preservation and which the United States may be morally and legally committed to preserve.[1]

These concerns cannot be passed off, as the author once believed, as mere vestiges of colonialistic thinking. The felt needs of nearly four mil-

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[1] In the case of American Samoa, the argument is supported by the instruments that transferred control to the United States. *See* Cession of Manu'a Islands, July 16, 1904, *reprinted in* I AM. SAMOA CODE 9 (1973); Cession of Tutuila and Aunuu, Apr. 17, 1900 *reprinted in* I AM. SAMOA CODE 6 (1973 & Supp. 1979). *See generally* Office of the Delegate at Large, *Memorandum in Support of Appropriate Organic Act for American Samoa*, 4 SAMOAN PAC. L.J. No. 1, at 31, 39 (1976)[hereinafter cited as *Organic Act Memorandum*].

lion Americans living in United States territories[2] and the variety of cultures they represent are reason enough why the topic should be given more attention than it has received in recent years.

Interest in the constitutional status of American territories peaked during the first quarter of this century, when the Supreme Court decided the *Insular Cases*.[3] The initial decisions and their early progeny filled hundreds of carefully worked pages in official court reports[4] and nearly that many in scholarly reviews.[5] Lately, the Court has dealt with the subject in rather cursory fashion,[6] and commentators either have ignored the issue

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[2] The total resident population in 1978 of United States insular territories and the Trust Territory of the Pacific Islands was 3,743,500. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SER. P-25, No. 872, CURRENT POPULATION REPORTS 6, table 1 (1980). The total resident population for that year in Puerto Rico was 3,358,000; for the Trust Territory of the Pacific Islands, 128,000; for Guam, 113,800; for the Virgin Islands, 95,900; for American Samoa, 31,100; and for the Northern Marianas, 16,700. *Id.*

[3] Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901)(steamship operating between New York and Puerto Rico not subject to state pilotage laws because not engaged in foreign trade); Downes v. Bidwell, 182 U.S. 244 (1901)(revenue clauses of Constitution held inapplicable to Puerto Rico); Armstrong v. United States, 182 U.S. 243 (1901)(post-treaty duties on imports recoverable under *Dooley*); Dooley v. United States, 182 U.S. 222 (1901)(military authority to establish duties on American imports to Puerto Rico ceased with ratification of treaty ceding the territory to the United States); Goetze v. United States, 182 U.S. 221 (1901)(Hawaii and Puerto Rico not foreign countries within meaning of tariff law); DeLima v. Bidwell, 182 U.S. 1 (1901)(Puerto Rico not a foreign country and import duties levied on sugar were illegal).

[4] *See* Balzac v. Porto Rico, 258 U.S. 298 (1922)(jury trial provision inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914)(grand jury provision inapplicable in Philippines); Dowdell v. United States, 221 U.S. 325 (1911)(confrontation clause not violated when Philippine court amended defendant's sentence in his absence); Rassmussen v. United States, 197 U.S. 516 (1905)(jury trial provision applicable in Alaska); Kepner v. United States, 195 U.S. 100 (1904)(Congress extended double jeopardy clause to Philippines in statutory bill of rights precluding government appeal of acquittal); Dorr v. United States, 195 U.S. 138 (1904)(jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903)(grand and petit jury requirements inapplicable in Hawaii); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901)(post-treaty duty on foreign imports inapplicable to Philippines); Dooley v. United States, 183 U.S. 151 (1901)(duties on goods moving from states to Puerto Rico upheld); note 3 *supra*.

[5] *See, e.g.*, Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926); Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169 (1901)[hereinafter cited as Littlefield]; Randolf, *Constitutional Aspects of Annexation*, 12 HARV. L.REV. 291 (1898); Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); 15 HARV. L. REV. 395 (1902).

[6] Harris v. Santiago Rosario, 100 S. Ct. 1929 (1980)(equal protection guarantee of fifth amendment does not prohibit disparate treatment of Puerto Rico under federal welfare statute); Terrol Torres v. Puerto Rico, 99 S. Ct. 2425, 2428-29 (1979)(fourth amendment applies to Puerto Rico); Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 599 n.30, 600 & n.31 (1976)(Puerto Rico statute precluding alien engineer from practicing profession violates either fifth or 14th amendment); Granville-Smith v. Granville-Smith, 349 U.S. 1, 4-6 (1955)(Virgin Islands divorce law invalid). *See* Reid v. Covert, 354 U.S. 1, 10-14 (1957). *But*

or have touched it incidentally en route to other themes.[7]

Yet the subject is very much alive and its importance may be on the increase rather than the wane. With the exception of the Canal Zone[8] (which was never a territory in the ordinary sense),[9] the United States is not imminently planning to liquidate any territories. In fact, the nation is in the process of adding the Commonwealth of the North Marianas to its list of permanent territories.[10] On the other hand, none of the territories, with the possible exception of the Commonwealth of Puerto Rico, are current candidates for statehood.[11] So each is concerned with its special status as a United States territory.

In earlier days the territories were in all significant matters governed from Washington. Today, they are exercising a large measure of self-government. A territory can adopt provisions similar to those in the United

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cf. United States v. Tiede, Crim. Nos. 78-001, 78-001A (Ct. Berlin Mar. 14, 1979), *reprinted in* 19 INT'L LEGAL MATERIALS 179 (1980)(jury trial guarantee applies in criminal proceedings before the United States Court for Berlin).

[7] *See, e.g.*, Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978)[hereinafter cited as Cabranes]; Leibowitz, *United States Federalism: The States and the Territories*, 28 AM. U.L. REV. 449 (1979)[hereinafter cited as Leibowitz]; Stewart, *American Law Below the Equator*, 59 A.B.A.J. 52 (1973); Note, *Puede el Congreso Discriminar Contra los Residentes de Puerto Rico Al Aprobar Leyes Nacionales que Proveen Beneficios a los Individuos?*, XLV REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO [REV. JUR. U.P.R.] 45 (1976); Note, *Inventive Statemanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA. L. REV. 1041 (1974); Comment, *Some Observations on the Judiciary in American Samoa*, 18 U.C.L.A. L. REV. 581 (1971). *But see* Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L.J. 220 (1980)[hereinafter cited as Leibowitz—Samoa]; Willens & Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373 (1977)[hereinafter cited as Willens & Siemer]; Note, *The Application of the American Constitution to American Samoa*, 9 J. INT'L L. & ECON. 325 (1974).

[8] In 1977, two treaties were negotiated with Panama, one to ensure the neutrality of the Canal Zone, and one to return the Panama Canal to Panama. *See* Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978). *See generally* Rubin, *The Panama Canal Treaties: Keys to the Locks*, 4 BROOKLYN J. INT'L L. 159 (1978)[hereinafter cited as Rubin]; Note, *Panama Canal*, 19 HARV. INT'L L.J. 279 (1978); 92 HARV. L. REV. 524 (1978); 1979 WIS. L. REV. 837.

[9] *See, e.g.*, Huasteca Petroleum Co. v. United States, 14 F.2d 495 (E.D.N.Y. 1926)(Canal Zone is possession and considered a foreign country for purposes of taking depositions). See note 30 *infra*.

[10] Joint Resolution of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. § 1681 note (1976).

[11] Congress has considered various proposals to modify the Commonwealth status of Puerto Rico short of granting statehood, *see* Helfeld, *Toward an Improved Compact of Association Between Puerto Rico and the United States*, 38 REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO [REV. C. ABO. P.R.] 509 (1977), and a separatist movement counterbalances support for statehood or other forms of closer association with the United States, *see* Clem & Levine, *The Consequences of Status—Notes on Imperial Development in Puerto Rico and Tadzhikistan—*, 38 REV. C. ABO. P.R. 529 (1977). *See also* Axtmeyer, *Non-Self-Governing Territories and the Constitutive Process of the United Nations: A General Analysis and the Case Study of Puerto Rico*, XLV REV. JUR. U.P.R. 211 (1976).

States Constitution as part of its own constitution or statutes.[12] Where that is not done, exemption from the Constitution may be claimed to permit some special arrangement that a territory considers vital to the preservation of its cultural or social system.[13] Certain aspects of the culture, reflected in local legislation, may not square neatly with Western concepts of property rights, a republican form of government, or due process of law.

For example, the laws of both American Samoa and the Northern Marianas purport to restrict land ownership to persons of predominately indigenous ancestry.[14] Similar state laws would face serious and quite likely successful constitutional challenges on equal protection and due process grounds as impermissible racial classifications.[15] But the Constitution does not necessarily require or warrant identical interpretation in its application to the territories.

United States territories are by definition in a legal status different from the States, and the Constitution traditionally has had unique application in territories. The territorial clause of the Constitution establishes an independent source of congressional power over non-state areas. "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."[16] Thus, in legislating for the territories, Congress need not relate such laws to interstate commerce, war powers, or any enumerated power other than the territorial clause. The clause effectively deprives territories of the analogous sovereignty reserved to the States by the tenth amendment.[17] Congress therefore has plenary power to legislate for the territories as if the federal enactments were state laws.[18] This does not imply, however, that Congress or the territorial gov-

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[12] *See, e.g.*, 48 U.S.C. § 731b (1976)(authorization for Puerto Rican constitution); House Resolution of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899 (authorization for Virgin Island and Guam constitutions). Similarly, Congress approved the Covenant transforming the Northern Mariana Islands from a trust territory to a commonwealth, Joint Resolution of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. § 1681 note (1976), which expressly allows self-governance in accordance with the commonwealth constitution. Covenant To Establish a Commonwealth of the Northern Mariana Islands, Feb. 15, 1975, United States-Northern Marianas, art. II, 14 INT'L LEGAL MATERIALS 344, *reprinted in* S. REP. No. 94-433, 94th Cong., 1st Sess. 1 (1975)[hereinafter cited as COVENANT]. The "unorganized" territory of American Samoa has a constitution by authorization of the Secretary of Interior, *see* text accompanying notes 141-44 *infra*.

[13] COVENANT, *supra* note 12, art. V, § 501(b), art. VIII, § 805(a); AM. SAMOA CONST. art. I, § 3. See the discussion in Part IID and note 269 *infra*.

[14] AM. SAMOA CODE tit. 27, §§ 201-208 (1972 & Supp. 1979); N. MARIANA ISLANDS CONST. art. XII. See note 269 and text accompanying notes 180-81 *infra*.

[15] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).

[16] U.S. CONST. art. IV, § 3, para. 2.

[17] *See* Leibowitz, *supra* note 7, at 451-56.

[18] First Nat'l Bank v. County of Yankton, 101 U.S. 129 (1880).

ernments it creates are unrestrained by the Constitution's specific limitations on governmental power (such as the Bill of Rights) when legislating for the territories.

Since Congress' power to legislate with respect to territories is drawn from the Constitution, through the territorial clause, it may be said that the Constitution always is in force in the territories. By their terms, of course, some provisions have a different effect in a territory. For example, the provision regarding United States Senators is in force both to deny representation to territories and to entitle representation upon statehood.[19] But other provisions which on their face have no geographic limitation, such as the grand jury guarantee, have been held inapplicable in certain non-state areas.[20] The issues that tend to be litigated are those testing the applicability of constitutional language where the geographic referent is ambiguous or nonexistent.[21] Discussion will focus on these latter types of clauses.

After a survey of relevant judicial precedent, this article will consider current issues involving territorial law and suggest a method for the appropriate application of doctrines developed by the Supreme Court and lower federal courts. American Samoa[22] will be used as a case study in

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[19] U.S. CONST. amend. XVII: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote." It is possible to say that the clause is in force in the territories because when and if they become States or parts of States their qualified voters will be entitled to elect Senators. This specific clause has an active, although negative, effect. Congress, in all likelihood, could not grant a territory voting representation in the United States Senate because of the negative implications of the clause. At least, Congress has proceeded on that assumption in proposing a constitutional amendment to grant congressional representation to the District of Columbia, H.R.J. Res. 554, 95th Cong., 2d Sess. (1978). A negative application is not necessarily implicit in all constitutional provisions that do not have positive effect in territories. For example, the inapplicability of the sixth amendment right to trial by jury did not preclude Puerto Rico from establishing the right for certain offenses by statute. *See* Balzac v. Porto Rico, 258 U.S. 298, 302-03 (1922)(trial by jury in felony cases only).

[20] Ocampo v. United States, 234 U.S. 91 (1914) (Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (Hawaii).

The fifth amendment provides in pertinent part as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

[21] *E.g.*, U.S. CONST. art. I, § 8, para. 1 ("all Duties, Imposts and Excises shall be uniform throughout the *United States*")(emphasis added); *id.* amend. VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *State* and district wherein the crime shall have been committed") (emphasis added). *See generally* cases cited in notes 3-4 *supra*.

[22] American Samoa is a group of seven islands in the southwest central Pacific ocean.

developing an interpretation of the Constitution that guarantees all citizens the essence of constitutional blessings while fulfilling the American promise to territorial residents that they could affiliate with the United States and still preserve their lands and culture.[23] Because the doctrines properly analyzed (from the author's perspective) call for individualized determinations of the impact that any constitutional provision would have on the culture of a particular territory, the article also suggests cooperative means by which lawyers, social scientists, and others may generate data necessary to measure the hypothetical effect of imposing specific constitutional principles on territories.

Although this article deals specifically with territories, the principles under consideration are significant in a broader context. The proposed approach to accommodating insular social systems may in some respects be transferrable to quasi-sovereign groups of Native Americans within the States.[24] It also may suggest useful methods for reducing the tension between local diversity and national uniformity implicit in our concept of federalism.[25] In essence, the question is whether the Constitution should

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With a land area of approximately 76 square miles, it is the smallest United States territory. Throughout this article the term Samoa refers to American Samoa.

[23] *See* notes 136, 291 *infra*.

[24] The Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), construed the Indian Civil Rights Act of 1968 to deny a private action brought by a member of the Pueblo Tribe challenging the tribal ordinance that allegedly discriminated on the basis of sex by granting Pueblo membership to the offspring of male members married to nonmembers but not to the offspring of female members married to nonmembers. The Court rejected the equal protection challenge, even though the statute incorporates equal protection guarantees, making it clear that fundamental constitutional provisions are not applicable to native peoples, absent express congressional intent, if their application would contravene the concept of sovereignty. The Court, however, noted that Congress retains plenary power to intervene by statute into this sphere of quasi-sovereignty. *See also* Morton v. Mancari, 417 U.S. 535 (1974)(hiring preference for American Indians in the Bureau of Indian Affairs does not violate equal protection); Crowe v. Eastern Band of Cherokee Indians, Inc., 584 F.2d 45 (4th Cir. 1978)(no federal jurisdiction on authority of *Martinez* to consider equal protection and due process irregularities in Indian elections); HAWAII CONST. art. XII, §§ 4, 6, art. XIII, § 7 (establishing trust entity for benefit of Hawaiians and Native Hawaiians statutorily defined by blood quantum and ancestry, HAWAII REV. STAT. § 10-2(5)-(6) (Supp. 1979)).

[25] The concept of federation which is at the heart of our constitutional structure is itself an effort to balance the need for uniform laws in certain areas with the desirability of diversity in others. Within this system, of course, the norm is that the Constitution serves the need for uniformity and should have uniform geographical application. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816). On the other hand, the case has been made that if the application of federal law is too inflexible, even in areas of admitted federal concern, the value of local diversity also implicit in federalism may be unduly stifled. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15, 24-25 (1973)(incorporating community standards into first amendment analysis of obscenity regulation); Laughlin, *A Requiem for Requiems: The Supreme Court at the Bar of Reality*, 68 MICH. L. REV. 1389 (1970). *Cf.* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)(adult theater zoning laws held constitutional). *But cf.* FCC v. Pacifica Foundation, 438 U.S. 726 (1978)(upholding federal regulation of radio broadcast that is indecent but not

have uniform applicability in all places under United States jurisdiction at all times.

I. THE INSULAR CASES

The status of American territories was once the premier constitutional question facing the Supreme Court, if interest in both legal circles and the general public is taken as a measure. The time was the turn of this century. The 1899 treaty that ended the Spanish-American War had given the United States the islands of Puerto Rico, the Philippines, Guam, and temporary control of Cuba.[26] In the same decade, this country had obtained the Hawaiian Islands[27] and the eastern part of the Samoan archipelago.[28] Alaska had been acquired in 1867,[29] and the United States was looking for a canal site in Central America.[30]

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obscene). The problems of constitutional application in the territories more dramatically exhibit the same concerns because the difference between insular societies (like Samoa) and the mainland United States are both more apparent and real than the differences among various communities on the mainland.

Similar tensions have been discussed in case law dealing with state criminal procedures, giving rise to the debate between advocates of automatic incorporation of the entire Bill of Rights through the 14th amendment, Adamson v. California, 332 U.S. 46, 68 (Black, J., dissenting), selective incorporation of certain guarantees through the 14th amendment, *see, e.g.*, Mapp. v. Ohio, 367 U.S. 643 (1961), and incorporation based on considerations of fundamental fairness, Palko v. Connecticut, 302 U.S. 319 (1937). *See* Williams v. Florida, 399 U.S. 78, 129-38 (1970) (Harlan, J., concurring).

[26] Treaty of Paris, Dec. 10, 1898, United States-Spain, 30 Stat. 1754, T.S. No. 343. *See generally* C. BUSS, THE UNITED STATES AND THE PHILIPPINES (1977); I-II P. FONER, THE SPANISH-CUBAN AMERICAN WAR AND THE BIRTH OF AMERICAN IMPERIALISM 1895-1902 (1972); R. SMITH, THE UNITED STATES AND CUBA (1960).

For unknown reasons Puerto Rico was spelled Porto Rico in the English version of the 1899 treaty and by governmental agencies and the courts until 1932 when Congress changed the official spelling. Joint Resolution of May 17, 1932, 47 Stat. 158.

[27] Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750. *See generally* G. DAWS, SHOAL OF TIME (1968); III R. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874-1893 (1953); Levy, *Native Hawaiian Land Rights*, 65 CALIF. L. REV. 848 (1975)[hereinafter cited as Levy]; Richardson, Judicial Independence: The Hawaii Experience, 2 U. HAWAII L. REV. 1, 5-13 (1979).

[28] *See* Convention Respecting Samoan Islands, Dec. 2, 1899, United States-Germany-Great Britain, art. II, 31 Stat. 1878, T.S. No. 314. See text accompanying notes 133-41 *infra*.

[29] Convention Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, United States-Russia, 15 Stat. 539, T.S. No. 301. *See generally* D. LEFF, UNCLE SAM'S PACIFIC ISLETS (1940). In addition, the two small islands known as Midway were discovered in 1859 by Captain N.C. Brooks, who claimed them for the United States. F. HADDEN, MIDWAY ISLANDS 1 (1943).

[30] For a history of the events leading to construction of the Canal, see Rubin, *supra* note 8, at 161-68. The United States assumed all attributes of sovereignty over the Canal Zone in 1903. Convention for the Construction of a Ship Canal, Nov. 18, 1903, United States-Panama, art. III, 33 Stat. 2234, T.S. No. 431. *See generally* W. MCCAIN, THE UNITED STATES AND THE REPUBLIC OF PANAMA (1937); D. MINER, THE FIGHT FOR THE PANAMA ROUTE (1940); J. NIEMEIER, THE PANAMA STORY (1968). Panama will regain ownership of the Canal pursuant

America's international star was rising and some Americans spoke openly and hopefully of an American empire.[31] A national debate raged over whether the United States should continue to expand its sphere of influence, a course which supporters characterized as part of our manifest destiny.[32] Those who favored expansion were encouraged by some non-Americans. Rudyard Kipling urged the United States to take up "The White Man's Burden," an exhortation enshrined in his poem of the same name.[33] Others opposed American colonialism on principle, or for pragmatic reasons, or both.

The national policy question was intertwined with the debate about constitutional status of territories, and the legal issue was popularly phrased as whether "the Constitution follows the flag."[34] The pre-Civil War Constitution had already accompanied the banner into the territory encompassed by the Missouri Compromise, denying Dred Scott his freedom, invalidating congressional abolition of slavery in the territory, and ousting federal courts of jurisdiction over noncitizen slaves.[35] The addi-

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to a recent treaty, *see* note 8 *supra*.

[31] Downes v. Bidwell, 182 U.S. 244, 261, 279 (1901). Chief Justice Marshall had used the term "American empire" eighty years earlier in Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820).

[32] N. GRAEBNER, MANIFEST DESTINY, (1968); F. MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY 247-48 (1963); M. TATE, THE UNITED STATES AND THE HAWAIIAN KINGDOM 265 (2d ed. 1967); R. WELCH, JR., IMPERIALISTS VS. ANTI-IMPERIALISTS (1972). *See generally*, A. WEINBERG, MANIFEST DESTINY 252-323 (1935).

[33] XXI R. KIPLING, THE WORKS OF RUDYARD KIPLING 78 (1903). Kipling painted such a bleak picture of the burdens of colonialism that his poem was quoted by a Senator from South Carolina, speaking against annexation of the Philippines. 32 CONG. REC. 1531-32 (1899)(remarks of Sen. Benjamin R. Tillman).

[34] The origin of the slogan was political. *See* OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION HELD IN KANSAS CITY MISSOURI, JULY 4TH, 5TH, & 6TH, at 121 (1900).

[35] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The very instruments by which the United States acquired its mainland territories had granted the privileges of citizenship to its inhabitants. Arizona, Gadsen Treaty, Dec. 30, 1853, United States-Mexico, art. V, 10 Stat. 1031, T.S. No. 208; Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, art. VIII, 9 Stat. 922, T.S. No. 207; Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States-Spain, art. VI, 8 Stat. 252, T.S. No. 327; Treaty Regarding Cession of Louisiana, Apr. 30, 1803, art. III, 8 Stat. 200, T.S. No. 86.

The earliest case law on the subject reflected the assumption that the Constitution was applicable in the territories, although in some cases Congress had extended constitutional guarantees by statute, a fact that would later become the basis for distinguishing those cases. *See, e.g.*, Callan v. Wilson, 127 U.S. 540, 549-50 (1888)(jury trial provision held applicable in District of Columbia); Murphy v. Ramsey, 114 U.S. 15 (1885)(upholding franchise disqualification of bigamists and polygamists in Utah as proper exercise of territorial clause while acknowledging that the Constitution guarantees personal rights to territorial inhabitants); First Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1880)(upholding congressional authorization for Dakota Territory to issue bonds); Reynolds v. United States, 98 U.S. 145 (1879)(trial by impartial jury and first amendment applicable in Utah, but territorial law governs size of grand jury since courts are not article III courts; upheld criminal law against bigamy); Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851)(Organic Act making civil jury trial provision applicable supersedes contrary Iowa territorial law); Strader v. Gra-

tion of the Civil War amendments and subsequent acquisitions of desirable possessions "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought" combined to compel a reevaluation of the flag-Constitution issue at the time of the *Insular Cases*.[36]

In general, colonialists were identified with the position that the United States could hold territory without extending citizenship or full constitutional rights to its inhabitants, thereby allowing the sovereign a free hand in governing and resolving problems associated with alien cultures, as they were only slightly euphemistically called. This also would obviate the uncertain effects of allowing such alien peoples to participate in the American political processes.[37]

In contrast, anti-colonialists tended to favor the view that the Constitution applied in full force in all areas under United States jurisdiction. They believed America should not have colonies and therefore any land it acquired must become part of the nation and the people accorded full citizenship.[38] This, some hoped, would deter future acquisitions.

There were many crosscurrents, some born of expediency. *Practitioners* of colonialism, those who actually did business in the newly acquired territories, had an interest in constitutional protection against the tariffs and other discriminatory regulations their mainland competitors were trying to impose on them. These frontier merchants were, in fact, the

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ham, 51 U.S. (10 How.) 82, 96 (1850)(Constitution applies to Northwest Territory); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 318-19 (1820)(Constitution applies to District of Columbia). *But cf.* Cross v. Harrison, 57 U.S. (16 How.) 164 (1854)(war tariff and duties imposed under civil government after ratification of treaty ceding California were valid until Congress enacted other revenue laws); American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828)(Florida territorial courts exercise jurisdiction pursuant to congressional authorization under territorial clause, not article III).

The decade before the *Insular Cases* produced opinions casting doubt upon the *ex proprio vigore* theory, American Pub. Co. v. Fisher, 166 U.S. 464, 466 (1897)(whether seventh amendment applies in territories by its own force may be a matter of dispute, but right to unanimous verdict in civil jury trial applies to Utah by operation of congressional legislation); Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 44 (1890)(in legislating for territories, Congress is bound by spirit of Constitution rather than its direct application; Congress had power to repeal the charter of the church). Justice Harlan, later the champion of *ex proprio vigore*, *see* note 76 *infra*, wrote the Court's opinion in a third case, Thompson v. Utah, 170 U.S. 343 (1898), which quoted the Mormon Church case, *id.* at 349 (quoting 136 U.S. at 44), then assumed that the sixth amendment applied in Utah, and held that a jury required 12 persons instead of eight. *Contra*, Williams v. Florida, 399 U.S. 78 (1970)(12-person jury not required).

[36] Justice Brown described territorial residents as "alien races" in Downes v. Bidwell, 182 U.S. 244, 287 (1901), the leading *Insular Case*, and acknowledged the impact of the Civil War amendments on his analysis, *see id.* at 251. *See generally* Cabranes, *supra* note 7, at 421 & n.104 (racism was significant factor in congressional debates regarding annexation of insular territories).

[37] *See* 182 U.S. at 278-80; *id.* at 311 (White, J., concurring).

[38] *See id.* at 379-83 (Harlan, J., dissenting); Cabranes, *supra* note 7, at 431.

principal plaintiffs in the *Insular Cases*.[39]

On the other hand, some anti-colonialists recognized that full application of the Constitution might well have the unacceptable result of making every territorial acquisition irrevocable. If the Civil War had established the indivisibility of this Nation, arguably a territory could never be granted independence once it was incorporated in the Union and its residents made citizens.[40]

The 1900 Presidential election was considered a referendum on colonialism, and the McKinley victory constituted a mandate for continued expansion, even though America's acquisition of territories actually had peaked by that time. It was in this socio-political context that the Court decided the *Insular Cases*, prompting Finley Dunne's fictional Mr. Dooley to comment in one of his more famous dialogues with Mr. Hennessy: "[N]o matther whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."[41]

The *Insular Cases* would come to stand for two propositions: (1) The Constitution applies *ex proprio vigore*, of its own force, throughout a territory which is incorporated into the United States; and (2) only "fundamental" constitutional rights apply to an unincorporated territory. This meaning was not immediately clear because of the Court's disarray, manifested by the several opinions of individual Justices. Moreover, even after the formula was clearly recognized, confusion remained as to what constituted indicia of incorporation, if indeed the key to this formula could be forged from objective data.

A. Downes v. Bidwell

Six cases decided during the Supreme Court's 1900 term comprise the *Insular Cases*,[42] although later decisions treating the status of territories are sometimes subsumed under the title.[43] Of the original six, *Downes v.*

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[39] *See* note 3 *supra*. The plaintiff in *DeLima* was a sugar importer; in *Dooley*, a general exporter; and in *Downes*, a tropical fruit importer.

Aside from philosophical conflict reflecting economic concerns, there were also different perceptions of what constituted manifest destiny. Some advocates believed that the white man's burden included extending the benefits of American citizenship, government, and culture to alien peoples. *See* Littlefield, *supra* note 5, at 295-97.

[40] After the Civil War, the Supreme Court held that the rebellious states had no right to secede from the Union because the Constitution created an indissoluble relationship which remained intact *vis-a-vis* each State as a body politic and all United States citizens within each State. Texas v. White, 74 U.S. (7 Wall.) 700, 720-26 (1869). Arguably, this relationship could not be disturbed even by a majority vote of Congress approving a state's withdrawal from the Union. In theory, the argument might apply to territories if the residents are United States citizens.

[41] F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (E. Bander ed. 1963).

[42] *See* note 3 *supra*.

[43] *See* cases cited in note 4 *supra*. *Rassmussen* involved Alaska and is therefore not an insular case in the literal sense, but it is nonetheless an important part of the development

Bidwell[44] is the most important because the Court directly confronted the applicability of constitutional provisions to congressional legislation affecting a territory.

During the Spanish-American War, in the summer of 1898, the United States invaded Puerto Rico and in one month defeated the Spanish forces there. The Spanish evacuated the island in October, turning over complete control to the American Army. In December, the United States and Spain signed the Peace Treaty which ended the war and, *inter alia*, ceded Puerto Rico to the victor.[45] Congress subsequently passed the Foraker Act,[46] effective May 1, 1900, establishing a civil government for Puerto Rico.[47] That Act also explicitly authorized the imposition of duties on goods entering or leaving Puerto Rico, including merchandise moving immediately to or from any state.[48]

Downes involved a constitutional attack on a duty imposed upon oranges sent from Puerto Rico to New York.[49] The essence of the plaintiff importer's argument was that the duty and the portion of the Foraker Act authorizing it violated the uniformity clause, which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States."[50] The petitioner also argued that the Act contravened a related revenue clause: "[N]or shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."[51] The second argument was not so strong as the first since it was more difficult to contend that Puerto Rico was a State within the meaning of the Constitution than it was to argue that it was part of the United States.

The Court upheld the duty and the Act but only by a single vote, a particularly slim margin in a day when such divisions were rare.[52] The precedential value of the case was further impaired by the fragmentation of the majority. Justice Henry B. Brown wrote what was designated the Opinion of the Court, but the four concurring Justices expressed serious reservations about the main opinion.[53] The Court's opinion was destined for oblivion; the concurring opinion of Justice Edward D. White[54] was to find a more permanent place in constitutional doctrine.

1. The Extension Doctrine.—Justice Brown held that the revenue

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of the *Insular Cases* doctrine.

[44] 182 U.S. 244 (1901).

[45] *See* note 26 *supra*.

[46] Act of Apr. 12, 1900, ch. 191, 31 Stat. 77. The legislative history of the Foraker Act is detailed in Cabranes, *supra* note 7, at 417-35.

[47] Act of Apr. 12, 1900, ch. 191, §§ 6-40, 31 Stat. 77.

[48] *Id.* §§ 2-5.

[49] *See id.* § 3.

[50] U.S. CONST. art. I, § 8, para. 1.

[51] *Id.* art. I, § 9, para. 6.

[52] *See* Littlefield, *supra* note 5, at 170.

[53] 182 U.S. at 287 (White, J., concurring, joined by Shiras, J., and McKenna, J.); *id.* at 344 (Gray, J., concurring).

[54] *See* note 53 *supra*.

clauses were not applicable in Puerto Rico nor binding upon Congress in legislating with respect to the island. The theory leading Justice Brown to this conclusion is called the "extension" doctrine. Under his theory, Congress manifestly must intend that the Constitution apply to a particular territory before every provision of the document is effective there.[55]

The opinion explained earlier decisions applying constitutional standards to territorial laws on the basis that, even where the Court had spoken in *ex proprio vigore* language, the Congress had in fact consciously extended the Constitution to the territory.[56] In order to deal with cases where congressional legislation had been voided (legislation that might manifest a congressional intent that conflicting provisions of the Constitution should not apply), Justice Brown concluded that extension once done was irrevocable.[57] Even so, he conceded the impossibility of adequately explaining the *Scott v. Sandford*[58] opinion,[59] which dealt with the validity of conflicting state and territorial laws concerning slaveholding. Justice Brown dismissed the troublesome language as dicta on the territorial issue before the Court in *Downes* and discredited the *Dred Scott* decision on the basis that the Nation subsequently repudiated slavery.[60] The dissenters in *Downes* maintained that *Dred Scott* had been repudiated with respect to its holding on slavery but not on the issue of the application of the Constitution to territories.[61]

Finally, the nominal Opinion of the Court conceded that some constitutional provisions may be applicable in territories absent congressional extension. These fundamental personal rights might be granted judicial protection based on a "natural law" theory.[62]

2. *The Incorporation Doctrine.*—Justice White's concurring opinion in *Downes* commanded more votes than the extension theory expounded by Justice Brown.[63] Both opinions admitted of the possibility that some basic constitutional principles would apply *ex proprio vigore* in every ter-

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[55] 182 U.S. at 270-71, 283-86.

[56] *Id.* at 269, 271. The opinion of Justice Brown sought to distinguish the holding in Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820), where congressional legislation was tested by application of the Constitution (thereby severely testing the extension theory) by noting that the Constitution had been applicable to the District of Columbia by virtue of its earlier status as part of Virginia and Maryland. Hence, Congress could not rescind the applicability of the Constitution which the District enjoyed before the two States ceded the land to the Federal Government. 182 U.S. at 260-61.

[57] 182 U.S. at 270.

[58] 60 U.S. (19 How.) 393 (1857), *discussed in* text accompanying note 35 *supra*.

[59] 182 U.S. at 273-74.

[60] *Id.* at 271-74.

[61] *Id.* at 360-61 (Fuller, C.J., dissenting, joined by Harlan, J., Brewer, J., and Peckham, J.).

[62] *Id.* at 268-69, 277, 282-83. Among the fundamental rights which might be beyond Congress' power to withhold from territories were freedom of speech and press, free access to courts, due process, and equal protection. *Id.* at 282.

[63] *See id.* at 344 (White, J., concurring); *id.* at 345 (Gray, J., concurring).

ritory.[64] But the concurring opinion claimed to diverge analytically from the extension doctrine.[65]

In fact, the fundamental principles upon which the concurrence rested were not unlike the basis for the dissent. Because all of the powers of the United States government derive from the Constitution, Justice White stated, every governmental function is potentially limited by the provisions thereof. As a result, the Constitution is operative in connection with congressional power over territories, and it remains only to decide whether a particular provision is applicable: "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[66]

Having sided with the dissent on general principles applicable to resolution of the case, the opinion suddenly shifted. The issue was whether Puerto Rico, at the time of the passage of the tax levy, had "been incorporated into and forms a part of the United States."[67] Had it been so incorporated, the duty would have been unconstitutional either because Congress is without power to levy a tax on goods transported from one to another part of the United States or because the levy violated the uniformity clause.[68] Unlike the dissenters, Justice White would not presume incorporation either from the fact of annexation or the establishment of a civil government.

The concurring opinion purported to find support for its conclusion in the early history of territorial acquisitions.[69] The treaty with France consummating the Louisiana Purchase had bound the United States to incorporate the inhabitants of the ceded territory into the Union,[70] but "incorporation" had no fixed legal meaning at the time. The reference in *Downes* rather suggested that incorporation reflected intent to endow statehood.[71] Justice White left the term largely undefined, although he did determine that Puerto Rico in 1901 was not incorporated.[72]

If the standard for determining incorporation of a territory is whether Congress intends eventually to grant statehood,[73] application of that stan-

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[64] *Id.* at 291 (White, J., concurring); note 62 *supra*.

[65] 182 U.S. at 287 (White, J., concurring).

[66] *Id.* at 292.

[67] *Id.* In the narrowest sense, Justice White merely could have been interpreting the words "United States" in the uniformity clause, *quoted in* text accompanying note 50 *supra*, but the remainder of the opinion makes it clear that he intended incorporation or the lack thereof to have broader significance.

[68] 182 U.S. at 292.

[69] *Id.* at 319-37.

[70] *Id.* at 324-25 (quoting Treaty Regarding Cession of Louisiana, Apr. 30, 1803, art. III, 8 Stat. 200, T.S. No. 86).

[71] *Id.* at 312.

[72] *Id.* at 340.

[73] This proposition, conceded by Justice White, finds support in later Supreme Court

dard would be extremely problematical. Because it is axiomatic that no Congress can bind a future one, any expression of intent as to future statehood would be at best hortatory, unless that particular Congress intended to grant statehood within its own term. (Even then, Members could change their minds.) If past judicial determinations of the status of territories is taken as predictive of prospects for statehood, the predictions would have been unreliable. Hawaii was held not to be incorporated in 1903 in *Hawaii v. Mankichi*;[74] Alaska was held to be incorporated in 1905 in *Rassmussen v. United States*.[75] Both territories celebrated statehood in 1959.

3. Light from the Dissent.—The primary dissenting opinion,[76] authored by Chief Justice Melville W. Fuller,[77] rejected the incorporation doctrine and refused to employ incorporation terminology. The opinion suggested, however, that something akin to incorporation had been accomplished by the Foraker Act itself:

> The inquiry is stated to be: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" And the answer being given that it had not, it is held that the rule of uniformity was not applicable.

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cases, *see, e.g.*, Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976); Balzac v. Porto Rico, 182 U.S. 298, 311 (1922).

[74] 190 U.S. 197 (1903). *Mankichi* was the first of a series of cases dealing with the application of the fifth amendment guarantee of a grand jury indictment and the sixth amendment guaratee of a jury trial in territories. Mankichi had been convicted in Hawaii of manslaughter. Pursuant to Hawaii's statutory law kept in force after annexation, the defendant had been tried without indictment and convicted by a less-than-unanimous twelve-member jury. Justice Brown again wrote the Opinion of the Court, which basically construed language from the congressional resolution annexing Hawaii. Justice White wrote a concurring opinion in which Justice McKenna joined. Not surprisingly, Justices Brown and White adhered to their former doctrinal positions, Brown concluding that the Constitution had not been extended to Hawaii and White finding that Hawaii was not incorporated, both holding that the rights involved were not fundamental. *Compare id.* at 217-18, *with id.* at 219-20 (White, J., concurring). The conviction was upheld over two dissenting opinions representing the same four dissenters as in *Downes*.

[75] 197 U.S. 516 (1905), *discussed in* Part IB *infra*.

[76] Justice Harlan also wrote a dissenting opinion. 182 U.S. at 375 (Harlan, J., dissenting). Justice Harlan today is best remembered for his strong dissents in Plessy v. Ferguson, 163 U.S. 537, 552 (1896)(Harlan, J., dissenting), and the Civil Rights Cases, 109 U.S. 3, 26 (1883)(Harlan, J., dissenting). He was the staunchest champion of the *ex proprio vigore* principle, which he espoused in nearly every territorial case decided while he was on the Court. *See, e.g.*, Dorr v. United States, 195 U.S. 138, 154 (1904)(Harlan, J., dissenting); Hawaii v. Mankichi, 190 U.S. 197, 226 (1903)(Harlan, J., dissenting). *Cf.* Rassmussen v. United States, 197 U.S. 516, 528 (1905)(Harlan, J., concurring). Justice Harlan believed in the universal validity of constitutional principles. While his position never prevailed in the *Insular Cases*, it finds a place in today's law through the hand of his ideological heir, Justice Hugo Black, *see* note 112 *infra*.

[77] 182 U.S. at 347 (Fuller, C.J., dissenting, joined by Harlan, J., Brewer, J., and Peckham, J.).

> I submit that that is not the question in this case. The question is whether, when Congress has created a civil government for Porto Rico, has constituted its inhabitants a body politic, has given it a governor and other officers, a legislative assembly, and courts, with the right of appeal to this court, Congress can in the same act and in the exercise of the power conferred by the first clause of section eight, impose duties on the commerce between Porto Rico and the States and other territories in contravention of the rule of uniformity qualifying the power.[78]

The concurring opinion of Justice White attempted to meet this argument by portraying the dissent as internally contradictory:

> I fail to see how it is possible, on the one hand, to declare that Congress in passing the act had exceeded its powers by treating Porto Rico as not incorporated into the United States, and, at the same time, it be said that the provisions of the act itself amount to an incorporation of Porto Rico into the United States, although the treaty had not previously done so.[79]

Justice White's argument is either sophistic or based upon the unarticulated premise that incorporation *is* solely dependent upon the specific intent of Congress to make the Constitution applicable. The latter alternative would make the incorporation doctrine essentially indistinguishable from the extension theory enunciated by Justice Brown. If the incorporation doctrine depended upon objective circumstances, Congress could create those circumstances at the same time it adopted an unconstitutional tax. Therefore, it was not illogical to say that Congress had done something (such as establishing a civil government through the Foraker Act) that causes the Constitution to be applicable at the same time that Congress contravened the Constitution by enacting a nonuniform tax.[80] If,

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[78] *Id.* at 372. The dissent could not have regarded congressional intent to incorporate as a significant factor in its analysis, given the floor debate on the question of citizenship for the people of Puerto Rico which manifested a contrary intent. Cabranes, *supra* note 7, at 427-28.

[79] 182 U.S. at 341 (White, J., concurring).

[80] The Chief Justice found the duty provisions of the Foraker Act unconstitutional because the Act itself had essentially incorporated Puerto Rico, making the Constitution fully applicable there. *See* text accompanying note 78 *supra*. Suppose that Congress expressly had incorporated the territory in the Act and nevertheless levied an unconstitutional tax. We would have a severability problem. *See generally* Board of Supervisors v. Stanley, 105 U.S. 305, 312 (1882). If Congress can incorporate a territory by serendipity, by bringing about certain objective conditions that result in incorporation (as the dissent thought the Foraker Act had done), there would be three ways to construe the Act. It could be resolved by (1) striking down the entire Act, (2) striking down the incorporation and upholding the tax, or (3) upholding the incorporation and striking down the tax. Since the provisions establishing a civil government for Puerto Rico were contained in the original Senate bill, and the original tax provisions establishing duty-free trade between the mainland and the territory were gutted by an amendment conforming with House policy, Cabranes, *supra* note 7, at 426-27, the third approach would have been the most reasonable course of action.

however, one assumes that a territory is incorporated *only* if Congress specifically intended to make the Constitution applicable there, then the fact that Congress in the Foraker Act imposed a tax on Puerto Rico which would be unconstitutional if Puerto Rico were incorporated was evidence that Congress did *not* intend to incorporate the territory.

Thus, for Justice White's response to the dissent to make sense, one must assume that a territory can be incorporated only if Congress has a specific intent to make the Constitution applicable there. But if one is to take seriously the proclaimed differences between the incorporation and extension theories that split the majority in *Downes*, then objective criteria for incorporation must exist.

B. Incorporation Doctrine Refined

For a generation and throughout a series of Supreme Court decisions involving the applicability of the fifth and sixth amendments to various territories,[81] acceptance of the incorporation doctrine was kept in doubt. Two of these latter *Insular Cases*[82] seemed most likely to elucidate the "occult meaning"[83] of incorporation. *Balzac v. Porto Rico*,[84] a 1922 decision, deserves consideration for its unanimous adoption of the incorporation doctrine and its rejection as conclusive evidence of incorporation the grant of United States citizenship to territorial citizens. *Rassmussen v. United States*[85] is important because the 1905 case was the first and only time a majority of the Court struck down congressional legislation for a noncontiguous territory because it had been incorporated.[86]

In *Rassmussen*, the Court declared that Alaska had been incorporated into the Union and reversed a misdemeanor conviction for maintaining a place of prostitution, because the criminal procedure did not comport with the sixth amendment. At issue was an act of Congress providing for six-man juries in Alaska's misdemeanor trials. The Court was unanimous in its conclusion that the statute was unconstitutional but remained divided on the theory by which that result should be reached.[87]

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[81] *E.g.*, Ocampo v. United States, 234 U.S. 91 (1914); Dowdell v. United States, 221 U.S. 325 (1911); Dorr v. United States, 195 U.S. 138 (1904).

[82] *See* cases cited in note 4 *supra* for a complete list of the latter *Insular Cases*.

[83] 182 U.S. at 373 (Fuller, C.J., dissenting); *id.* at 291 (Harlan, J., dissenting).

[84] 258 U.S. 298 (1922).

[85] 197 U.S. 516 (1905).

[86] *Cf.* Binns v. United States, 194 U.S. 486 (1904)(upholding congressional legislation as local legislation for Alaska which the court determined had been incorporated). For a collection of earlier cases dealing with contiguous territories, see note 35 *supra*.

[87] Justice Brown concurred on the basis of his extension theory, pointing out for the last time before his retirement that it was his opinion, not that of Justice White, that had been "the opinion of the court" in *Downes*. 197 U.S. at 531-32 (Brown, J., concurring). Justice Harlan also concurred in the result, adhering to his earlier views that the Constitution applies to all areas under United States jurisdiction; applicability is not contingent upon the

Justice White wrote the Opinion of the Court, based on the incorporation doctrine. His opinion in *Rassmussen* pointedly considered the intent of Congress and found requisite evidence of incorporation primarily in the treaty by which Alaska was acquired from Russia, granting the territorial inhabitants "all the rights, advantages and immunities of citizens of the United States."[88] The treaty provision was characterized as the equivalent of express incorporation "especially in the absence of other provisions showing an intention to the contrary."[89] This, coupled with congressional acts extending taxation, customs, commerce, and navigation laws to the territory and including Alaska within a federal judicial circuit, compelled the conclusion of incorporation.[90] One might have assumed that the Court had identified these actions as objective criteria by which to determine the status of all territories.

In *Downes*, of course, the same Act which provided some evidence of intent to incorporate repudiated that inference by disregarding the uniformity clause. Here the Court garnered evidentiary facts from congressional actions predating the criminal code claimed to violate the Constitution. Thus, *Rassmussen* suggested either that incorporation does not depend upon the specific desire of Congress or, as Justice Brown reasoned in *Downes*, Congress was not at liberty to rescind its original extension of the Constitution.[91]

There would be little doubt that incorporation does depend on congressional intent after *Balzac v. Porto Rico*,[92] but the same type of evidence used to measure that intent in *Rassmussen* would not dictate the same result. The Court in *Balzac* again considered a misdemeanor conviction, this time involving a newspaper editor's criminal libel against the Governor of Puerto Rico. The issue was whether incorporation had occurred

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will of Congress. *Id.* at 528 (Harlan, J., concurring).

Rassmussen has been superseded by more recent decisions of the Supreme Court regarding the substance of rights encompassed by a jury trial. *See, e.g.*, Burch v. Louisiana, 441 U.S. 130 (1979)(sixth amendment requires unanimous verdict of six-member jury); Ballew v. Georgia, 435 U.S. 223 (1978)(jury of less than six violates sixth amendment); Apodaca v. Oregon, 406 U.S. 404 (1972)(sustaining jury convictions by votes of 11-1 and 10-2); Johnson v. Louisiana, 406 U.S. 356 (1972)(sustaining conviction on 9-3 jury vote); Williams v. Florida, 399 U.S. 78 (1970)(six-member jury trial authorized by state law did not violate sixth amendment).

[88] 197 U.S. at 522 (quoting Convention Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, United States-Russia, art. III, 15 Stat. 539, T.S. No. 301).

[89] *Id.*

[90] *Id.* at 523-25.

[91] *See* note 56 and text accompanying note 57 *supra*.

[92] Before the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important, or at least it was not fully understood and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference from various legislative acts; but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.

258 U.S. at 306.

after *Downes* that would operate to provide the defendant with a right to jury trial, otherwise prohibited by Puerto Rican law.[93]

In 1917, Congress had passed the Jones Act,[94] an organic law for Puerto Rico which granted full United States citizenship to all Puerto Ricans who desired it. The Act also created a statutory Bill of Rights including guarantees of the first eight amendments save only the rights to indictment by grand jury and to trial by petit jury in criminal cases.

The Court was forced to concede in light of *Rassmussen* that the grant of citizenship created an inference of incorporation[95] but held that such inference was rebutted by two negative implications. First, Congress was familiar with the incorporation theory by 1917, and failure to express specific intent to incorporate Puerto Rico in the Jones Act argued against incorporation.[96] Second, the statutory extension of select constitutional rights implied nonincorporation since the entire Bill of Rights would have been applicable *ex proprio vigore* if incorporation had been intended.[97] The extension of other federal laws to Puerto Rico and creation of a federal district court could not overcome the negative implications rebutting incorporation.[98]

While all the indices of incorporation relied upon in *Rassmussen* were present in *Balzac*, Puerto Rico remained unincorporated territory. The Court for the first time expressly linked incorporation with the prospect of statehood[99] and drew the following distinction between the territories:

> Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents . . . .[100]

That passage may have suggested the unspoken premise of the incorporation doctrine; that is, incorporated territories were those which the Court presumed eventually would be settled in their majorities by the Caucasian peoples who were (most of) the citizens (but not, of course, the entire population) of the Thirteen Original States and who eventually settled and ruled the continental United States. Those territories which in likelihood would remain primarily populated by nonwhite indigenous peoples would be in a separate status.[101]

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[93] *Id.* at 305.
[94] Act of Mar. 2, 1917, ch. 145, 39 Stat. 951.
[95] 258 U.S. at 307-08.
[96] *Id.* at 306.
[97] *Id.* at 306-07.
[98] *Id.* at 311-12.
[99] *Id.* at 311.
[100] *Id.* at 309.
[101] *See* text accompanying notes 104-05 *infra*.

It is tempting here to speculate on the fact that so many of these cases involved juries and grand juries.[102] To the extent that the jury system is designed to interpose community sentiment between government and citizenry, it would have been unthinkable for most of the overtly colonial governments of the period to allow members of the indigenous territorial population to serve as jurors or grand jurors. In this same vein, two of the Supreme Court decisions on territorial status had the effect of affirming seditious libel convictions against anti-government newspaper writers.[103] These facts tend to support a conclusion that the incorporation doctrine initially was designed to separate those territories that were to be self-governing from those that would be governed from without, and thus reflected a colonial mentality.

Whatever motives may be imputed to the incorporation doctrine, *Balzac* made clear that congressional intent controls incorporation, thereby reviving the extension doctrine under a different name. It appears that the battle between Justices Brown and White may have been more over who would be remembered as the father of territorial law than over the substance of the doctrine which prevailed for at least a half century.

C. Modern Reappraisal

After 1922 the incorporation doctrine was the law of the land in the sense that it was firmly established by a unanimous precedent of the Supreme Court in *Balzac*. Furthermore, the status of several territories had been determined. Alaska was incorporated;[104] Puerto Rico, Hawaii, and the Philippines were unincorporated.[105] In Alaska the Constitution was thus fully applicable. In the other territories only those provisions which protected fundamental rights were operative. A modern reappraisal of the early territorial law, however, has cast doubt on the continued validity of the infrequently considered incorporation doctrine and has returned the Court to its former divided posture.

Following *Balzac*, the Supreme Court did not comment significantly on the general theory of the *Insular Cases* until *Reid v. Covert*,[106] decided in 1957. The decision, issued on rehearing,[107] consolidated appeals of two habeas corpus actions. In each case the wife of a military officer was

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[102] *See* note 4 *supra*.

[103] 258 U.S. at 300, 314; Dorr v. United States, 195 U.S. 138, 149-53 (1904).

[104] Rassmussen v. United States, 197 U.S. 516 (1905).

[105] Balzac v. Porto Rico, 258 U.S. 298 (1922)(Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914)(Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (Hawaii).

[106] 354 U.S. 1 (1957).

[107] During the previous term, the Court had affirmed the court-martial convictions, Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (1956). Justice Harlan, who voted with the majority on both occasions, supported the petitions for rehearing, 354 U.S. at 65 (Harlan, J., concurring).

charged with the murder of her husband on a United States base located in a foreign country. Each defendant was found guilty by a court-martial, and each was sentenced to life imprisonment. The writs of habeas corpus were sought on the grounds that congressional legislation purporting to subject civilian dependents accompanying military personnel in foreign countries to court-martial jurisdiction violated the defendants' sixth amendment right to trial by jury.

The cases therefore involved the application of the Constitution to an American enclave in a foreign nation rather than to citizens of a United State territory. The positions of the parties were, however, analogous to those taken in the *Insular Cases* where the plenary power of Congress under the territorial clause was tested. The Government argued in *Covert* that the "necessary and proper" clause[108] together with the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces"[109] gave Congress broad authority to legislate with respect to military affairs. Relying on the *Insular Cases*,[110] the government further contended that when such powers are exercised outside the United States, constitutional restraints are not fully applicable even when the legislation affects American civilians. Defendants maintained that nonmilitary citizens are entitled to a jury trial in any criminal proceeding prosecuted by the United States irrespective of the situs of the crime or the trial.

Justice Hugo L. Black wrote the plurality opinion of the Court sustaining the defendants' constitutional claim. In his view, all authority of Congress derives from the Constitution and is limited by it.[111] Although a certain degree of latitude regarding legislation for the military may be implied from specific constitutional provisions, no concept of expediency or felt necessity would justify the same degree of flexibility with regard to the constitutional rights of nonmilitary citizens.[112]

Justice Black denounced the *Insular Cases* as espousing a "very dangerous doctrine" based on expediency[113] at the same time that he distin-

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[108] U.S. CONST. art. I, § 8, para. 18.

[109] *Id.* para. 14.

[110] The Government also relied upon *In re* Ross, 140 U.S. 453 (1891), the leading consular case. 354 U.S. at 10. In the 19th century, Congress had given American consuls broad powers to define crimes, penalties, and procedures, and to try United States citizens in those countries that would relinquish jurisdiction over Americans. Some of the consular courts had been roundly criticized for their Draconian punishments and disregard of due process. Justice Black, writing for a plurality in *Covert*, explained that the consular system had been repudiated and repealed by Congress, and thus the *Ross* approach which denied application of the Constitution abroad was discredited precedent. *Id.* at 12. *But see id.* at 74-75 (Harlan, J., concurring).

[111] 354 U.S. at 5-10.

[112] *See id.* at 34-35. This view is very similar to the language employed by the first Justice Harlan dissenting in *Downes*. *Compare id.* at 14, *with* Downes v. Bidwell, 182 U.S. 244, 386-87 (Harlan, J., dissenting).

[113] 354 U.S. at 14. *Accord*, United States v. Tiede, Crim. Nos. 78-001, 78-001A, slip op. at

guished them.

> The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. . . . Moreover, it is our judgment that neither the [Insular C]ases nor their reasoning should be given any further expansion.[114]

This attempt to distinguish the *Insular Cases* ignored the gloss put on them by *Balzac* where Puerto Ricans *had* become United States citizens by virtue of the Jones Act.[115] The very weakness of the distinction, however, gave added weight to the concomitant disapprobation of the territorial decisions. It may have been precisely the relevance to *Covert* of the *Insular Cases*, even without their expansion, that prompted the harsh criticism of the earlier Court's rationale. The two concurring opinions (at least one of which was necessary to make a majority) were neither hostile to the theories of the *Insular Cases* nor did they rely on the distinction made in the plurality opinion.[116]

What Justice Black had seen as a concession to expediency in the territorial decisions, Justice Felix Frankfurter saw as the balancing of interests[117] that was at the heart of his theory of constitutional adjudication, and he generally approved of the *Insular Cases* for that reason. In Justice Frankfurter's view, however, those cases did not control the outcome in *Covert* because the territorial provision of the Constitution was not at issue there.[118]

Justice John M. Harlan concurred on similar grounds, asserting that the *Insular Cases*, "properly understood, still have vitality."[119] Both Justices construed the territorial cases to mean "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."[120] Thus, the analysis required in *Covert* was compatible with the *Insular Cases*, and described by Justice Harlan as follows:

> [T]he question is *which* guarantees of the Constitution *should* apply in view of

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36-37 (Ct. Berlin Mar. 14, 1979), *reprinted in* 19 INT'TL LEGAL MATERIALS 179, 197 (1980).

[114] 354 U.S. at 14.

[115] *See* text accompanying notes 92-98 *supra*.

[116] 354 U.S. at 65 (Harlan, J., concurring); *id.* at 41 (Frankfurter, J., concurring).

[117] *Id.* at 53 (Frankfurter, J., concurring).

[118] *Id.* at 53-54. Justice Frankfurter did consider the teachings of the *Insular Cases* relevant to *Covert*: "The territorial cases, in the emphasis put by them on the necessity for considering the specific circumstances of each particular case, are thus relevant in that they provide an illustrative method for harmonizing constitutional provisions which appear, separately considered, to be conflicting." *Id.* at 54.

[119] *Id.* at 67 (Harlan, J., concurring).

[120] *Id.* at 74; *see id.* at 51-53 (Frankfurter, J., concurring).

> the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it. . . .
> . . . The Government, it seems to me, has made an impressive showing that at least for the run-of-the-mill offenses committed by dependents overseas, such a [jury trial] requirement would be *as impractical and as anomalous* as it would have been to require jury trial for Balzac in Porto Rico.[121]

The controlling factor for both concurring opinions was that the women were charged with capital offenses.[122] These were not "run-of-the-mill" cases. It was neither impractical nor anomalous to require the Government to conduct jury trials when the lives of civilian defendants hung in the balance, notwithstanding the difficulties inherent in doing so when the crimes took place on military bases in foreign countries.[123]

Although the continued validity of the *Insular Cases* was placed in doubt by the plurality opinion in *Covert*, a majority of the Supreme Court endorsed the territorial cases as recently as 1979. In *Terrol Torres v. Puerto Rico*[124] the question was whether the fourth amendment prohibition against unreasonable searches and its exclusionary rule are applicable throughout Puerto Rico. The entire Court agreed that the principles do apply, but did not decide whether the result derived from direct application of the constitutional provision under the incorporation doctrine or by incorporation—in the other sense—of the fourth amendment into the

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[121] *Id.* at 75-76 (Harlan, J., concurring)(footnote omitted)(emphasis added at "as impractical and as anomalous"). This represents an application of the principle Justice Harlan derived from *In re* Ross, 140 U.S. 453 (1891), *discussed in* note 110 *supra*, and the *Insular Cases*, to the effect that "there is no rigid . . . rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the gurantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether *impracticable and anomalous*." 354 U.S. at 74 (emphasis added).

[122] 354 U.S. at 77-78 (Harlan, J., concurring); *id.* at 45-46 (Frankfurter, J., concurring). See note 252 *infra*.

[123] When the United States Court for Berlin convened for the first time in 1979, the issue was whether defendants had a right to a jury trial under the United States Constitution. The court found the *Insular Cases* inapposite because they would govern only if "German courts sitting in the American Sector of Berlin were asserting jurisdiction in a criminal case and the defendants demanded rights guaranteed by the United States Constitution by virtue of the fact that the United States exercises 'supreme authority' in that sector." United States v. Tiede, Crim. Nos. 78-001, 78-001A, slip op. at 35 (Ct. Berlin Mar. 14, 1979), *reprinted in* 19 INT'L LEGAL MATERIALS 179, 196 (1980). The court held that the constitutional guarantee applies because the United States Government, not German authorities, was acting as prosecutor and because the proceeding invoked the jurisdiction of a federal court. Although the *Tiede* court emphasized factual differences intended to distinguish the latter *Insular Cases* involving criminal procedure, *see* note 4 *supra*, the distinction has not been made previously under the *Insular Cases* doctrine. In *Downes*, where the doctrine originated, the statute in question was a United States tariff created by act of Congress and collected by a federal customs official at the New York port, and the original action was brought in federal court.

[124] 99 S. Ct. 2425 (1979).

due process clause.[125]

Chief Justice Warren E. Burger, writing for the Court, cited approvingly to latter *Insular Cases*[126] and explained that Justice White's concurring opinion in *Downes* "emphasized that full application of the Constitution to all territory under the control of the United States would create such severe practical difficulties under certain circumstances as to pro-

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[125] *Id.* at 2429. The Court cited Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), for the proposition that the due process clause of either the fifth or 14th amendment applies to Puerto Rico, but the territorial issue was not discussed fully in that case, *id.* at 668-69 & n.5. The Court held that neither due process nor the takings provision of the fifth amendment prevented forfeiture of an innocent boatowner's vessel where it had been used to transport illegal drugs. *Id.* at 678-79, 686-90. Two years later, the Court again declined to decide whether it was by virtue of the fifth or 14th amendment that due process and equal protection guarantees apply to Puerto Rico. Examining Board v. Flores de Otero, 426 U.S. 572, 600-01 (1976).

The *Calero-Toledo* and *Flores de Otero* precedents conflict with the Court's cursory treatment of an equal protection challenge in Califano v. Torres, 435 U.S. 1 (1978). There the Court considered a claim that exclusion of Puerto Rico from the supplemental security income (SSI) program of the Social Security Act infringed the right to travel and contravened equal protection guarantees. Appellees had received benefits under the SSI program in mainland states before moving to Puerto Rico where benefits were terminated. The Court assumed that the unqualified right to travel interstate included Puerto Rico but concluded that the right was not infringed by a denial of benefits. In a footnote, the Court dismissed the equal protection claim based on the due process clause of the fifth amendment.

> Acceptance of that claim would have meant that all otherwise qualified persons in Puerto Rico are entitled to SSI benefits, not just those who received such benefits before moving to Puerto Rico. But the District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Puerto Rico has a relationship to the United States "that has no parallel in our history." *Examining Board v. Flores de Otero*, 426 U.S. 572, 596 (1976).

435 U.S. at 3 n.4.

In Harris v. Santiago Rosario, 100 S. Ct. 1929 (1980), the Court upheld that portion of the federal AFDC statute which provides less assistance to Puerto Rico than the states in meeting the needs of dependent children. The district court had ruled that the law violated the equal protection component of the fifth amendment, and the Supreme Court summarily reversed. *Id.* at 1930. The Court compared its analysis in *Rosario* with *Torres* and found them consistent. The majority reasoned that Congress, empowered under the territorial clause, "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Id.* Dissenting Justice Marshall contended that (1) the majority lacked authority for its analysis, (2) *Torres* did not state the rule announced by the majority, (3) *Torres* did not thoroughly consider the equal protection issue, (4) there is an apparent conflict between the *Insular Cases* and more recent decisions of the Court, and (5) even the rationality for disparate treatment was not established. *Id.* at 1930-32 (Marshall, J., dissenting). Justices Brennan, Blackmun, and Marshall would have set the case for oral argument.

The Court's failure to fully explain the holdings in *Rosario*, *Torres*, and *Flores de Otero*, respectively, undermines the strength of these precedents. *See also* Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970)(abstention doctrine applied to due process challenge regarding retrospective application of law governing dealer contracts where supreme court of Puerto Rico had not construed the territorial statute).

[126] 99 S. Ct. at 2428-29 (citing Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Downes v. Bidwell, 182 U.S. 244 (1901)).

hibit the United States from exercising its constitutional power to occupy and acquire new lands."[127] Ultimately, the national interest and considerations of fairness controlled the analysis,[128] which also reflected the incorporation doctrine's deference to congressional intent.

> Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling. . . . Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico. . . . However, because the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight.[129]

Thus, the Court relied on congressional extension in 1917 of equivalent fourth amendment protections and later congressional authorization for a Puerto Rican constitution, provided it contain a Bill of Rights.

Justice William J. Brennan, Jr., the only remaining member of the *Covert* plurality which denounced the *Insular Cases*, concurred in the holding that the isolated airport search of Terry Terrol Torres' luggage was unconstitutional absent probable cause and the marijuana obtained thereby should have been excluded at trial.[130] The sole purpose of the concurring opinion, representing the views of four Justices, was to dispute the relevance of the *Insular Cases*. "[T]hose cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."[131]

Torres therefore indicates that the Court is split again as to the validity of the incorporation doctrine. Yet, the current positions are marked by a lack of attention to the subject and vagueness with respect to the analytical bases for the divergent opinions.[132] This is the framework within which similar issues regarding American Samoa laws must be resolved, a subject to which we now turn.

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[127] 99 S. Ct. at 2428.

[128] *Id.* at 2429.

[129] *Id.* (citations omitted).

[130] *Id.* at 2431 (Brennan, J., concurring, joined by Stewart, J., Marshall, J., and Blackmun, J.).

[131] *Id.* at 2432. Applying the *Insular Cases* to Puerto Rico in *Torres* is hardly an expansion of the precedents but rather employs the earlier principles in the exact context in which they arose, the question of the application of the Constitution in a territory. *Covert* did involve significantly different facts so that application of the *Insular Cases* there could be considered an expansion of earlier principles, although the analogy was close. *See* text accompanying notes 113-16 *supra*.

[132] *See* Harris v. Santiago Rosario, 100 S. Ct. 1929, 1931 (Marshall, J., dissenting); note 125 *supra*.

II. American Samoa: A Case Study

During the nineteenth century, the United States became interested in Samoa as a potential naval coaling station,[133] for which the sheltered, deep-water bay at Pago Pago was peculiarly well suited. In 1899, the islands became the subject of a treaty to which the United States, Great Britain, and Germany were signatories.[134] The United States relinquished all claims to Samoan islands west of the 171st meridian, west of Greenwich, while Germany and England forfeited any rights to the islands east of the meridian.[135]

In 1900 and 1904, the United States obtained Articles of Cession signed by most of the senior *matai* or chiefs of the islands now comprising American Samoa.[136] Even before the first of these Articles was signed, President McKinley, by Executive order, had authorized the construction of a naval coaling station at Pago Pago.[137] American control of the eastern islands continued from that date.

Congress did not accept formally the Articles of Cession until 1929[138] and never has adopted an organic act for the territory. The 1929 legislation consolidates Executive control over the territory:

> Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.[139]

In 1951 the naval station was closed, and the President transferred the administration of American Samoa from the Secretary of the Navy to the

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[133] L. Holmes, Samoan Village 52 (1974)[hereinafter cited as Holmes]; Leibowitz—Samoa, *supra* note 7, at 227-28. *See* Downes v. Bidwell, 182 U.S. 244, 311 (1901)(White, J., concurring).

[134] Convention Respecting Samoan Islands, Dec. 2, 1899, United States-Germany-Great Britain, 31 Stat. 1878, T.S. No. 314.

[135] *Id.* art. II.

[136] The 1904 document expressly preserves Samoan customs regarding property rights.

> It is intended and claimed by these Presents that there shall be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein, and also that *the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized.*

Cession of Manu'a Islands, July 16, 1904, *reprinted in* I Am. Samoa Code 9, 10 (1973)(emphasis added). The 1900 instrument of cession is less specific in this regard. *See* Cession of Tutuila and Aunuu, Apr. 17, 1900, § 2, *reprinted in* I Am. Samoa Code 6 (1973 & Supp. 1979). See note 291 *infra*.

[137] Navy Dep't, General Order No. 540 (Feb. 19, 1900), *reprinted in* I Am. Samoa Code 13 (1973)(incorporating President McKinley's Executive Order within the Navy document).

[138] Act of Feb. 20, 1929, ch. 281, 45 Stat. 1253 (codified at 48 U.S.C. § 1661(a) (1976)).

[139] 48 U.S.C. § 1661(c) (1976).

Secretary of the Interior.[140] Samoa therefore continues to be an "unorganized" territory, unincorporated into the Union.[141] That has not precluded Samoans from adopting many Western institutions.

The revised Consitution of American Samoa took effect in 1967.[142] It was proposed a year earlier by a constitutional convention held in Fagatoga, the seat of Samoa's legislature, and approved in a referendum of the electorate.[143] The legal force of the document nevertheless derives from the fact that it was approved and promulgated by the Secretary of the Interior.[144] The constitution delineates a tripartite structure of government resembling that of the United States,[145] but each branch has its subtle and not-so-subtle differences largely based on traditional Samoan culture.

In order to discuss the interface between constitutional provisions of the United States and the laws of Samoa, an understanding of Samoan culture and governmental structure is required. The following description is designed to provide background for that discussion and is not an exhaustive explication of either the social or legal system of American

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[140] Exec. Order No. 10264, 3 C.F.R. 765 (1949-1953 Compilation), *reprinted in* 48 U.S.C. § 1662 note (1976).

[141] American Samoa has had two study commissions on future political status which have considered the following alternatives to the current relationship with the United States. (Possible drawbacks are noted parenthetically.)

1. Statehood (American Samoa is probably too small and geographically remote to be seriously considered by Congress as a State).

2. Assimilation into the State of Hawaii (Hawaii is over two thousand miles from Samoa and the needs of the smaller Samoan population, geographically isolated from the capital, would likely be neglected).

3. Independence (Samoa is perhaps too small to become a viably independent economic and political entity).

4. Merger with the Independent Republic of Western Samoa (Samoans would lose their rights and privileges as United States nationals which, *inter alia*, would endanger their ties with kinspeople residing in states. Negotiations for satisfactory terms with the Republic might be difficult and prevent American Samoa from achieving its political, economic, and cultural goals).

5. Organized United States territory (This could result in more strict application of the Constitution in Samoa and creation of a government more closely paralleling that of states, with the resultant adverse impact on Samoan culture that is the subject of this article. Although the first two alternatives also would affect the applicability of the Constitution in Samoa, they would at least provide greater benefits and representation to the Samoan population than would mere organization).

See generally Report from the Second Future Political Status Commission to the Governor of American Samoa and the Fifteenth Legislature of American Samoa, Second Regular Session (1979); Report of the Political Status Commission (1970).

[142] The first constitution was adopted in 1960.

[143] AM. SAMOA CONST. art. V, § 11.

[144] *Id.*

[145] *Id.* art. II (legislative branch), art. III (judicial branch), art. IV (executive branch).

Samoa.

A. A Brief Survey of Samoan Culture and Legal Institutions

The basic social unit in traditional Samoan society is the *'aiga*, described by anthropologists as a cognatic descent group.[146] That means all members of an *'aiga* trace their heritage to a common ancestor who thus defines the group. The relationship of a member may be established either through paternal or maternal lines or a combination thereof. A given individual may be eligible for membership in a number of *'aiga*, but for practical reasons active membership is usually maintained in only one *'aiga* at a time.[147] *'Aiga* vary in membership from a dozen or so individuals to over one thousand. Larger *'aiga* may be divided into subunits known as *faletama*. The smallest unit in the *'aiga* or *faletama* is the extended household.

The land of an *'aiga* is owned in common. Although some individual land ownership is recognized today, more than ninety percent of the land in American Samoa is held by the various *'aiga* as tribal property.[148]

The property and affairs of an *'aiga* are administered on behalf of the members by a high chief or *matai*.[149] Lesser ranking *matai* preside over *faletama* and households.[150] *Matai* are selected in family councils and serve for life unless removed. While primogenator is not practiced per se, ancestry is strongly considered along with leadership ability and knowledge of Samoan custom in the *matai* selection process.[151] The choice attempts to reflect consensus of the *'aiga* (rather than a simple majority),

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[146] *See generally* HOLMES, *supra* note 133, at 19; M. MEADE, SOCIAL ORGANIZATION OF MANUA 40 (1930)[hereinafter cited as MEAD]; Leibowitz—Samoa, *supra* note 7, at 221-25; Tiffany, *The Cognatic Descent Groups of Contemporary Samoa*, 10 MAN (n.s.) 430 (1975); Tiffany, *Entrepreneurship and Political Participation in Western Samoa: A Case Study*, 46 OCEANIA 85 (1975)[hereinafter cited as Tiffany].

[147] Tiffany, *supra* note 146, at 85-86.

[148] Leibowitz—Samoa, *supra* note 7, at 239 (92% communal landholdings); Lutali & Stewart, *A Chieftal System in Twentieth Century America: Legal Aspects of the* Matai *System in the Territory of American Samoa*, 4 GA. J. INT'L & COMP. L. 387, 391 (1974)[hereinafter cited as Lutali & Stewart] (96% communal landholdings). Certain fee simple titles created prior to American control of the islands are freely alienable. These constitute about three percent of the total land in American Samoa today. All figures are at best rough estimates. First, most of the landholdings in Samoa are neither surveyed nor recorded by written instruments. Second, there are undoubtedly many conflicting claims that have not been settled by litigation. Moreover, land that was thought to be communal is sometimes successfully claimed by individuals. Nouata v. Pasene, App. No. 007-79 (H.C.A.D. Am. Samoa July 11, 1980). Individual land is different from freehold land, *see* note 181 *infra*.

[149] *See generally* Lutali & Stewart, *supra* note 148, at 391-93.

[150] HOLMES, *supra* note 133, at 18-20.

[151] *See generally* Tiffany, *The Role of the High Court in Matai Succession Disputes in American Samoa*, 5 SAMOAN PAC. L.J. 11, 17, 26-27 (1979) [hereinafter cited as Tiffany—High Court].

and the process therefore is often protracted.

While present *matai* have nothing close to the life-or-death powers possessed by their predecessors in precontact days, they continue to exercise important authority.[152] Modern *matai* jurisdiction includes the following: (1) Allocation of *'aiga* land to members for house sites and cultivation; (2) assessment of labor, goods, and money for ceremonial redistribution and for *'aiga*- and village-sponsored projects; (3) custody and maintenance of other *'aiga* assets, such as an official house or a bank account; (4) mediation and arbitration of intra- and inter-*'aiga* disputes; (5) representation of the *'aiga* in *fono* (councils) at district, village, or other levels.[153]

Samoan society also is organized horizontally on an inter-*'aiga* basis. Each village has a *fono* composed of chiefs from each *'aiga* represented in the village; district *fono* are structured analogously. Vestiges of islandwide *fono* may still exist, but the Great *Fono*, made up of chiefs from the entire Samoan archipelago (the area now comprising both American Samoa and the Independent Republic of Western Samoa), has not met in modern times. Reference to rank in the Great *Fono*, however, determined the relative status of chiefs.[154] Other inter-*'aiga* councils deal with matters of special concern that affect more than one *'aiga*. These include the *aumaga* or council of untitled men and the *aualuma*, the village women's association.[155]

While traditional Samoan social organization does not comport exactly with the American model of representative government, there is much citizen involvement and more than a semblance of participatory democracy. Although the basic concepts of Samoan polity are somewhat different from our own, the governmental structure attempts to accommodate the difference.

1. The Legislature.—Samoa has a bicameral legislature called the *Fono* after the traditional Samoan council of chiefs. The name literally translated means gathering of the titles. Any United States national at

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[152] In Tiumalo v. Fuimaono, 1 A.S. 17, 19-20 (H.C.T.D. 1900), the high court considered obsolete the traditional means of removing *matai* by force. Thus, in a sense, American intervention in Samoan land disputes may be seen as protective of the incumbent *matai*. *Matai* authority over land is now subject to judicial review, but the *matai* is protected against violent overthrow. While there is a statutory procedure for removing a *matai*, AM. SAMOA CODE tit. 1, § 801 (Supp. 1979), it is seldom invoked and even less often successful. On balance, then, it is not clear that the relative power of the *matai* is weakened. *But see* Leibowitz—Samoa, *supra* note 7, at 233-38; note 294 *infra*.

[153] HOLMES, *supra* note 133, at 22-31. While the terms of the traditional *matai* trust are not clearly defined, many Samoans assert that there are certain customary restrictions on *matai* authority over land. For example, it is contended that use rights are not to be terminated or reassigned without good cause. Tiffany, *High Court Influences on Land Tenure Patterns in American Samoa*, 49 OCEANIA 258, 265-68 (1979). Cf. Fiailoa v. Meredith, 2 A.S. 129, 133-35 (H.C.T.D. 1941)(allocation of use rights terminated with death of *matai* who granted them).

[154] *See* MEAD, *supra* note 146, at 10-18.

[155] *See* HOLMES, *supra* note 133, at 31-32; MEAD. *supra* note 146, at 92-93.

least twenty-five years of age who has resided in American Samoa for five years is eligible to run for the lower chamber, the house of representatives,[156] and house members are chosen by secret ballot in a general election.[157] Eligibility for office in the upper house is quite different: Senators must hold a *matai* title[158] and are selected not by the electorate but by other *matai* in their respective county *fono*.[159] A number of potential constitutional problems are implicit in this accommodation to Samoan custom.[160]

2. *The Executive.*—Since 1977, the Governor and Lieutenant Governor of American Samoa have been elected by the people of Samoa.[161] Prior to that time the executive was appointed by the Secretary of the Interior. The Governor has the power to issue executive regulations (presumably on any subject) so long as they do not conflict with the laws or constitution of Samoa or with applicable United States law.[162] The Governor's veto of legislation can be overridden by the *Fono* only if the Secretary of the Interior approves.[163] The Governor thus is in the anomalous position of being elected by the people but at the same time being answerable to the Secretary, through whom he derives authority.[164]

3. *The Judiciary.*—The High Court of American Samoa was created by the Samoan constitution promulgated by the Secretary of the Interior rather than by Congress pursuant to article III of the Constitution. Justices are appointed by the Secretary, and appointees typically have been non-Samoan lawyers.[165] Associate judges are appointed by the Governor[166] and traditionally have been Samoan *matai* who in most cases have no formal legal training. Justices and judges of the high court alternate

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[156] AM. SAMOA CONST. art. II, § 3. Samoans are nationals at birth. *See* note 204 *infra*.

[157] AM. SAMOA CONST. art. II, § 4.

[158] *Id.* § 3. Eligibility for succession to *matai* title requires, *inter alia*, that the person be "of at least one-half Samoan blood", AM. SAMOA CODE tit. 1, § 751 (1973), and priority generally is given to males over females, *id.* tit. 1, § 757 (c)(1), *quoted in* note 174 *infra*.

[159] AM. SAMOA CONST. art II, § 4.

[160] Note, *The Application of the American Constitution to American Samoa*, 9 J. INT'L L. & ECON. 325, 347-50 (1974); note 175 *infra* and accompanying text.

[161] Dep't of Interior, Secretary's Order No. 3009 (Sept. 13, 1977), *reprinted in* I AM. SAMOA CODE 5 (Supp. 1979)(amending AM. SAMOA CONST. art. IV). The territory only recently became entitled to elect nonvoting delegates to the House of Representatives. 48 U.S.C. §§ 1731-1733 (Supp. II 1978).

[162] AM. SAMOA CONST. art. IV, § 6.

[163] *Id.* art. II, § 9.

[164] Prior to 1977, the constitution provided that the Governor "shall perform his duties under the general supervision of the Secretary of the Interior." *Id.* art. IV, § 2 (1966, amended 1977). The amended section deleted the reference to the Secretary and now mandates that the elected executives "serve in accordance with the laws of American Samoa," but the fact that the amendment itself was made by order of the Secretary, *see* note 161 *supra*, illustrates the Secretary's ultimate control over the Governor.

[165] AM. SAMOA CONST. art. III, § 3; AM. SAMOA CODE tit. 5, § 201 (1973). *See generally* Comment, *supra* note 7.

[166] AM. SAMOA CODE tit. 5, § 204 (Supp. 1979).

among trial, land and *matai* titles, and appellate panels.[167]

The territory of American Samoa is not within a federal judicial district or circuit, and there is no prescribed channel for appealing decisions of the high court off the islands. A 1975 case, however, established that actions of the high court can be attacked collaterally, if federal court jurisdictional requirements are met, by bringing suit against the Secretary of the Interior in the United States District Court for the District of Columbia.[168] Although that course is not a particularly practical mode of review for most litigants, given the distance between Samoa and the District, practitioners are well aware of this collateral procedure and seriously consider the option in discussing important litigation.

4. Unique Samoan Legal Institutions.—In the early days of American governance of Samoa, the Commandant of the naval station served both as Governor and presiding judge.[169] The first governor-judge quickly learned that disputes involving land and *matai* titles would occupy a major portion of his attention.[170]

Since 1906 the United States Government has required registration of *matai* titles before they are exercised.[171] Challenges to proffered registrations are resolved by a justice and four associate judges, which generally means Samoan judges control the results.[172] Through the years, the legal standards for resolving such disputes have been codified and recodified by the *Fono*.[173] The present criteria may require the court to decide, in effect, which candidate it believes has the qualities most likely to make a good *matai*.[174]

Government involvement in the *matai* selection process arguably constitutes the grant of a title of nobility which is prohibited by the United States Constitution.[175] On the other hand, it is clear that the *matai* sys-

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[167] *Id.* tit. 5, § 408.

[168] King v. Morton, 520 F.2d 1140 (1975).

[169] Commander B.F. Tilley was the first Commandant of the United States Naval Station at Tutuila and was ex-officio the first presiding judge of the High Court of American Samoa.

[170] *See, e.g.*, Tiumalo v. Fuimaono, 1 A.S. 17 (H.C.T.D. 1900).

[171] Tiffany—High Court, *supra* note 151, at 14.

[172] AM. SAMOA CODE tit. 5, § 408(d) (Supp. 1979).

[173] Tiffany—High Court, *supra* note 151, at 25-28.

[174] In the trial of title cases, the High Court shall be guided by the following considerations, in the priority listed:

(1) The best hereditary right, as to which the male and female descendants shall be equal in families where this has been customary; otherwise, the male descendant shall prevail over the female.

(2) The wish of the majority or plurality of those clans of the family as customary in that family.

(3) The forcefulness, character and personality of the persons under consideration for the title, and their knowledge of Samoan customs.

(4) The value of the holder of the title to the family, village and country.

AM. SAMOA CODE tit. 1, § 757(c) (1973).

[175] *See* Downes v. Bidwell, 182 U.S. 244, 277 (1901)(prohibition against granting title of nobility, U.S. CONST. art. I, § 9, applies to territories)(dictum). This issue is discussed in

tem is at the heart of traditional Samoan culture. If the United States did not recognize the authority of the *matai* it could hardly claim to be honoring its promise to preserve *fa'a Samoa*, the Samoan way.[176]

The Navy discovered that it was impossible to recognize *matai* authority without knowing who the *matai* were. Several Samoans have suggested to the author that government need not have become so deeply involved in the *matai* selection process, that it was American impatience with the slow but deliberate workings of the traditional procedure which caused United States involvement. While this analysis may be valid, it is also true that among the first cases Samoans brought to the court created by the Navy in 1900[177] was a *matai* title dispute.[178] Furthermore, the *Fono* has participated in the formulation of legal standards that incorporate judicial review of candidates' qualifications for *matai*.[179]

5. Land Alienation Restrictions.—The restrictions on land alienation may be the most drastic and significant deviation of Samoan law from American legal norms. Samoa's constitution specifically authorizes such legislation and establishes an extraordinary amendatory procedure.

> SECTION 3. *Policy Protective Legislation*: It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.[180]

Note, *supra* note 160, at 347-50. It will not be elaborated here. Other constitutional considerations arising from equal protection guarantees regarding the blood quantum requirement, *see* note 158 *supra*, and preference for male *matai* succession, *see* note 174 *supra*, present potentially serious questions regarding the validity of the *matai* structure. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971)(automatic preference for male executor unconstitutional). *But cf.* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(denying private action against Pueblo Tribe where plaintiff challenged membership ordinance as impermissible sex discrimination in violation of the equal protection guarantees incorporated into the Indian Civil Rights Act of 1968). The equal protection considerations must be viewed in light of the importance that the *matai* system has for the Samoan culture. *See Organic Act Memorandum, supra* note 1, at 32-35 (matai system and communal lands are essential to Samoan culture). The analytical approach advocated in this article and applied to Samoa's land alienation restrictions would be applicable to the *matai* system and present a sound basis for determining that the current system should prevail.

[176] *See Organic Act Memorandum, supra* note 1, at 55.

[177] The first Commandant of the United States Naval Station at Tutuila created the high court and put himself on the bench. Tiffany—High Court, *supra* note 151, at 12.

[178] Tiumalo v. Fuimaono, 1 A.S. 17 (H.C.T.D. 1900).

[179] AM. SAMOA CODE tit. 1, § 751 (1973).

[180] AM. SAMOA CONST. art I, § 3.

Implementing legislation virtually prohibits alienation of land to persons of less than fifty percent Native Samoan ancestry.

> (a) It is prohibited for any matai of a Samoan family who is, as such, in control of the communal family lands or any part thereof, to alienate such family lands or any part thereof to any person without the written approval of the Governor of American Samoa.
>
> (b) It is prohibited to alienate any lands except freehold lands to any person who has less than one-half native blood, and if a person has any nonnative blood whatever, it is prohibited to alienate any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than five years and has officially declared his intention of making American Samoa his home for life.
>
> (c) If a person who has any nonnative blood marries another person who has any nonnative blood, the children of such marriage cannot inherit land unless they are of at least one-half native blood.[181]

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[181] AM. SAMOA CODE tit. 27, § 204 (1973). In February 1980 the Land and Titles Division of the High Court of American Samoa held invalid as against public policy the 1968 conveyance of 0.236 acres of communal land to the Government which in turn was conveyed to the Burns Philp Company for the site of a store. Atufili v. Burns Philp (South Sea) Co., LT. No. 014-79 (H.C.L.T.D. Am. Samoa Feb. 29, 1980). The 1962 version of the land alienation legislation was at issue rather than the current version, but both laws are equally vulnerable for the reason that they were not passed by two successive legislatures as required by the American Samoa constitution, AM. SAMOA CODE tit. 27, § 201 Revision note (1973). In *Atufili* the court invalidated the 1962 law. This merely had the effect of reinstituting a similar predecessor statute from the 1949 Code which for the same reason was not validly repealed.

The important *Craddick* decision upheld the current land alienation laws, a majority of the appellate division having held that the issue of invalid enactment was not timely raised. Craddick v. Territorial Registrar, App. No. 010-79 (H.C.A.D. Am. Samoa Apr. 23, 1980), *discussed in* notes 271-83 *infra* and accompanying text. Appellants in *Craddick* claimed that the present statute was approved by only one legislature and therefore not effective. *Id.*, slip op. at 8 (Murphy, J., dissenting). The dissent correctly pointed out that the issue of the validity of a statute *qua* statute may be raised at any time, even by the court sua sponte. The relevant statute from the 1949 Code is set out here because it may be the operative law.

> Alienation of lands in American Samoa is prohibited except under the following conditions and restrictions. It is prohibited for any matai of a Samoan family who is, as such, in control of the communal family lands or any part thereof to alienate such family lands or any part thereof to any person without the written approval of the Governor of American Samoa. It is prohibited to alienate any lands except freehold lands to any person who has less than *three-quarters native blood*. If such a person has any non-native blood whatever, it is then prohibited to alienate any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, and has lived in American Samoa for more than five years and officially declared his intention of making American Samoa his home for life. If such a person who has any non-native blood whatever marries another person who has any non-native blood whatever, the children by such marriage cannot inherit land unless they are of at least *one-half native blood*. Provided, however, that this regulation shall not prohibit the conveyance and transfer of native land for governmental purposes to the United States Government or to the Government of American Samoa or to a lawful agent or trustee thereof; provided further, that this regulation shall not prohibit the conveyance and

Samoa's statutory scheme clearly is based upon two assumptions: (1)Large numbers of Samoans may be induced to sell their land if free alienation is permitted; and (2) the resulting economic dislocation would destroy their culture and leave them a dispossessed people in their native islands. As proof that this can happen, advocates of the restrictions point to the experience of Polynesians in Hawaii.[182]

Native Hawaiians have lost most of their land.[183] The language is in

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transfer, in the discretion and upon the approval of the Governor, to an authorized, recognized religious society of sufficient land for the erection theron of a church or a dwelling house for the pastor or both; and provided further, that the reconveyance and retransfer of such land shall be only to native Samoans and in the discretion and upon the approval of the Governor; and provided further, that the true children of the present record title holder of Swain's Island (which island became a part of American Samoa some twenty-five years subsequent to the original enactment of this section and is not under the matai system) and their lineal descendants born in American Samoa shall notwithstanding the foregoing provisions, be deemed to have heritable blood with respect to said island or any part thereof, and provided further, that a devise otherwise valid of said island or any part thereof to any such true child of such descendant shall not be construed to be alienation in violation of this section.

AM. SAMOA CODE § 1282 (1949)(current version at *id.* tit. 27, § 204 (1973))(emphasis added).

If the 1949 Code is the operative law today, it covers only communal land, *id.* § 1287, while the current version of the land statutes governs communal and freehold lands (allowing alienation of freehold lands), and may apply to a third category, "individual" lands. Indeed, the court in *Craddick* applied the current statute to individually owned land, App. No. 010-79, slip op. at 9 (Murphy, J., dissenting). Theoretically, title to individual land is gained by clearing virgin bush. It is often argued by *'aiga* that the land is actually communal because in pre-American times all land was owned communally by some family and it is doubtful that any useable land today is really virgin. *See* Nouata v. Pasene, App. No. 007-79 (H.C.A.D. Am. Samoa July 11, 1980). On the other hand, the Speaker of the Samoa House of Representatives, himself a *matai*, told the author that individual ownership of land was known in ancient Samoa.

Although section 204 land restrictions have not so far been enacted by two successive legislatures, the related provision governing leases of "native land" to any person for up to 55 years, for almost any purpose, with the Governor's approval was passed by two successive legislatures. The recent amendment increased the allowable duration of such a lease from 30 to 55 years. AM. SAMOA CODE § 206 (Supp. 1979).

[182] The phrase "another Hawaii" is used often in Samoa to describe the possibility of Samoa becoming overdeveloped and Westernized. It should be noted that the loss of Polynesian culture in Hawaii was affected by many factors that have not existed in Samoa (or not existed to the same degree) and in significant measure took place in the 19th century prior to annexation. *See generally* J. Muller, *The Ancient Hawaiian* Kapu *System* 26-32 (May 4, 1980)(unpublished seminar paper on file with *University of Hawaii Law Review*). For example, within a few decades of the time Captain Cook discovered the islands in 1778, the Polynesian population of Hawaii declined from approximately 300,000 to little more than 40,000, largely due to the accidental introduction of diseases against which the Hawaiians had little or no resistance. L. FUCHS, HAWAII PONO: A SOCIAL HISTORY 4 (1961).

In 1848, King Kamehameha III, under the influence of American missionaries, initiated the Great Mahele, effecting a redistribution of land and replacing feudalistic Hawaiian custom with fee-simple property concepts. *See generally* J. CHINEN, THE GREAT MAHELE (1958). This and subsequent events left most of the land in the hands of non-Native Hawaiians. Levy, *supra* note 27, at 856-58, 866-80.

[183] It has been estimated that despite the Great Mahele, *see* note 182 *supra*, (or because

jeopardy; few persons, many of them older, converse fluently in their native tongue.[184] Although a Hawaiian renaissance may have begun,[185] Samoans seek to avert the dark ages. The comparison is particularly poignant because Samoans and Hawaiians share the same ancestral, cultural, and religious origins;[186] both territories joined the American empire in the same period;[187] and the islands are similar in topography, flora, seascape, and other aspects of natural beauty.[188] It is perhaps only Sa-

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of it) less than one percent of the total land in Hawaii is owned by Native Hawaiians. F. GRAY, HAWAII: THE SUGAR-COATED FORTRESS 49 (1972).

[184] A 1978 amendment to the Hawaii constitution may reverse this situation by providing in pertinent part as follows: "The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools." HAWAII CONST. art. X, § 4.

[185] One measure of the growing preoccupation with Hawaiian culture and the recognition that much unwritten knowledge of Hawaiian custom may become extinct is the recent establishment of the Office of Hawaiian Affairs. *Id.* art. VII, §§ 4-6, art. XVI, § 7. This new creature of government is an umbrella entity which is to serve a coordinating role in the management and dispersal of monies to which persons of Hawaiian and part-Hawaiian blood are entitled.

Upon admission to statehood, the federal government ceded to Hawaii certain lands in trust. This was accomplished by the Admission Act, which established the public trust purposes and named Native Hawaiians of 50% blood as a beneficiary. Act of Mar. 18, 1959, Pub. L. No. 86-3, §§ 5(b), 5(f), 73 Stat. 4. The Office of Hawaiian Affairs will administer 20% of the proceeds from State leases of the trust lands for the benefit of Native Hawaiians. Act 273, 1980 Hawaii Sess. Laws ___. This represents the first time that funds derived from the trust lands will be earmarked for Hawaiians because the prior practice was to use the lease proceeds for the benefit of the general public, CONF. COMM. REP. No. 76, 10th Hawaii Leg., 1st Sess. 4 (1979).

It was intended by the drafters of the constitutional provision authorizing the Office of Hawaiian Affairs that the entity would enjoy maximum autonomy, COMM. WHOLE REP. No. 13, 3d Hawaii Const. Conv. 4 (1978), and its establishment anticipates ultimate success in extracting reparations from Congress for Native Hawaiians and Hawaiians, based on analogous legislation for American Indians. *See To Establish the Native Hawaiians Study Commission: Hearing on H.R. 5791 Before the Subcomm. on National Parks and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. (1979); *Hawaiian Native Claims Settlement Study Commission: Joint Hearings Before the Subcomm. on Public Lands and Resources and the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. (1977). Thus, the entity exists as a potential receptacle for future funds which Hawaiians themselves will administer.

[186] *See, e.g.*, E. HANDY, POLYNESIAN RELIGION 46, 50, 329 (1927)[hereinafter cited as HANDY]; R. LEVY, TAHITIANS 156 (1973); R. TRUMBULL, TIN ROOFS AND PALM TREES 6 (1977).

[187] *See* text accompanying notes 27-28 *supra*.

[188] Aspects of Hawaii's exploitation of its natural beauty to develop tourism as the state's major industry have frequently been the subject of criticism. *See, e.g.*, F. GRAY, HAWAII: THE SUGAR-COATED FORTRESS (1972). Samoa's Governor Peter T. Coleman told the author in the summer of 1978 that although the Government recognizes that some increase in tourism could contribute to the economic independence of the islands, officials are very cautious about expanding tourism for fear of the impact on the Samoan culture. In 1980 the Governor's administrative assistant informed the author that tourism has declined since 1978.

Samoa purports to regulate and restrict immigration of non-Samoans. AM. SAMOA CODE tit. 9, § 371 (1973). Failure to comply with the substantial statutory requirements carries criminal penalties and threat of deportation. *Id.* §§ 377, 618. These restrictions, as applied to United States citizens, may be subject to constitutional challenge. *See, e.g.*, Shapiro v.

moa's geographical remoteness that has prevented or delayed duplication of Hawaiian history in American Samoa.

Insular peoples by definition have limited land resources. Polynesian culture is therefore land oriented and has developed social systems conducive to conservation of existing assets.[189] Samoa's increasing indigenous population continually shrinks the scarce supply of land, and the influx of outsiders has put it in critically short supply.[190]

Retaining native control of the land may be the single most important reason Samoans solicit an interpretation of the Constitution specially adapted to their needs.[191] At the same time, no other Samoan law raises more serious constitutional problems. Not only are the laws contrary to the American legal preference for free alienation,[192] but the statutory restriction involves an overtly racial classification.[193] Furthermore, when development spreads in the Pacific (as it most probably will), no other control is more likely to face a constitutional challenge.[194] Similar landholding limitations are included in the new constitution for the Commonwealth of the Northern Marianas,[195] and potential suits there raise nearly identical issues.[196]

The constitutionality of Samoa's land restriction legislation was considered by the High Court of American Samoa in 1980[197] but has yet to be

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Thompson, 394 U.S. 618 (1969); Edwards v. California 314 U.S. 160 (1941)(right to travel).

[189] *See* HANDY, *supra* note 186, at 46; Levy, *supra* note 27, at 849; Tiffany, *High Court Influences on Land Tenure Patterns in American Samoa*, 49 OCEANIA 258 (1979); Willens & Siemer, *supra* note 7, at 1407. For example, bottom fishing in American Samoa is still done only with handlines. In 1978 a study was conducted for the purpose of improving the catch by introducing the use of Western Samoan hand reels. The experiment, which proved successful, was conducted within 15 nautical miles of the main island of Tutuila. P. Mead, Report on the South Pacific Commission Deep Sea Fisheries Development Project in American Samoa 1 (South Pacific Commission, Noumea, New Caledonia 1978, in Pacific Collection of University of Hawaii Hamilton Library).

[190] The population of American Samoa has experienced a net change of 14.6% increase from 1970 to 1978, totalling an estimated 31,100 persons as of July 1, 1978. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SER. P-25, No. 872, CURRENT POPULATION REPORTS 6, tables 1 & 2 (1980).

[191] *Organic Act Memorandum*, *supra* note 1, at 32-37. *See Comment*, *supra* note 7, at 587 & n.16 (proposed organic act was withdrawn by the sponsors because they feared Congress would strike the discriminatory land restrictions).

[192] Buchanan v. Warley, 245 U.S. 74 (1917).

[193] *See* text accompanying notes 181 *supra* and 274 *infra*.

[194] While the land alienation restrictions reflect the paternalistic assumption that free alienation will lead to a massive selloff, the proposition is not unrealistic. *See* King v. Andrus, 452 F. Supp. 11, 14 (D.D.C. 1977). Cash incomes in Samoa are small, U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 877 (100th ed. 1979)(median family income in American Samoa for 1969 was $2,840), and what would be bargain prices to outsiders might be hard for Samoans to refuse.

[195] N. MARIANA ISLANDS CONST. art. XII. See note 269 *infra*.

[196] *See* Willens & Siemer, *supra* note 7, at 1392, 1405-12.

[197] Craddick v. Territorial Registrar, App. No. 010-79 (H.C.A.D. Am. Samoa Apr. 23, 1980), *discussed in* text accompanying notes 271-83 *infra*.

litigated in article III courts. The threshold question is, of course, the applicability of constitutional provisions that threaten the viability of Samoa's laws. Recent federal decisions involving jury trials in Samoa provide a workable approach, based on the *Insular Cases* and their refinement, for resolving this critical issue.

B. Jury Trials in Samoa

Congress established a pattern in writing statutory equivalents of the Bill of Rights for territories (and for American Indians and the Armed Forces) that excludes jury trials from the list of enumerated rights.[198] In *Balzac* the Court upheld the policy in part because it deemed Puerto Ricans unprepared by tradition or heritage to perform the Anglo-Saxon function of jurors.[199] Similarly, it has been argued that the Samoan culture does not engender impartiality and works against a functional jury system.[200] Viewed abstractly, such arguments are not terribly persuasive.

With the exception of the so-called Blue Ribbon Jury experiments of several decades ago,[201] American jurisprudence has eschewed the idea that a special background for jury service is desirable, opting instead for impaneling a cross section of the community, including the unsophisticated and foreign born.[202] The *Balzac* perspective, that Puerto Ricans were unfit for jury duty because of their civil-law heritage, is rather far fetched. Many mainland Americans never see the inside of a courthouse before being called for jury duty, and they or their ancestors may have emigrated from civil-law countries.[203] The suggestion that place of birth or

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[198] *See, e.g.*, 10 U.S.C. § 818 (1976)(courts-martial); 25 U.S.C. § 1302 (1976)(American Indians); 48 U.S.C. § 1406g (1976)(Virgin Islands).

[199] Balzac v. Porto Rico, 258 U.S. 298, 310 (1922). In Dorr v. United States, 195 U.S. 138, 148 (1904), the Court approved nonjury trials in the Philippines, construing the failure of Congress to extend the sixth amendment guarantee as an accommodation of the non-Anglo culture which should be allowed to develop at its own pace.

[200] King v. Andrus, 452 F. Supp. 11, 12-13 (D.D.C. 1977). Samoa had no jury trials at all prior to the *King* decision. In contrast, Puerto Rico provided jury trials in felony cases prior to the Court's decision in Balzac v. Porto Rico, 258 U.S. 298 (1922), where the jury trial requirement of the Constitution was not extended to the territory. See note 19 *supra*.

[201] The Blue Ribbon Jury was an effort on the part of New York to select juries from among the well educated to try difficult cases. The Court upheld the system, Moore v. New York, 333 U.S. 565 (1948); Fay v. New York, 332 U.S. 261 (1947), which was widely criticized as being contrary to the spirit of the jury system and susceptible of producing racially imbalanced juries. *See, e.g.*, 47 COLUM. L. REV. 463, 468-69 (1947); 60 HARV. L. REV. 613, 613-14 & n.4 (1947).

[202] All litigants entitled to trial by jury in federal courts "shall have the right to grand and petit juries selected at random from a fair cross section of the community." 28 U.S.C. § 1861 (1976). Moreover, Congress has established the policy that all United States citizens shall have the opportunity to be considered for jury duty. *Id.*

[203] *See* 28 U.S.C. § 1865 (1976 & Supp. II 1978)(federal juror qualified if 18 years of age, United States citizen, has one-year residence in judicial district, is free from conviction or charge of certain crimes, can read, write, speak, and understand English, and is not signifi-

lengthy residency specially prepares a juror is of dubious validity.[204]

At times there seemed implicit in the withholding of jury trials from territories the us-against-them philosophy that imbued the darker side of colonialism. Even in contemporary times, the Government has argued that Samoans should not be jurors because they would be reluctant to convict one of their own.[205] Assuming territorial verdicts would nullify laws, that should not in theory inveigh against adoption of the jury system. Traditionally, jurors are supposed to interpose themselves between the State and the individual, rendering convictions in accord with community conscience.[206]

The Court also has implied that a territory's preference for nonjury trials should be respected, rather than imposing a foreign form of justice.[207] One explanation for the failure of territories to guarantee jury trials of their own initiative (especially true in earlier times) is that the local leaders had to go along with federal officials to get along.[208] In other cases indigenous leaders did not trust the jury system and believed their compatriots were culturally unsuited for it. This was true of some Samoan leaders at the time *King v. Morton*[209] was decided in 1975.

1. King v. Morton: *Round One.*—Jake King is a non-Samoan American citizen who for a number of years published the only newspaper in American Samoa, the weekly *Samoan News.* In 1972 the Samoan Government charged Mr. King with willful failure to pay Samoan income tax in 1969 and willful failure to file a return in 1970.[210] The chief justice of the high court, sitting as trial judge, denied the defendant's motion for a jury

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cantly mentally or physically incapacitated).

[204] *Cf.* Proc. No. 4568, 43 Fed. Reg. 1999 (1978), *reprinted in* 48 U.S.C. § 1681 note, at 91 (Supp. II 1978)(President suspends law to make noncitizens eligible for federal jury service in the Northern Mariana Islands). American Samoans are noncitizen nationals at birth. 8 U.S.C. § 1408 (1976). They are not subject to travel restrictions applicable to aliens, Gonsalez v. Williams, 192 U.S. 1 (1904)(Puerto Ricans entering New York port may not be detained as aliens), and may enjoy an unrestricted right to travel, *see* Califano v. Torres, 435 U.S. 572, 599-601 (1978)(assuming without deciding that the constitutional right to travel extends to the Commonwealth of Puerto Rico). Noncitizen nationals may apply for immediate naturalization upon establishing permanent residence in a State, 8 U.S.C. § 1436 (1976), but a six-month durational residency requirement has been imposed, *see In re* Taulapapa, 282 F. Supp. 156 (D. Hawaii 1968). *See generally* 3 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW & PROCEDURE § 17.4 (1980).

[205] King v. Andrus, 452 F. Supp. 11, 13 (D.D.C. 1977).

[206] Baldwin v. New York, 399 U.S. 66, 72 (1970); United States v. Dougherty, 473 F.2d 1113, 1139 (D.C. Cir. 1972)(Bazelon, J., dissenting in part); Van Dyke, *Selecting a Jury in Political Trials,* 27 CASE W. RES. L. REV. 609, 610-12 (1977)(reprinted from J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977)).

[207] Dorr v. United States, 195 U.S. 138, 148 (1904).

[208] *See generally* Hughes, *Democracy in a Traditional Society: Two Hypotheses on Role,* 71 AM. ANTHROPOLOGIST 36, 39 (1969).

[209] 520 F.2d 1140 (D.C. Cir. 1975).

[210] *Id.* at 1142.

trial on the ground that the laws of American Samoa did not so provide and the Constitution did not require jury trials in unincorporated territories, citing *Balzac v. Porto Rico* and several of the *Insular Cases*.[211]

Mr. King then filed a civil suit in the United States District Court for the District of Columbia naming then Secretary of the Interior, Rogers C. Morton, as defendant and seeking declaratory and injunctive relief on the basis that denial of a jury trial violated his sixth amendment rights. The Government opposed federal court jurisdiction of the collateral attack on Samoa's law. The district court dismissed the case for lack of jurisdiction, but the court of appeals in *King v. Morton* reversed and remanded the case for reconsideration of the jurisdictional issue.[212]

Because potential jurisdiction over the mandamus action against the Secretary was inextricably related to the merits (the writ would lie if the Secretary had a duty to provide jury trials), the appellate court considered the claim "to assist" the district court in its disposition on remand.[213] Appellant King had conceded that (1)American Samoa is unincorporated territory, (2) only fundamental constitutional rights are applicable in that context, and (3) *Balzac* held that the right to jury trial is not fundamental.[214] Appellant argued, however, that *Balzac* was modified by later Supreme Court decisions in *Duncan v. Louisiana*[215] and *Baldwin v. New York*.[216] In those cases the Court had held that the right to a jury trial *is* fundamental for the purpose of incorporation into the fourteenth amendment.[217]

The difficulty with the argument lay not in "its logic but its generality,"[218] said the appellate court. *Duncan* and *Baldwin* considered jury trials fundamental in states, not territories; the *Insular Cases* and *Balzac* still stated the law applicable to Jake King.[219] The circuit court's understanding of those cases, however, was Justice Harlan's interpretation of them in *Covert*.

> As Mr. Justice Harlan wrote in *Reid v. Covert*, . . . "the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas."[220]

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[211] *Id.* at 1142-43.

[212] *Id.* at 1146.

[213] *Id.*

[214] *Id.* at 1146-47.

[215] 391 U.S. 145 (1968).

[216] 399 U.S. 66 (1970).

[217] 399 U.S. at 73-74 (State must provide right to jury trial where possible penalty exceeds six months' imprisonment); 391 U.S. at 149-50 (jury trial is fundamental right and sixth amendment requirement is applicable to the states through 14th amendment).

[218] 520 F.2d at 1147.

[219] *Id.*

[220] *Id.* at 1147 (quoting Reid v. Covert, 354 U.S. 1, 75 (1957)(Harlan, J., concur-

The court of appeals then borrowed from Justice Harlan the terms that became the touchstone for the *King v. Morton* analysis: "In short, the question is whether in American Samoa 'circumstances are such that trial by jury would be *impractical and anomalous.*' "[221] In language obviously meant for the trial court on remand, the appellate court emphasized that "a decision in this case [must] rest on a solid understanding of the present legal and cultural development of American Samoa. That understanding cannot be based on unsubstantiated opinion; it must be based on facts."[222]

The dissent differed from the majority only in that it created a stronger presumption favoring application of constitutional provisions in a territory.[223] Rather than remanding for an evidentiary hearing, the dissent would have granted judgment for the plaintiff, finding no plausible basis for determining that jury trials would be impractical or anomalous in American Samoa.[224]

2. King v. Andrus: *Round Two.*—On remand in *King v. Andrus*,[225] the Government called witnesses to establish that jury trials in American Samoa would be frustrated by the control that *matai* exercise over members of their *'aiga* and the "sense of oneness" of all Samoans, strengthened by the nearly limitless family relationships.[226] The district court found that *matai* control had eroded considerably under Western influence,[227] and the modern legal and social infrastructure would support a functional jury system.[228] All members of an *'aiga* speak freely on political matters; Samoans testify against members of their own *'aiga*, even their own *matai*, in criminal and civil cases; local judges, prosecutors, and police demonstrate no reluctance to participate in the criminal justice system.[229] Indeed, the court found the "evidence supporting plaintiff's position . . . overwhelming—most of it coming from defendant's own witnesses."[230]

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ring)(original emphasis))(citation omitted). *Covert* is discussed in Part IC *supra*.

[221] 520 F.2d at 1147 (quoting 354 U.S. at 75 (Harlan, J., concurring))(emphasis added). See text accompanying note 121 *supra*.

[222] 520 F.2d at 1147.

[223] *Id.* at 1148 (Tamm, J., dissenting).

[224] *Id.* at 1156-61.

[225] 452 F. Supp. 11 (D.D.C. 1977).

[226] *Id.* at 12-15.

[227] *Id.* at 14.

[228] *Id.* at 17.

[229] *Id.* at 14.

[230] *Id.* at 13. The Government had presented some high-ranking *matai* as witnesses. On cross-examination plaintiff's counsel asked each *matai* who had testified that other *matai* might unduly influence *'aiga* members if he personally would attempt to influence a member of his family serving as a juror. Each (no doubt recognizing that such conduct would be illegal) denied the possibility for himself. *Id.* at 15. This example characterizes the nature of the plaintiff's successful case. It cast doubt on the validity of the Government's contention that jury trials would be impractical and anomalous rather than proving affirmatively that they would be practical and not anomalous. The burden apparently rested with the Government to show that a constitutional right should not be extended to a territory, and this is as

The Government also asserted impracticability of juries based on *ifoga*, a formal ceremony of restitution (somewhat similar to the ancient Saxon *weregild*)[231] where the offender's *matai* makes an offer of restitution to the victim's *matai* to atone for a serious offense.[232] The argument here was that *ifoga* would jeopardize the possibility of conviction in serious crimes because jurors would be satisfied that justice already had been done. The court found no evidence that the assertion was accurate.[233]

Finally, the district court acknowledged the appealing nature of a self-determination argument that Samoans should decide if and when jury trials are appropriate[234] but found it inadequate. "[T]he many expressions of this point of view do not of themselves establish dispositively the impracticality or anomaly of a jury trial in serious criminal proceedings in American Samoa at this time."[235] The court's conclusion that the jury system would work properly in American Samoa has been supported by the experience with jury trials conducted in Samoa after *King v. Andrus*.[236]

C. *Restatement of the* King *Test*

The *King* decisions outline a workable test for determining the applicability of constitutional provisions in unincorporated territories. The doctrine derived from the *Insular Cases*[237] is applied in light of *Reid v. Cov-*

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it should be.

[231] The *weregild* was the compensation paid in connection with homicide. *See generally* Malone, *Ruminations on the Role of Fault in the History of Torts*, in U.S. DEP'T OF TRANSP., AUTOMOBILE INSURANCE AND COMPENSATION STUDY, THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION: STUDIES OF THE ROLE OF FAULT IN AUTOMOBILE ACCIDENT COMPENSATION LAW 1 (1970).

[232] The *ifoga* was traditionally done in a highly formalized ceremony. The offender's *matai* and other members of his *'aiga* sat in front of the house of the victim's *matai* with fine mats intended as gifts draped over their heads. MEAD, *supra* note 146, at 43. In *Andrus*, Judge Bryant relied on testimony that *ifoga* is rarely practiced. 452 F. Supp. at 15. While formal *ifoga* ceremonies are rare, the practice of the offender's *'aiga* making less formal offers of restitution to the victim's *'aiga* is still prevalent. Interview with Aviata F. Fa'alevao, Attorney General of American Samoa, in Fagatoga (July 1978). Sometimes the informality includes much beer drinking and takes on a jocular mood. Interview with Napoleone Tuiteleleapaga, author of *Organic Act Memorandum*, *supra* note 1, in Pago Pago (Sept. 1980).

[233] 452 F. Supp. at 15. Circuit Judge Tamm came to the same conclusion, noting that a judge properly could consider restitution through *ifoga* in reaching a sentencing decision. 520 F.2d at 1161 (Tamm, J., dissenting).

[234] 452 F. Supp. at 17.

[235] *Id.*

[236] Damon, *The First Jury Trials in American Samoa*, 5 SAMOAN PAC. L.J. 31, 38 (1979). *But cf.* Harriman, *The Impact of* King v. Andrus: *Jury Trials and Beyond*, 5 SAMOAN PAC. L.J. 39 (1979)(implementing rules failed to incorporate all relevant constitutional principles).

[237] *See* Part IA-B *supra*.

ert.[238] The plurality opinion of Justice Black is understood to mean that nonapplication of a constitutional provision is not to be lightly assumed.[239] The concurring opinion of Justice Harlan provides the framework for decisions, based on empirical evidence, that respect the delicate balance between enforcing constitutional guarantees and preserving essential cultural identity.[240] The incorporation doctrine thus may be reformulated as follows: In an unincorporated territory, a rebuttable presumption favoring the application of the Constitution throughout the territory may be overcome by proof that application of a specific provision in that particular territory would be impractical or anomalous.[241]

1. Standard of Proof.—In implementing the proposed analysis, the standard of proof required to rebut the presumption of applicability must be addressed. The appellate court made clear that a judgment of the impractical or anomalous nature of a jury system "cannot be based on unsubstantiated opinion; it must be based on facts."[242] It should be noted that the inquiry deals with legislative facts, as distinguished from the facts of a particular case.[243] Courts do not speak in terms of preponderance of evidence or reasonable doubt when dealing with legislative facts. The standard is typically phrased in terms such as strict scrutiny-compelling state interest or rational basis.[244]

In dealing with the applicability of a constitutional guarantee, it seems obvious that something more than a rational basis must be required to justify a finding of nonapplication if we are to give substance to the presumption favoring application.[245] On the other hand, the presumption should not be absolute if the initial determination of nonincorporation

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[238] 354 U.S. 1 (1957), *discussed in* Part IC *supra*.

[239] *See* text accompanying notes 111-16 *supra*.

[240] *See* text accompanying notes 119-23 *supra*.

[241] *See* Willens & Siemer, *supra* note 7, at 1398-1400. The *King* opinions and Justice Harlan's concurrence in *Covert* did not attach much significance to whether "impractical" and "anomalous" are to be considered in the conjunctive or in the disjunctive. In those cases the respective opinions spoke of real or hypothetical applications of the Constitution as being either impractical *and* anomalous or neither impractical *nor* anomalous, disregarding situations in which an application might be impractical but not anomalous, or the converse. Because the words are not synonymous, I assume that in an appropriate case a court would consider the elements separately. Thus, where it is adequately shown that a given application of a constitutional provision would be *either* impractical *or* anomalous, a court would hold that grounds were established to modify such application.

[242] 520 F.2d at 1147.

[243] *See* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 99-100 [hereinafter cited as Karst].

[244] *Compare* Dandridge v. Williams, 397 U.S. 471 (1970)(rational basis), *with* Loving v. Virginia, 388 U.S. 1 (1967)(strict scrutiny).

[245] Otherwise, the ease with which the Court could surmise a rational basis for nonapplication would deny the weight that a presumption logically would carry. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *But cf.* Harris v. Santiago Rosario, 100 S. Ct. 1929, 1930 (1980)("Congress . . . may treat Puerto Rico differently from States so long as there is a rational basis for its actions.")

retains its significance.[246] An impossible burden therefore should not be placed on the party claiming an exception. An intermediate level of scrutiny is thus appropriate.[247]

Affirmative action legislation is somewhat analogous, and the standard of review utilized by Justice Brennan in considering such programs under the equal protection clause is appropriate to consider here. That standard was "not ' "strict" in theory and fatal in fact,'. . . but strict and searching nonetheless."[248] The district court in *King* appears to have used a similar standard without articulating it. The testimony of senior *matai* and government officials might have provided a "rational basis" for finding that jury trials were unworkable in Samoa, but the court (with the aid of plaintiff's counsel on cross-examination) searched below the surface of the representations and found them wanting.[249]

2. *Fundamental Rights Distinction Preserved.*—The test extrapolated from *King* preserves but modifies the fundamental rights distinction from the *Insular Cases*. The circuit court in *King* referred to the fundamental rights analysis[250] but superimposed the impractical and anomalous standard as the means by which to determine if the jury right were fundamental. There is much to commend this approach.

In the past, Justices of divergent philosophies have expressed views criticizing a heirarchy of constitutional rights.[251] Indeed, if the Constitution is to remain supreme law, one must be cautious about ranking some

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[246] *See* Part IA *supra*.

[247] The Court has articulated an intermediate standard of review in the context of equal protection challenges to gender classifications. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976). *See generally* Broder & Wee, *Hawaii's Equal Rights Amendment: Its Impact on Athletic Opportunities and Competition for Women*, 2 U. HAWAII L. REV. 97, 106 n.45, 127-32 (1979); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972)[hereinafter cited as Gunther]; Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979).

[248] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978)(Brennan, J., concurring in part)(footnote omitted)(quoting Gunther, *supra* note 247, at 8). See text accompanying note 285 *infra*. Laws designed to protect the Samoan culture could be considered benign racial classifications, *Organic Act Memorandum, supra* note 1, at 40, analogous to affirmative action. In the national context, Samoans do constitute a "discrete and insular" minority, United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938), warranting the protective legislation. *See* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975)(advocating intermediate test for scrutinizing official preferences for racial minorities). Samoa's laws are atypical of benign gender classifications that have been upheld (under the intermediate test, rather than strict scrutiny which racial classifications generally receive), Califano v. Webster, 430 U.S. 313 (1977), because Samoa's laws do not attempt to remedy past deprivations but are designed to allow a minority to keep what it has.

[249] *See* note 230 *supra*.

[250] 520 F.2d at 1146-47.

[251] Kovacs v. Cooper, 336 U.S. 77, 90-96 (1949)(Frankfurter, J., concurring); Adamson v. California, 332 U.S. 46, 82-90 (1947)(Black, J., dissenting). *See* Rochin v. California, 342 U.S. 165, 179 (1952)(Douglas, J., concurring).

of its provisions below others. The fundamental rights concept of the incorporation doctrine requires such distinctions. Under the *King* test, the importance of a particular right to the individual before the court is a factor to be considered in determining whether application of a constitutional provision is impractical or anomalous. This approach does not disparage any constitutional right. It simply acknowledges that where the right is crucial to the individual, the territory has a heavier burden in justifying nonapplication. This was the critical factor in the *Covert* concurring opinions: What might have been an impractical administrative burden (overseas jury trials) was not impractical when a defendant was on trial for her life.[352]

3. The Impractical Branch of the Test.—Clearly, the proposed test must respect Justice Black's admonition in *Covert* that constitutional protections may not be defeated by mere inconvenience or expediency.[353] Properly construed, the impractical branch of the test presumes that the underlying value of the right warrants a substantial degree of inconvenience.

Application of a constitutional provision throughout a territory could not be deemed impractical for reasons that would be equally applicable to a State. For example, it could not be properly argued that the fourth amendment is inapplicable because guilty defendants will escape punishment as a result; nor could a first amendment exemption be based on the theory that free speech permits agitators to create unrest. These reasons are fatally universal. The rationale would have to be unique to the territory claiming exemption and would assume that (1) the territory would be prepared to experience the same quality of inconvenience as the states do in protecting the right in question; and (2) if literal application of the constitutional provision under scrutiny is not required either (a) the territory seeks to protect the underlying value served by reasonably effective alternative means, or (b) the value attached to the constitutional provision is not important in that particular territory or is sufficiently deflated by competing values unique to the territory.

Application of criterion (2) may be seen in sixth amendment cases prior to *King*. Protection of the innocent and interjection of community opinion between the citizen and the law, values traditionally associated with

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[352] *See* note 122 *supra* and accompanying text. The Court later rejected the Frankfurter-Harlan distinction, holding in Kinsella v. United States, 361 U.S. 234 (1960), that civilians were entitled under Reid v. Covert, 354 U.S. 1 (1957), to jury trials in noncapital as well as capital cases. Justice Clark, who had dissented in *Covert*, *id.* at 78 (Clark, J., dissenting), subsequently felt bound by the majority decision. He wrote the Court's opinion in *Singleton*, which rejected the balancing approach advocated by Justice Frankfurter in *Covert*, *see* text accompanying note 117 *supra*. It is clear, however, that the *King* analysis contemplates a balancing of interests in deciding whether a constitutional provision applies without exception to a territory.

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

the jury trial guarantee,[354] can be effected in other ways. Even while holding that a jury trial is fundamental in an "Anglo-American regime of ordered liberty,"[355] the Court in *Duncan v. Louisiana*[356] acknowledged that "a civilized system could be imagined that would not accord the particular protection."[357] Two latter *Insular Cases* discussed the failure of territorial legislatures to establish jury trials and concluded that the people of those territories did not share the Anglo-Saxon values attached to the right.[358] This reasoning is not to be accepted uncritically. Constitutional values are not determined by majority vote. The rationalization is in the nature of a tautology seeking to justify a solution by stating the problem. Before concluding that a constitutional value is not shared by the people of a territory, the court would need more evidence than the mere fact that the right is not protected by territorial law.

American Samoa provided an alternative means of obtaining citizen participation in criminal trials (lay judges)[359] which has worked elsewhere.[360] But the Government lost its bid for exemption because it failed to demonstrate that difficulties inherent in providing jury trials in Samoa were substantially greater than those involved throughout the United States. In the district court's view, most of the American criminal justice system worked well in Samoa, and the competing uniquely Samoan institutions were so attenuated that the inconvenience of accommodating jury trials would not differ qualitatively from the problems encountered when juries are impaneled in small rural communities of the United States.[361]

4. The Anomalous Branch of the Test.—More subtle and sensitive measurements are required to implement the "anomalous" portion of the test. Anomalous is defined, *inter alia*, as "exhibiting or containing incongruous or often contradictory elements."[362] The question then is whether application of a certain part of the Constitution would contradict the cultural values of the particular territory or be incongruous with the cultural

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[354] *See* note 206 *supra*.

[355] Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968).

[356] 391 U.S. 145 (1968).

[357] *Id.* at 149 n.14.

[358] Dorr v. United States, 195 U.S. 138, 148 (1904); Hawaii v. Mankichi, 190 U.S. 197, 215-16, 218 (1903).

[359] *See* text accompanying notes 165-67 *supra*.

[360] *See, e.g.*, Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972); Comment, *Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description*, 7 CASE W. RES. J. INT'L STUD. 198 (1975). *See also* Weiss, *The East German Social Courts: Development and Comparison with China*, 20 AM. J. COMP. L. 266 (1972) (use of lay judges as mediators and arbitrators in socialist contexts).

[361] *See* 452 F. Supp. at 16-17 (administrative inconvenience minimal); text accompanying notes 227-33 *supra* (unique cultural institutions weakened by Western influence).

[362] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 89 (unabridged 16th ed. P. Gove ed. 1971). Incongruous is defined as "characterized by lack of harmony, consistency, or compatibility." *Id.* at 1144. The Court has relied on dictionary definitions in constitutional analysis, *see, e.g.*, Roth v. United States, 354 U.S. 476, 487 n.20 (1957)(prurient defined).

setting.

The district court's sensitivity to arguments favoring self-determination came closest to acknowledging this branch of the proposed test.[263] Discussion of the reduced *matai* influence and infrequent use of *ifoga* would have demonstrated the analysis contemplated here if the context of that discussion had focused more on preserving those ancient customs rather than discounting them as obstacles to functioning juries.[264]

In any case, the impact on indigenous culture is important to each branch of the test and represents the merger point. Similar data is required to judge whether the culture would make the constitutional rule unworkable (impractical), whether the hardship caused by applying the rule would require major adjustments to non-Western social and political institutions (impractical and anomalous), or whether substantially similar ends are served by existing institutions that would be undermined or made obsolete by application of the rule (anomalous).

D. Testing Samoa's Land Laws

No laws are more central to the preservation of Samoan culture than those restricting land ownership and alienation.[265] While internal challenges to the communal landholding structure are possible,[266] the most obvious and serious constitutional considerations arise with respect to the

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[263] *See* text accompanying notes 234-35 *supra*.

[264] The district court did note, however, that the jury trial requirement would not affect the communal land system, which the court described as "[t]he obviously major cultural difference between the United States and American Samoa." 452 F. Supp. at 15.

[265] *See* text accompanying notes 180-94 *supra* and note 290 *infra*.

[266] For example, it is conceivable that an *'aiga* member would seek partition of the communal lands, in conformity with Western property concepts. Every American State recognizes the right of an owner of an undivided interest in land to have the parcel partitioned. RESTATEMENT OF PROPERTY ch. 11, topic 1, at 654-55 (1936). One court characterized partition as "an absolute and unconditional right, under both common law and statute." Schnitt v. McKellar, 244 Ark. 377, 387, 427 S.W.2d 202, 208 (1968). Apparently no court has entertained the question whether such right is protected by the fifth or 14th amendments under the due process clause, most likely because the right always was found to exist under state law. Absent constitutional considerations, Samoan customs may operate to exclude the power to partition. *See In re* Ashford, 50 Hawaii 314, 315, 440 P.2d 76, 77 (1968)("Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage."); RESTATEMENT OF PROPERTY §§ 173-174 (1936). *But cf.* Rice v. Rice, 468 Pa. 1, 359 A.2d 782 (1976)(court must determine whether particular restraint on alienation was unreasonable and therefore invalid after considering the length of time the restraint may be exercised and whether it is supported by consideration). If partition rights were recognized in Samoa, the decision likely would lead to the destruction of the land base of the *matai* system, eliminating the most significant tangible sanction that the *matai* possess to enforce their authority, *see* text accompanying note 153 *supra*. Although traditional cultures have survived on other Pacific islands despite a shift from tribal to individual land ownership, N. MELLER, THE CONGRESS OF MICRONESIA 124-25 (1969), erosion of the communal land system of Samoa would be a serious problem.

blood qualification for ownership.[367] Due process and equal protection guarantees of the fifth and fourteenth amendments may protect prospective non-Samoan buyers.[368]

Similar land restrictions in the Northern Marianas attempt to mitigate against constitutional attacks characterizing their laws as racial classifications by phrasing the ownership eligibility criterion in terms of personal or family durational residency.[369] Whether redrafting Samoa's laws to

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[367] AM. SAMOA CODE tit. 27, § 204(b) (1973), *quoted in* text accompanying note 181 *supra*. The immigration laws present similar constitutional issues, *id.* tit. 9, §§ 201-618. See notes 188 *supra*, 269 *infra*.

[368] That the Federal Government is required under the fifth amendment to adhere to equal protection standards similar to or identical with those imposed upon the states by the 14th amendment was established more than two decades ago. Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(racial segregation in District of Columbia schools violates due process, which incorporates equal protection principles). Because Samoa remains unincorporated territory, only fundamental rights are applicable (absent congressional action) under the *Insular Cases*. The Court's dictum in *Downes* suggested that equal protection and due process guarantees would be extended to the unincorporated territory of Puerto Rico as fundamental, *see* note 62 *supra*. Since then, Puerto Rico obtained commonwealth status, and the Court has indeed found equal protection and due process principles applicable there, although the most recent precedent suggests that the Court's analysis will make certain accommodations to territorial status, *see* note 125 and text accompanying notes 124-29 *supra*.

One commentator has suggested that attempts to justify Samoa's land restraints under the *Insular Cases* analysis should be abandoned in favor of invoking the war powers clause and upholding racial classifications on the authority of Hirabayashi v. United States, 320 U.S. 81 (1943). Leibowitz—Samoa, *supra* note 7, at 247-48. If the *Insular Cases* represent a dangerous doctrine, *see* text accompanying note 113 *supra*, the prospect of reviving *Hirabayashi* surely evokes even greater fears, Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945), and is not advocated here. Assuming that a traditional equal protection analysis is employed, however, the land restrictions may be attacked both as unconstitutional discrimination against non-Samoan buyers and Samoan sellers. *See* Shelley v. Kraemer, 334 U.S. 1, 11-12 (1948); Buchanan v. Warley, 245 U.S. 60 (1917). The latitude provided in administering the restrictions by allowing gubernatorial-approved exemptions, *see* text accompanying note 181 *supra*, would not strengthen Samoa's position, 334 U.S. at 12 (discussing Harmon v. Tyler, 273 U.S. 668 (1927)).

[369] N. MARIANA ISLANDS CONST. art. XII, § 4:

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

The constitution restricts "acquisition of permanent and long-term interests in real property . . . to persons of Northern Marianas descent." *Id.* § 1. The Covenant authorizes the Government of the Northern Mariana Islands to "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent." COVENANT, *supra* note 12, art. V, § 805(a). United States constitutional provisions are made powerless to invalidate the restrictions. *Id.* art. V, § 501(b). The President proclaimed that the constitutional provisions are effective, as

limit ownership based on established cultural ties rather than blood quantum would improve the chances of thwarting an equal protection challenge is doubtful given the obvious impact *and* intent of the restriction.[270] In fact, without candidly acknowledging the purpose of restricting non-Samoan land ownership in order to preserve Samoan culture, it is impossible to make the case *for* upholding the statutes.

In April 1980 the Appellate Division of the High Court of American Samoa upheld the laws restricting land ownership by non-Samoans against a due process and equal protection challenge. The case was *Craddick v. Territorial Registrar*,[271] decided by a divided court. The facts giving rise to the litigation may be simply stated. Magdelene Craddick is a Native Samoan. Her husband, Douglas, is a non-Samoan American citizen. The Craddicks sought to register a warranty deed purporting to convey certain individually owned land to them. When the Territorial Registrar of American Samoa refused to record the deed, the Craddicks filed a mandamus action. The Registrar defended on the ground that the deed contravened the statutory prohibition against alienation of land to non-Samoans, which the Craddicks attacked as unconstitutional legislation. The trial court granted summary judgment for the Registrar, and the appellate division affirmed.

The majority's analysis began with the statement "that the constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa."[272] The appel-

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are the pertinent covenant provisions, but he did not suspend the Constitution to further the land alienation laws. Proc. No. 4534, 42 Fed. Reg. 56593 (1977), *reprinted in* 48 U.S.C. § 1681 note, at 91 (Supp. II 1978). For an analysis of the Marianas provisions supporting their constitutionality, see Willens & Siemer, *supra* note 7, at 1450-57. Samoa's highly restrictive immigration statutes, which use the durational residency since 1950 language found in the Marianas law, have not been litigated. AM. SAMOA CODE tit. 9, § 372 (1973).

[270] *Compare* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)(no discrimination absent intent), *and* Washington v. Davis, 426 U.S. 229 (1976)(racially disproportionate impact of facially neutral employment qualification test does not violate equal protection component of due process guarantee), *with* Griffin v. County School Bd., 377 U.S. 218 (1964)(purpose for closing schools was to frustrate desegregation), *and* Gomillion v. Lightfoot, 364 U.S. 339 (1960)(setting aside legislative gerrymandering intended to disenfranchise black citizens). The Court in *Arlington Heights* listed the factors that are relevant to finding discriminatory intent, 429 U.S. at 264-68, which would be applied to Samoa's laws under a conventional equal protection analysis. The factors include (1) racially disproportionate impact, (2) historical background of the law in terms of other racially discriminatory actions, (3) specific antecedent events leading to adoption of the challenged statute, (4) departures from normal procedures in adoption of the law, and (5) contemporary statements of decisionmakers who passed the law.

[271] App. No. 010-79 (H.C.A.D. Am. Samoa Apr. 23, 1980).

[272] *Id.* slip op. at 3. The trial court reached the same conclusion.

Both courts relied on the fifth amendment.

> It seems safe to say that the rights guaranteed by the Fifth Amendment — including the broad right to due process and the more explicit assurance of the equal protection of the laws — are so basic to our system of law that it is inconceivable that the Secretary of the Interior would not be bound by these provisions in governing the territories, whether

late division also found that section 204(b) of Samoa's land laws[273] "does create a classification based on race"[274] and thus constitutes a "suspect classification" requiring "the strictest judicial scrutiny."[275] The court then held that "the Territory of American Samoa has demonstrated a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa, or Samoan culture."[276] The majority concluded that the section 204(b) prohibition against the alienation of lands to non-Samoans is necessary to promote the state interest and therefore is a permissible racial classification.[277] In reaching this result, the majority relied almost exclusively on the enabling provision of Samoa's constitution which expresses the policy to protect against alienation to non-Samoans[278] and a 1964 decision of the high court which took judicial notice of the great importance that the land has to Samoa's people.[279]

One justice dissented on the ground, *inter alia*, that the case should be remanded for an evidentiary hearing followed by findings of fact as to the effect of free alienation on the Samoan culture.[280] "There has yet to be one iota of evidence presented to this Court. To issue decisions such as in this case . . . seems the ultimate of paternalism."[281]

The result reached by the majority in *Craddick* was, in the author's opinion, justified and not unexpected from a court sitting in Fagatoga. It would be misleading, however, to assume that the Government would prevail so easily in a mainland court. First, and most obviously, a mainland court is unlikely to rely on judicial notice in approaching the constitu-

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'organized', 'incorporated', or no [*sic*].

Id. (quoting Order Denying Motion for New Trial or Rehearing at 4). The Supreme Court has not been so explicit as to the source of equal protection and due process protections applicable in the territories. *See* note 125 *supra*.

[273] AM. SAMOA CODE tit. 27, § 204(b) (1973), *quoted in* text accompanying note 181 *supra*.

[274] App. No. 010-79, slip op. at 3.

[275] *Id.*

[276] *Id.*

[277] *Id.* at 4, 6.

[278] *Id.* at 4 (quoting AM. SAMOA CONST. art. I, § 3, *quoted in* text accompanying note 180 *supra*).

[279] *Id.* at 4-6 (quoting Haleck v. Lee, 4 A.S. 519 (H.C.T.D. 1964)). As the dissent in *Craddick* pointed out, *id.* at 9 & n.2 (Murphy, J., dissenting), *Haleck* raised a very different issue. There it was argued that the Governor's power under the protective laws to disapprove leases of communal land, as applied to a lease negotiated pursuant to a renewal clause in a preexisting lease, amounted to a law impairing the obligation of contract. The high court's concern with the importance of land then was merely to determine if the law was reasonable, in which case it was treated (under some analysis of the contracts clause) as an exercise of the police power, and hence valid when applied retroactively.

[280] *Id.* at 10-11 (Murphy, J., dissenting). Justice Murphy also dissented on the ground that the court should have considered appellants' claim, raised only on appeal, that the land restriction statute had not been passed in accordance with Samoa's constitution. *See* note 181 *supra*.

[281] App. No. 010-79, slip op. at 10 (Murphy, J., dissenting).

tional issues.[282] Second, while the majority opinion employed the literal language of strict scrutiny, judicial review was not rigorous. This is inconsistent with the trend in the application of strict scrutiny which has become fatally strict.[283]

Even where, as here, an intermediate standard of review is warranted,[284] the burden on the Government is substantial. Justice Brennan has explained why:

> In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.[285]

In order to prevail on the issue in a mainland court, the territory will have to (1) argue for modification of strict scrutiny and the application of an intermediate standard of review, and (2) document both the central role of land in the preservation of *fa'a Samoa* and the lack of practical alternatives by which the Govenment could "achieve its ends in the foreseeable future without the use of race-conscious measures."[286] As the dissent in *Craddick* pointed out, the framework for such analysis was created by the *King* decisions.[287]

Application of the *Insular Cases-King* doctrine would diverge somewhat from the majority's approach in *Craddick*, although it might yield the same result. Analysis would still begin with the presumption that the constitutional guarantees apply to Samoa, a presumption strengthened by the interplay of equal protection concepts in the context of private property rights, which have an independent constitutional basis.[288] It would

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[282] *See* text accompanying note 222 *supra*. Ironically, only dissenting Justice Murphy is a permanent associate justice of the high court. Two justices in the majority were on temporary assignment from the Ninth United States Judicial Circuit.

[283] Gunther, *supra* note 247, at 8.

[284] *See* note 248 and text accompanying notes 245-49 *supra*.

[285] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (1978)(Brennan, J., concurring in part).

[286] *Id.* at 376.

[287] App. No. 010-79, slip op. at 10 (Murphy, J., dissenting)(discussing King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977)).

[288] The Court has included the right to dispose of property among the constitutional protections contemplated by the takings provision of the fifth amendment. Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035, 2041 n.6 (1980) (quoting United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945)). But the constitutional analysis must consider "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." 100 S. Ct. at 2041-42. Here, the governmental action is protective of the communal property, the economic goal is stability, and the invest-

then be incumbent upon the Government to show that application of the fifth or fourteenth amendment under the circumstances would be impractical or anomalous.

Free alienation would not be impractical in the sense that it would not work in Samoa. The problem is that it might work too well. Samoans might too readily sell their lands and forfeit cultural identity inextricably tied to the ancient landholding system.[289]

> American Samoa, with its unique customs, culture and traditional way of life, different from all other territorial possessions of the United States, should be exempted from Constitutional provisions that affect its lands and matai system and deprive the people of their inherent right to enjoy life under a culture they have managed to follow for centuries before their ancestors ceded their islands to the United States.[290]

Thus, the application of constitutional guarantees that invalidate Samoa's land-ownership restrictions is a problem not because of the impact the culture has on the rule but because of the impact the rule has on the culture. The operational effects that application would have on American Samoa would differ qualitatively from the effect visited upon states.

A result that would permit predominately non-Samoan land ownership may be anomalous and contradict the United States' pledge to protect Samoan cultural institutions, the *matai* system in particular, and to preserve the rights and property of the inhabitants.[291] The communal land-ownership system itself bespeaks the absence of Western values associated with individual property ownership in Samoan culture.[292]

The mere assertion of a significant and irreconcilable conflict of cultural values that would result from changes in the Samoan land tenure pattern will not meet the burden of proof. More than casual references to

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ment expectations do not exist for Samoans under the system the restrictions are designed to preserve.

Pruneyard held that a shopping center owner's rights were not infringed when the state equivalent of first amendment provisions was construed to allow political speech on the premises. In reaching the holding, the Court quickly disposed of the claim that the owner was denied his property without due process. *Id.* at 2042-43. Applying the test to Samoa's land restrictions, one need prove that the laws are not arbitrary or capricious and that they are substantially related to the goals of cultural preservation and economic integrity.

[289] *See* note 194 *supra*.

[290] *Organic Act Memorandum, supra* note 1, at 55.

[291] *See* note 136 *supra*. In light of the case law regarding the Federal Government's abrogation of Indian treaties, the Articles of Cession would not themselves provide a solid basis for upholding the land restrictions; the Court might not consider claims based on the Articles, perceiving the issue as a political question. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)(Congress may unilaterally reduce the size of reservation where its intention to do so is clear, notwithstanding that the action is forbidden by treaty); 21 How. L.J. 625 (1978).

[292] The fact that equal protection considerations have been overcome in analogous American Indian case law also suggests that a similar accommodation to Samoa's needs is constitutionally possible. *See* Willens & Siemer, *supra* note 7, at 1409-10; note 24 *supra*.

the current Hawaiian dilemma may be required to avoid a similar future for Samoans. Data must be systematically organized, analyzed, and presented to the court either as evidence at trial or in a modern Brandeis brief.[293] Comparative cultural histories of American Samoa and Hawaii could be utilized. A diachronic study of Samoan culture could be compared with an analysis of legal changes associated with traditional land arrangements to demonstrate the extent to which the culture already has been affected.[294] These results could in turn be compared with an assessment of similar data from the Independent Republic of Western Samoa where the traditional system seems to be more intact.[295] Joint legal and cultural research and analysis properly would prepare the Government to argue successfully that the fifth and fourteenth amendments do not invalidate Samoa's land restrictions.

III. CONCLUSION

There are indeed aspects of territorial culture which are so fragile and so non-Western that literal application of the Constitution in all instances in all territories might be destructive and consequently would not

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[293] Although the Brandeis brief has been celebrated since its first appearance before the Court in Muller v. Oregon, 209 U.S. 412 (1908), a skeptical attitude about the quality of social science data has been manifested in judicial opinions and reinforced by commentators. *See, e.g.* Miranda v. Arizona, 384 U.S. 442, 533 (1966)(White, J., dissenting); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 153-54 (1955). The fairness and accuracy of scholarly briefs, of course, can be tested in the adversary process, and that would enhance the decisionmaking, especially since the litigation of issues concerning Samoa will be conducted in a courtroom thousands of miles from the territory. *See generally* Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924); Karst, *supra* note 243, at 100-05. *But cf.* P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 201-02 (1972)(misrepresentation of data reflects the weakness of the adversary system but should not preclude use of social science material in briefs).

[294] The willingness of the high court to entertain suits challenging the absolute right of *matai* to evict family members has changed the power equation in Samoa. While believing that the court must protect legal rights, one official expressed a typical concern that taking a *matai* to court weakens his authority. "The young family member, if he does not like what the *matai* does, says 'I will sue you!' " Interview with Tuana'itau F. Tuia, in Fagatoga (summer 1978). The chief justice of the high court explained to the author why, in his view, it became necessary for the American courts to become involved in disputes over use rights within *'aiga*:

> In the old days all people lived in the *fale* [the traditional Samoan house]. An evicted *'aiga* member could move his *fale* or build a new one or move in with his wife's relatives in another village. But today people build Western-style houses, that may cost as much as twenty thousand dollars or more, on family land. If the *matai* orders such a person off the land and he complains that the *matai's* act is unreasonable or biased or unfair, the court has little option but to hear the case.

Interview with Richard Miyamoto, Chief Justice of the High Court of American Samoa, in Fagatoga (August 1978).

[295] *Cf.* R. TRUMBULL, TIN ROOFS AND PALM TREES ch. 11 (1977) (comparing the two Samoas from a travel reporter's perspective).

serve the best interests of the inhabitants of the territories or of the United States. Ironically, the incorporation doctrine which originally legitimated popular desire to fulfill America's manifest destiny now provides the theoretical basis for assuring a large measure of territorial self-determination.

The historical and cultural genesis of Samoa's land laws severely test the presumption derived from *Covert* that the Constitution has uniform applicability in all places under United States jurisdiction at all times. The *King* cases provide the courts with a doctrinal framework for making intelligent and informed decisions on this issue. Collaboration among lawyers, social scientists, and the Samoan people should provide the courts with sufficient data to apply the legal analysis.

As challenges to territorial laws are adjudicated, the decisions must weigh the scientifically measured impact that application of a constitutional principle would have on the indigenous culture. Only then will the value of the constitutional guarantee be revealed in context. Justice Robert H. Jackson once said that the Bill of Rights is not a suicide pact.[296] Neither is it a genocide pact, whether we define genocide as physically destroying a people or killing their culture.

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[296] Terminello v. Chicago, 337 U.S. 1, 37 (1948)(Jackson, J., dissenting).

INCOME TAX INCENTIVES FOR INVESTMENT IN THE NORTHERN MARIANA ISLANDS

Howard M. Liebman*

Although it has been six years since the Northern Mariana Islands signed a Covenant with the United States under which they were to be established as a Commonwealth "in political union with the United States of America,"[1] relatively little consideration appears to have been given to the changes which this Covenant has wrought in the fiscal relationship between the United States and the Marianas.[2] In view of the fact

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[1] Covenant To Establish a Commonwealth of the Northern Mariana Islands, Feb. 15, 1975, United States-Northern Marianas, 14 INT'L LEGAL MATERIALS 344, *reprinted in* S. REP. No. 94-433, 94th Cong., 1st Sess. 1 (1975). The Covenant was signed at Saipan in the Mariana Islands, by representatives of the Marianas Political Status Commission, on the one hand, and by Ambassador F. Haydn Williams, Personal Representative of the President of the United States, on the other hand. The Covenant was approved unanimously by the Mariana Islands District Legislature, on February 20, 1975, and by 78.8 percent of the people of the Northern Marianas voting in a plebiscite held on June 17, 1975, with a United Nations observer present. *Id. See generally* N.Y. Times, Feb. 25, 1976, at 1, col. 1. The text of the Covenant, as approved by the United States Congress and signed into law by President Gerald R. Ford on March 24, 1976, is contained in Public Law No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1681 note (1976) [herinafter cited as COVENANT], originally introduced as H.R.J. Res. 549, 94th Cong., 1st Sess. (1975). The discussion of the Covenant which follows will refer to the text as reprinted in Public Law No. 94-241, 90 Stat. 263 (1976), and partially reproduced in the appendix to this article.

[2] Whereas the tax effects have been all but ignored in the legal literature, the details of the new political status have been extensively discussed. *See* Armstrong, *The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity*, 5 BROOKLYN J. INT'L L. 207 (1979); Willens & Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373 (1977) [hereinafter cited as Willens & Siemer]; Note, *Self-Determination and Security in the Pacific: A Study of the Covenant Between the United States and the Northern Mariana Islands*, 9 N.Y.U. J. INT'L L. & POL. 277 (1976); Comment, *The Marianas, the United States and the United Nations: The Uncertain Status of*

that the United States recently completed negotiations to determine the future political status of the other island groups which comprise the Trust Territory of the Pacific,[3] as well as the fact that it is actively seeking to conclude bilateral tax treaties with a number of developing countries,[4] most of which are desirous of encouraging foreign investment,[5] it

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the New American Commonwealth, 6 CAL. W. INT'L L.J. 382 (1976); 18 HARV. INT'L L.J. 204 (1977).

[3] *See* note 202 *infra*. The Trust Territory is a group of island chains—the Northern Marianas, the Eastern and Western Caroline Islands, and the Marshall Islands—in the southwestern region of the Pacific Ocean. It comprises more than 2,100 islands covering an area of approximately three million square miles, commonly known as Micronesia. The total resident population in 1978 for the Trust Territory of the Pacific Islands was 128,000, U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SER. P-25, NO. 872, CURRENT POPULATION REPORTS 6, table 1 (1980) [hereinafter cited as POPULATION REPORTS]. Many residents are United States citizens connected with the Pacific Missile Range Facility on Kwajalein, in the Marshall Islands, *see* TIME, Jan. 16, 1978, at 18. *Cf.* Richard W. Benfer, 45 T.C. 277 (1965) (description of life for United States expatriate personnel stationed on Kwajalein). The Marianas are comprised of 13 single islands and one atoll of three islands (183 square miles of land) with a total population of approximately 16,700, POPULATION REPORTS, *supra*. They are denominated the Northern Marianas to distinguish them from Guam which is at the southern tip of the archipelago. *The Pacific Basin Region* 2, in PACIFIC BASIN DEVELOPMENT CONFERENCE (FEB. 17-20, 1980), CONFERENCE WORKBOOK [hereinafter cited as CONFERENCE WORKBOOK]; *see* 18 HARV. INT'L L.J. 204, 205 (1977). The Pacific Basin Development Conference was a joint series of workshops involving representatives of government, industry, labor, academia, and public interest groups, which sought to identify the problems and analyze potential solutions for furthering economic growth in the Pacific Basin (*viz.*, the territories of American Samoa and Guam, the State of Hawaii, and the Commonwealth of the Northern Mariana Islands). *See generally* Takeuchi, *Many hurdles in developing Pacific Islands*, Sunday Star-Bulletin & Advertiser, Feb. 24, 1980, at A-19, col. 1; Honolulu Advertiser, Feb. 21, 1980, at A-3, col. 3.

A brief but concise summary of the history of Micronesia prior to the establishment of the Trust Territory may be found in McComish v. Commissioner, 580 F.2d 1323, 1324 & n.2 (9th Cir. 1978). The Trust Territory was created after World War II when the United States gained military control over Micronesia. A total of 11 trusteeships were established after the war, all but this one under the aegis of the United Nations Trusteeship Council. The Pacific Islands Trust Territory was designated a "strategic trust" which meant that the United States, as the "administering authority," was responsible only to the Security Council, where it could exercise its veto power. Trusteeship Agreement for the Former Japanese Mandated Islands, Apr. 2-July 18, 1947, United States-United Nations, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. *See* Willens & Siemer, *supra* note 2, at 1375 n.7. *See generally* Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y.L.F. 139 (1972); Note, *supra* note 2, at 279-86. Micronesia is the only remaining trusteeship of all those created after World War II, Marks, *Micronesians must end U.S. dependence*, Sunday Star-Bulletin & Advertiser, Oct. 15, 1978, at H-3, col. 1.

[4] The United States has signed treaties, which are not yet in force, with Bangladesh, Egypt, Jamaica, Cyprus, Malta, Morocco, the Philippines, and Israel. Convention for the Avoidance of Double Taxation, Oct. 6, 1980, United States-People's Republic of Bangladesh, *reprinted in* 1 TAX TREATIES (CCH) ¶ 573B; Convention Respecting Taxes on Income, Aug. 24, 1980, *reprinted in* 2 TAX TREATIES (CCH) ¶ 8006; Convention for the Avoidance of Double Taxation, May 21, 1980, United States-Jamaica, *reprinted in* 1 TAX TREATIES (CCH) ¶ 4386B; Convention for the Avoidance of Double Taxation, Mar. 26, 1980, United States-Republic of Cyrus, *reprinted in* 1 TAX TREATIES (CCH) ¶ 2005; Agreement Respect-

would appear worthwhile to review the special tax benefits accorded to the Marianas as part of their Covenant with the United States.

The analysis in this article therefore will focus on those concessions which are intended to or it is hoped will foster investment in the Northern Mariana Islands. Based upon this analysis, some conclusions will be drawn concerning the extent to which the granting of such concessions might be indicative of a willingness on the part of the United States to offer investment tax incentives to other developing areas, despite the fact that recent amendments to the Internal Revenue Code of 1954 have eliminated those incentives which had been granted by statute.[6] The willingness of the United States to use tax incentives to encourage investment in the Marianas will be of great practical importance to those Islands. It is of equal interest to know whether this willingness is the harbinger of a more expanded view of the role of such incentives, a view which might be extended to the growing bilateral tax treaty network between the United States and developing countries.

I. The Tax Provisions of the Covenant

A. General Structure of the New Tax Regime

Article VI of the Covenant (entitled "Revenue and Taxation") sets forth the provisions which establish the basic tax regime for the new political unit and are to govern its fiscal relations with the United States. Under section 601(a), the federal income tax laws of the United States (the Internal Revenue Code of 1954, as amended)[7] are to be applied in

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ing Taxes on Income, Mar. 21, 1980, United States-Republic of Malta, *reprinted in* 1 Tax Treaties (CCH) ¶ 5405; Convention for the Avoidance of Double Taxation, Aug. 1, 1977, United States-Morocco, 77 Dep't State Bull. 295 (1977), *reprinted in* 1 Tax Treaties (CCH) ¶ 5603; Convention Respecting Taxes on Income, Oct. 1, 1976, United States-Philippines, *reprinted in* 2 Tax Treaties (CCH) ¶ 6603; Convention Respecting Taxes on Income, Nov. 20, 1975, United States-Israel, 73 Dep't State Bull. 839 (1975), *reprinted in* 1 Tax Treaties (CCH) ¶ 4203. A treaty with Korea entered into force October 20, 1979, Convention for the Avoidance of Double Taxation, June 4, 1976, United States-Republic of Korea, _ U.S.T. _, T.I.A.S. No. 9506, *reprinted in* 1 Tax Treaties (CCH) ¶ 4803. Negotiations have been completed with Argentina. 2 Tax Treaties (CCH) ¶ 9691 (Sept. 27, 1979. Ongoing negotiations include those with Tunisia, *id.* at ¶ 9649 (Oct. 27, 1980), and with Brazil, Costa Rica, and Nigeria, Daily Tax Rep. (BNA) No. 182, at G-7, -8 (Sept. 18, 1979). *See generally* Liebman, Book Review, 13 J. World Trade L. 367, 370-71 (1979).

[5] *See generally* Liebman, *A Formula for Tax-Sparing Credits in U.S. Tax Treaties with Developing Countries*, 72 Am. J. Int'l L. 296 (1978) [hereinafter cited as Liebman].

[6] *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1022(a), 90 Stat. 1520 (amending I.R.C. § 1248(d)(3), by repealing the special treatment allowed upon the sale or exchange of stock in so-called Less Developed Country Corporations (LDCC)); *id.* § 1033(a) (amending I.R.C. § 902, by modifying the exception from the gross-up requirement when calculating the foreign tax credit limitation as applied to LDCC dividends).

[7] I.R.C. §§ 1-9042 (codified at 26 U.S.C. §§ 1-9042 (1976 & Supp. III 1979)).

the Marianas as a "local territorial income tax" in the same manner in which they are applicable to Guam;[8] namely, by substituting the words "Northern Mariana Islands" for the words "United States," wherever the latter appear in the Internal Revenue Code.[9] References in the Internal Revenue Code to Guam also will be substituted by the words "Northern Mariana Islands," unless such a substitution yields an inconsistency or otherwise produces a resulting tax effect which is incompatible with the intent of either the Covenant or the Internal Revenue Code.[10]

These income taxes will be collected by the Marianas Government and may be retained by it.[11] Under the Internal Revenue Code, however, taxes attributable to U.S.-source income are to be "covered into the Treasury of the United States" in the event they are collected from an individual who ordinarily would file and pay taxes only to the Marianas and who has (a) an adjusted gross income of $50,000 or more, and (b) gross income of $5,000 or more from U.S. sources.[12]

The Covenant specifically gives the Marianas the authority to rebate, if they so desire, any taxes received by them which are derived from Marianas-source income.[13] The authority to rebate "any" taxes from Mari-

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[8] COVENANT, *supra* note 1, at art. VI, § 601(a).

[9] Rev. Rul. 80-167, 1980-1 C.B. 176; "Explanation of the Covenant," in *To Approve "The Covenant To Establish a Commonwealth of the Northern Mariana Islands," and for Other Purposes: Hearing on H.J. Res. 549, H.J. Res. 550, and H.J. Res. 547 Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 384, 390 (1975) [hereinafter cited as *Hearing*]. The federal unemployment tax and the benefits thereunder are not, however, applicable to the Marianas (nor are they applicable to Guam). "Section-by-Section Analysis of the Covenant To Establish a Commonwealth of the Northern Mariana Islands" [hereinafter cited as Section-by-Section Analysis], in *Hearing, supra*, at 626, 646.

[10] COVENANT, *supra* note 1, at art. VI, § 601(c): "References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof or of this Covenant."

[11] OFFICE OF THE PLEBISCITE COMM'R, SAIPAN, MARIANA ISLANDS, THE COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA EXPLAINED 7 (1975) [hereinafter cited as *Covenant Explained*], *reprinted in Hearing, supra* note 9, at 543, 551. *See* I.R.C. § 935(c)(3), as applied to the Marianas pursuant to COVENANT, *supra* note 1, at art. VI, § 601(b), *quoted in* note 22 *infra*. See Part IIIA *infra*.

[12] I.R.C. § 7654(a). *See also* Treas. Reg. § 301.7654-1(a)(2) (1975). This provision of the Internal Revenue Code is applicable to the Marianas by reason of its applicability to Guam and the coordinate treatment of the two jurisdictions pursuant to section 601(c) of the Covenant. *See* note 10 *supra*.

[13] COVENANT, *supra* note 1, at art. VI, § 602:

> The Government of the Northern Mariana Islands may by local law impose such taxes, in addition to those imposed under Section 601, as it deems appropriate and provide for the rebate of any taxes received by it, except that the power of the Government of the Northern Mariana Islands to rebate collections of the local territorial income tax received by it will be limited to taxes on income derived from sources within the Northern Mariana Islands.

Congress recently clarified its understanding of "rebate" by declaring that the term "does not permit the abatement of taxes," Act of Mar. 12, 1980, Pub. L. No. 96-205, § 205(c), 94

anas-source income has been construed to include those taxes which are collected by the United States but which are subsequently transferred to the Marianas pursuant to section 703(b) of the Covenant.[14] The rebate authority does not extend to those taxes collected by the Marianas which must, in turn, be covered into the United States Treasury as mentioned above since such taxes are attributable to U.S.-source income.[15]

The Covenant also accords to the Marianas the authority to enact local laws to impose any additional taxes which the Commonwealth deems desirable.[16] Thus, in combination with the rebate provision of section 602 of the Covenant, the actual tax system in the Marianas could be vastly different from that envisioned in the Internal Revenue Code.[17]

The tax provisions of the Covenant (with the exception of those concerned with social security taxes) were to come into effect within 180 days

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Stat. 84, but subsequently suspended the force and effect of the clarifying provision until January 1, 1983, Act of Dec. 24, 1980, Pub. L. No. 96-597, § 303(b), 94 Stat. 3477. See notes 73, 90 *infra*.

Guam also has rebate authority, and "corporations organized in Guam or the United States may qualify for rebates of 75 percent of Guam income taxes." U.S. DEP'T OF THE TREASURY, TERRITORIAL INCOME TAX SYSTEMS 24 (1979) [hereinafter cited as TREASURY REPORT]. In 1977, the Guam Legislature authorized rebates of 75 percent of the Guamanian taxes paid on foreign earned income by its resident individuals. *Id.* at 3, 25; TIME, Jan. 16, 1978, at 19. See note 91 *infra*. In order to qualify for a rebate of corporate tax, the corporate investor must meet certain minimum investment requirements and its investment must increase employment, replace imports, or create much needed facilities. U.S. DEP'T OF THE TREASURY, THE OPERATION AND EFFECT OF THE POSSESSIONS CORPORATION SYSTEM OF TAXATION: FIRST ANNUAL REPORT 71 (1978) [hereinafter cited as POSSESSIONS REPORT] (Guam rebate for corporate income taxes allowed for up to 20 years; for taxes on dividends, up to five years; for other exemptions, up to ten years; rebate and exemption periods are doubled where corporation elects to take half the benefit).

[14] Section-by-Section Analysis, *supra* note 9, in *Hearing*, *supra* note 9, at 647. Those taxes required to be paid over to the Marianas treasury under section 703(b) of the Covenant include customs and excise duties levied on exports from the Marianas to the United States or on products consumed in the Marianas.

> There will be paid into the Treasury of the Government of the Northern Mariana Islands, to be expended to the benefit of the people thereof as that Government may by law prescribe, the proceeds of all customs duties and federal income taxes derived from the Northern Mariana Islands, the proceeds of all taxes collected under the internal revenue laws of the United States on articles produced in the Northern Mariana Islands and transported to the United States, its territories or possessions, or consumed in the Northern Mariana Islands, the proceeds of any other taxes which may be levied by the Congress on the inhabitants of the Northern Mariana Islands, and all quarantine, passport, immigration and naturalization fees collected in the Northern Mariana Islands, except that nothing in this Section shall be construed to apply to any tax imposed by Chapters 2 [Tax on Self-Employment Income] or 21 [Federal Insurance Contributions Act] of Title 26, United States Code.

COVENANT, *supra* note 1, at art. VII, § 703(b). *See* text accompanying notes 39-51 *infra*.

[15] *See* note 12 *supra* and accompanying text.

[16] COVENANT, *supra* note 1, at art. VI, § 602, *quoted in* note 13 *supra*.

[17] *See* text accompanying notes 68-79 *infra*.

after the approval of the Covenant and a new Marianas constitution,[18] except to the extent any provision which may be contained in such a constitution is inconsistent with the Trusteeship Agreement.[19] The Trusteeship is expected to be terminated in 1981.[20] For the most part, the tax provisions came into effect in January 1979.[21]

B. Taxation of Individuals

The Covenant specifically provides for individual taxation to be governed by section 935 of the Internal Revenue Code.[22] Thus, a citizen or resident of either the United States or the Marianas need only file one income tax return and by doing so will fulfill his filing obligations to both jurisdictions.[23] The return is to be filed with the jurisdiction in which the taxpayer resides, as his residence is defined under the United States Treasury Regulations.[24] In the event an individual resides in neither the United States nor the Marianas, he must file in the latter if he is a Marianas citizen but not otherwise a citizen of the United States.[25] This category would include "any individual who has become a citizen of the United States by birth or naturalization" in the Marianas.[26] All other persons, including nonresident aliens of both jurisdictions, are to file in the United States.[27]

Thus, all individual residents of the Marianas will file and pay income tax to the Marianas Government. This rule applies equally to United States citizens employed by the United States Government who establish a residence in the Marianas.[28] In the case of members of the United

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[18] COVENANT, *supra* note 1, at art. X, § 1003(b).

[19] *Id.* § 1004(b).

[20] TREASURY REPORT, *supra* note 13, at 5 n.*.

[21] *But see* note 73 *infra*.

[22]. COVENANT, *supra* note 1, at art. VI, § 601(b):

> Any individual who is a citizen or a resident of the United States, of Guam, or of the Northern Mariana Islands (including a national of the United States who is not a citizen), will file only one income tax return with respect to his income, in a manner similar to the provisions of Section 935 of Title 26, United States Code.

[23] I.R.C. § 935(b)(1).

[24] Treas. Reg. § 1.935-1(b) (1975) (describing the system applicable to Guam). Guam reportedly has extended its residency status to all persons who desire it "regardless of where they reside or do business." TIME, Jan. 16, 1978, at 19. This attempt to attract United States investors probably will fall short of its goal since the Treasury Regulations require that the tests of residency contained in Treasury Regulation sections 1.871-2 to -5 generally should be applied to determine whether a person resides in Guam or in the United States. Treas. Reg. § 1.935-1(a)(3) (1975). The same rule therefore should apply to the Marianas.

[25] I.R.C. § 935(b)(1)(C)(i), as applied to the Marianas pursuant to COVENANT, *supra* note 1, at art. VI, § 601(b), *quoted in* note 22 *supra*; Treas. Reg. § 1.935-1(b)(1)(iii)(A) (1975).

[26] Treas. Reg. § 1.935-1(a)(3) (1975).

[27] I.R.C. § 935(b)(1)(C)(ii), as applied to the Marianas pursuant to COVENANT, *supra* note 1, at art. VI, § 601(b), *quoted in* note 22 *supra*.

[28] *See* Treas. Reg. § 1.935-1(b)(1)(ii) (1975).

States Armed Forces who are temporarily stationed in the Marianas, however, the Covenant preserves the treatment accorded by the Soldiers and Sailors Civil Relief Act[29] to the same extent as it applies to the taxation of United States servicemen stationed on Guam.[30] Under this special Act, military personnel are considered United States residents for tax purposes regardless of their actual place of residence.[31] Thus, their military pay will be deemed to have been derived from U.S. sources, and they will file and pay taxes to the United States even if they are otherwise residing in the Marianas at the end of the taxable year.[32]

If one follows the series of cross-references, it nevertheless appears that the Marianas ultimately will receive the taxes collected from such servicemen. Under the Internal Revenue Code, the United States must pay over to Guam all income taxes withheld from the compensation paid to United States servicemen stationed on Guam.[33] As section 601(c) of the Covenant deems references to Guam in the Internal Revenue Code as also referring to the Northern Mariana Islands,[34] the latter also should receive the tax receipts withheld from the compensation paid to military personnel stationed in the Marianas.

If, on the other hand, a serviceman stationed in the Marianas has Marianas-source income in addition to his military pay, the tax receipts must follow a different route. According to the Treasury Regulations, the Internal Revenue Code provision regarding military pay to be covered over into the Marianas treasury "does not apply to wages for services performed in . . . [the Marianas] by members of the Armed Forces of the United States which are not compensation for military or naval service."[35] Although the serviceman in such a case still must file with the United States because he is deemed a United States resident under the Soldiers

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[29] 50 U.S.C. app. §§ 514, 574 (1976).

[30] COVENANT, *supra* note 1, at art. VI, § 605:

> Nothing in this Article will be deemed to authorize the Government of the Northern Mariana Islands to impose any customs duties on the property of the United States or on the personal property of military or civilian personnel of the United States Government or their dependents entering or leaving the Northern Mariana Islands pursuant to their contract of employment or orders assigning them to or from the Northern Mariana Islands or to impose any taxes on the property, activities or instrumentalities of the United States which one of the several States could not impose; nor will any provision of this Article be deemed to affect the operation of the Soldiers and Sailors Civil Relief Act of 1940, as amended, which will be applicable to the Northern Mariana Islands as it is applicable to Guam.

[31] 50 U.S.C. app. § 574 (1976).

[32] *Cf.* Treas. Reg. § 1.935-1(a)(3) (1975), as applied to the Marianas pursuant to COVENANT, *supra* note 1, at art. VI, §§ 601(b), 605, *quoted in* notes 22, 30 *supra* (Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. app. § 574 (1976), governs residency for tax purposes of individuals under military or naval orders). *See also* text accompanying note 15 *supra*.

[33] I.R.C. § 7654(d); Treas. Reg. § 301.7654-1(e) (1975).

[34] *See* note 10 *supra*.

[35] Treas. Reg. § 301.7654-1(e) (1975).

and Sailors Civil Relief Act, the United States is nevertheless expressly obligated under the Covenant to turn over to the Marianas treasury that portion of federal income taxes it has collected which is "derived from" the Marianas.[36] Since the Soldiers and Sailors Civil Relief Act only changes the source-of-income rules with regard to "compensation for military or naval service,"[37] other income of a serviceman will be categorized under the ordinary source-of-income rules.[38]

C. *Miscellaneous Provisions*

1. Customs Duties.— Although not within the scope of this article, it is worth noting that, in contrast to Puerto Rico, the Marianas are explicitly excluded from the customs territory of the United States[39] but are instead subject to the same treatment as is Guam.[40] Thus, goods from the Marianas may enter the United States free from duty only if no more than fifty percent of the value of such goods is derived from foreign materials.[41] The same condition is imposed if goods entering the Marianas from the United States are to be free from Marianas customs duties.

A potential advantage which the Marianas may derive from their exclusion from the United States customs territory is the freedom to establish a duty-free port.[42] In addition, they are free to levy duties on exports or imports from non-U.S. sources independent of the United States schedule of duties.[43] Thus, duties may be custom tailored to meet local needs and need not impose too great a burden on Marianas residents who must, of necessity, rely to a considerable extent on imports.

This freedom is somewhat circumscribed since the Marianas duties may not be levied in a manner inconsistent "with the international obligations of the United States."[44] Moreover, the Marianas are precluded from imposing duties on the import (or export) of property by the United States Government or military or civilian personnel employed by the lat-

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[36] COVENANT, *supra* note 1, at art. VII, § 703(b), *quoted in* note 14 *supra*.

[37] 50 U.S.C. app. § 574(1) (1976).

[38] *See* I.R.C. §§ 861-864.

[39] COVENANT, *supra* note 1, at art. VI, § 603(a).

[40] *Id.* § 603(c).

[41] Final Joint Communique (Dec. 19, 1973), in OFFICE FOR MICRONESIAN STATUS NEGOTIATIONS, MARIANAS POLITICAL STATUS NEGOTIATIONS, THIRD SESSION, SAIPAN, DEC. 6-19, 1973, at 6, 8 [hereinafter cited as Joint Communique], *reprinted in Hearing, supra* note 9, at 179, 187, 189.

[42] Section-by-Section Analysis, *supra* note 9, in *Hearing, supra* note 9, at 647.

[43] *See* COVENANT, *supra* note 1, at art. VI, § 603(b). Collection costs likely would exceed revenues from the duties at the current level of imports. *See Omnibus Territorial Legislation—1979: Hearing on H.R. 3756 and H.R. 3758 Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 124-25 [hereinafter cited as *Senate Hearing*] (statement of H. David Rosenbloom).

[44] COVENANT, *supra* note 1, at art. VI, § 603(b).

ter and their dependents.[45] Finally, the United States is obligated to seek concessions from foreign countries with regard to Marianas exports, more specifically the granting of "developing territory" treatment consistent with the preferential provisions allowable under the General Agreement on Tariffs and Trade (GATT) Code.[46]

2. *Excise Taxes.*— An additional benefit accorded the Marianas is that goods or merchandise shipped from the United States to the Marianas will be exempt from certain federal excise taxes.[47] This benefit arises by reason of section 601(c) of the Covenant which, as has been mentioned, grants to the Marianas those benefits which already accrue to Guam.[48] Among such benefits is the federal excise tax exemption contained in the Internal Revenue Code.[49] Thus, certain goods will be cheaper in the Marianas than elsewhere.

It should be noted, however, that there is no general exemption covering the converse situation. The United States has the authority to levy excise taxes on goods manufactured, sold, or used or on services rendered in the Marianas to the same extent as such taxes are applicable in Guam.[50] Nonetheless, any such taxes collected are to be turned over to the Marianas under section 703(b) of the Covenant and may be rebated, in turn, by the Marianas under section 602 of the Covenant.[51]

Hence, the jurisdictional allocations do not necessarily affect the revenue base of the Marianas unless the Islands exercise their rebate privilege. Presumably, the purpose of allowing such rebates is to afford the Marianas the flexibility to determine the level and mix of taxation which is best suited for economic development given their particular needs. The Marianas are granted the authority to levy excise duties on "goods manufactured, sold or used or services rendered" there as long as such duties

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[45] *Id.* § 605, *quoted in* note 30 *supra*. *See generally* "Explanation of the Covenant," in *Hearing*, *supra* note 9, at 392.

[46] Joint Communique, *supra* note 41, at 8, *reprinted in Hearing*, *supra* note 9, at 189. This topic was discussed as part of the Pacific Basin Development Conference, *see* note 3 *supra*, the goal being to encourage the more efficient use of the so-called GSP (Generalized System of Preferences) status for Pacific Basin exports. *See* CONFERENCE WORKBOOK, *supra* note 3, at 3A-6. The GATT allows waivers to permit ten-year exemptions from the Most-Favored-Nation principle of the GATT in order to accord preferential tariff treatment to imports from developing countries or territories. Waivers, Generalized System of Preferences, Decision of June 25, 1971 (L/3545), GATT Doc. C/M/69 (1971), *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 24 (18th Supp. 1972). For a useful discussion of the pros and cons of such preferences from the point of view of economic development theory, see Johnson, *Trade Preferences and Developing Countries*, in INTERNATIONAL TRADE AND FINANCE 246 (R. Baldwin & J. Richardson eds. 1974).

[47] "Explanation of the Covenant," in *Hearing*, *supra* note 9, at 390.

[48] *See* note 10 *supra*.

[49] *See* I.R.C. § 7653(b) (applicable to Guam, Puerto Rico, the Virgin Islands, and American Samoa).

[50] COVENANT, *supra* note 1, at art. VI, § 604(a).

[51] Section-by-Section Analysis, *supra* note 9, in *Hearing*, *supra* note 9, at 648; *see* notes 13-14 *supra*.

are imposed in a manner which is consistent with the international obligations of the United States.[53]

3. Social Security Taxes.— In addition to the income, excise, and customs duties provisions discussed above, the Covenant also contains detailed measures aimed to integrate the social security systems of the Marianas and the United States.[54] Basically, this is to be accomplished by first transferring to the United States Treasury the Northern Marianas' share of social security taxes paid into the present Social Security Retirement Fund of the Trust Territory of the Pacific Islands.[55] During the remainder of the Trusteeship, the United States will administer this money as a separate trust fund (to be known as the Northern Mariana Islands Social Security Retirement Fund) in accordance with applicable Trust Territory laws, but with payments guaranteed by the United States Government.[56]

Upon the termination of the United Nations Trusteeship Agreement[56] or at an earlier agreed-upon time, the full United States social security system, including the self-employment tax system, will apply to the Marianas.[57] Thus, Marianas taxpayers will be subject to the same social security taxes as those imposed in the United States and will be eligible for the same benefits in full,[58] while at the same time receiving credits for amounts contributed under the prior Trust Territory laws.[59]

4. Tax-Exempt Bonds.— Finally, the Covenant affirms that bonds and other obligations issued by the Government of the Northern Mariana Islands will be exempt from all United States federal, state, or local taxation,[60] ensuring that the Marianas will be able to borrow money for public projects at the lowest possible cost.[61] The Marianas are limited, however, in the amount of public indebtedness they may incur during the period in which they receive financial assistance from the United States.[62]

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[53] COVENANT, *supra* note 1, at art. VI, § 604(b). *See also id.* § 602, *quoted in* note 13 *supra* (granting the power to impose "such taxes . . . as it deems appropriate").

[54] *Id.* § 606.

[55] Section-by-Section Analysis, *supra* note 9, in *Hearing, supra* note 9, at 649; "Explanation of the Covenant," in *Hearing, supra* note 9, at 392.

[56] COVENANT, *supra* note 1, at art. VI, § 606(a).

[56] Termination is expected in 1981, TREASURY REPORT, *supra* note 13, at 5 n.*; *Conference Background* 1, in CONFERENCE WORKBOOK, *supra* note 3.

[57] *See* COVENANT, *supra* note 1, at art. VI, § 606(b), (c)(1).

[58] Section-by-Section Analysis, *supra* note 9, in *Hearing, supra* note 9, at 649-50; *Covenant Explained, supra* note 11, at 8, *reprinted in Hearing, supra* note 9, at 552.

[59] *See* COVENANT, *supra* note 1, at art. VI, § 606(c)(2)-(3).

[60] *Id.* § 607(a).

[61] *See* I.R.C. § 103(a)(1). Puerto Rico, the Virgin Islands, and Guam have been accorded the same benefit. "Explanation of the Covenant," in *Hearing, supra* note 9, at 392; *see* I.R.C. § 103(g)(1)-(2) (relating to Puerto Rico and Virgin Islands insular and municipal bonds); Rev. Rul. 71-402, 1971-2 C.B. 91 (interest on bonds issued by instrumentality of Guam declared tax exempt).

[62] COVENANT, *supra* note 1, at art. VI, § 607(b).

A potential anomaly arose in a related area due to the fact that it was unclear whether the Marianas would be treated as a "possession" under all instances where the term arises in the Internal Revenue Code.[63] In contrast with Guam, the Trust Territory and its political subdivisions and agencies have been treated as a foreign government for purposes of section 892 of the Internal Revenue Code, thus making the Trust Territory income from investments on United States stocks and securities and from interest accrued on United States bank deposits tax exempt.[64] Reasoning that the Covenant requires similar treatment of Guam and the Marianas, the Internal Revenue Service ruled that the Marianas, but not the remainder of the Trust Territory, are not considered a foreign government under section 892 for all taxable years beginning January 1, 1979, the effective date of the relevant Covenant provisions.[65] The Marianas may, however, qualify for the equivalent exemption under section 115, which exempts income accruing to a "State or any political subdivision thereof," or to "the government of any possession of the United States, or any political subdivision thereof."[66] The possessions exemption is in fact more advantageous than the exemption for States and municipalities; the former exemption applies to all "income" and is not limited, as is the latter, to income derived from the exercise of an "essential governmental function."[67]

D. The Application of the Covenant in Practice

As has already been mentioned, the Covenant grants to the Marianas the right to impose local taxes separate and apart from the Internal Revenue Code.[68] The Commonwealth of the Northern Marianas in effect has been given the "complete authority to write its own tax code."[69] Since the Covenant also allows the Marianas to rebate those taxes imposed under the Internal Revenue Code on Marianas-source income,[70] the Marianas basically may substitute their own tax code for that of the United States. According to the legislative history of the enactment of the Covenant,

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[63] The Marianas are not a possession for purposes of section 931 of the Internal Revenue Code and are not a foreign country for purposes of sections 892, 911, and 913, Rev. Rul. 80-167, 1980-1 C.B. 176. The status of the Marianas for purposes of other Code sections is yet unclear, *see* notes 89, 115, 119 *infra*.

[64] Rev. Rul. 73-46, 1973-1 C.B. 342 (income from funds invested in United States securities by Pacific Islands Trust Territory Social Security Board is exempt from United States income tax), *as modified by* Rev. Rul. 80-167, 1980-1 C.B. 176.

[65] Rev. Rul. 80-167, 1980-1 C.B. 176.

[66] I.R.C. § 115(1)-(2).

[67] Section 115 also exempts States and municipalities from the taxation of that portion of their income derived from utilities. *Id.* § 115(1).

[68] *See* text accompanying note 16 *supra*.

[69] Section-by-Section Analysis, *supra* note 9, in *Hearing, supra* note 9, at 647.

[70] *See* note 13 *supra*.

"[t]he record of the hearing on H.J. Res. 549 before the Subcommittee established the intent that this section [602] authorizes, among other actions, the providing of rebates on taxes collected and the enactment of surtaxes on income by the Government of the Northern Marianas."[71] The net result, according to the official Minority Views of the Senate Armed Services Committee, is to "allow the Marianas to avoid, in effect, the payment of any income taxes to the United States Government."[72]

This is in fact precisely what happened. Pursuant to the terms of the Covenant, the Internal Revenue Code became effective as a local territorial income tax as of January 1, 1979, but in December 1980 Congress delayed implementation until January 1, 1983.[73] Before Congress acted, however, the Marianas enacted legislation, effective January 1, 1979, whereby a full 100-percent rebate of taxes collected on Marianas-source income was granted until Commonwealth citizens become United States citizens when the Trusteeship is terminated.[74] Consequently, taxation is based entirely on local taxes enacted pursuant to section 602 of the Covenant.

To a great extent, the tax system now resembles that in effect under

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[71] H.R. REP. No. 94-364, 94th Cong., 1st Sess. 10 (1975).

[72] S. REP. No. 94-596, 94th Cong., 2d Sess. 23 (1976) (views of Senators John C. Stennis, Howard W. Cannon, Harry F. Byrd, Jr., Gary Hart, & William L. Scott).

[73] *See* COVENANT, *supra* note 1, at art. VI, § 601 (income tax laws come into force as local taxes on "the first day of January following the effective date of this Section"); *id.* art. X, § 1003(b) (effective date of, *inter alia*, the tax provisions of the Covenant to be determined by Presidential proclamation); Proc. No. 4534, §§ 1-2, 42 Fed. Reg. 56593 (1977), *reprinted in* 48 U.S.C. § 1681 note, at 91 (Supp. II 1978) (proclaiming January 9, 1978 the effective date of, *inter alia*, section 601 of the Covenant); Rev. Rul. 80-167, 1980-1 C.B. 176, 177. Congress originally delayed implementation of the Internal Revenue Code as applied to Marianas-source income until taxable years beginning January 1, 1981, except to the extent that the Marianas rebates result in the abatement of taxes, and authorized further delay of implementation until January 1, 1982, only if by September 1980 the Marianas repealed, effective December 31, 1981, the local laws authorizing 100% rebates, Act of Mar. 12, 1980, Pub. L. No. 96-205, § 205, 94 Stat. 84. *See* note 74 *infra*. The Marianas did not repeal their legislation, and, in December 1980, Congress delayed the implementation date of the Code until January 1, 1983, without qualification. Act of Dec. 24, 1980, Pub. L. No. 96-597, § 303(a)-(b), 94 Stat. 3477.

The Marianas Government opposed postponement of the implementation of the Internal Revenue Code before passage of the March legislation (that is, before Congress included language impacting on the rebate provision of the Covenant) in part because delay would mean a minimum loss "of $300,000.00 to the Commonwealth Treasury." *Senate Hearing*, *supra* note 43, at 155 (statement of Gov. Carlos S. Camacho).

[74] Commonwealth of the Northern Mariana Islands Tax Act of 1979, Pub. L. No. 1-30, ch. II, 1st N. Marianas Leg., 3d Sess. The Act became law on May 3, 1979, having retroactive effect to January 1, 1979, *id.* ch. II, § 8, after both chambers of the Commonwealth legislature overrode (by a two-thirds majority) the veto of Governor Carlos S. Camacho. *See generally Senate Hearing*, *supra* note 43, at 155 (statement of Gov. Carlos S. Camacho) (rebate granted until Commonwealth citizens become United States citizens when the Trusteeship is terminated, *see* note 96 *infra*); TREASURY REPORT, *supra* note 13, at 27, 38. See note 73 *supra*.

the prior Trust Territory Code.[76] There is a tax on annual gross wages and salaries levied at progressive rates of from zero percent (on gross wages of $5,000 or less) to six percent (on gross wages of $22,000).[76] Businesses are subject to annual gross revenue taxes of from zero percent (on gross revenues of $5,000 or less) to four percent (on gross revenues in excess of $250,000).[77] Special concessions are offered to agricultural and fishing endeavors which are subject to a tax of only one percent of annual gross revenues in excess of $20,000.[78] Banks and financial institutions, such as building and loan associations, are subject to the greater of a four-percent tax on net income or a one-percent tax on gross revenue.[79] These rates are clearly intended as both a realistic appraisal of what the indigenous population should pay in taxes and an attempt to attract investment and investors to the Marianas.[80]

II. Foreign Investment Incentives Under The Covenant

A. Individuals

Under section 931 of the Internal Revenue Code, a United States citizen's non-U.S.-source income may be exempted under certain circumstances from United States income taxation when he is engaged in a trade or business within a United States "possession."[81] Guam is excluded from the definition of a possession for purposes of this exemption,[82] and so are

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[75] T.T. Code tit. 77, §§ 252 (tax on wages and salaries), 258 (gross revenues of businesses), 280-281 (surtax on wages and gross revenues) (Cum. Supp. 1975). See notes 184, 190 *infra*. *See generally* Udui, *Economic Development, Foreign Investment and Taxation in the Trust Territory of the Pacific Islands*, 34 Bull. Int'l Fiscal Documentation 501 (1980) [hereinafter cited as Udui].

[76] Commonwealth of the Northern Mariana Islands Tax Act of 1979, Pub. L. No. 1-30, ch. I, § 2, 1st N. Marianas Leg., 3d Sess. (reenacting T.T. Code tit. 77, § 252 (Cum. Supp. 1975), as applied to the Commonwealth). See note 184 *infra*. For detailed information on withholding obligations and tax returns to be filed, see Division of Revenue and Taxation, Commonwealth of the Northern Mariana Islands, IN No. 79-8 (May 23, 1979).

[77] Commonwealth of the Northern Mariana Islands Tax Act of 1979, Pub. L. No. 1-30, ch. I, § 3, 1st N. Marianas Leg., 3d Sess. (reenacting T.T. Code tit. 77, § 258 (Cum. Supp. 1975), as applied to the Commonwealth). See note 190 *infra*.

[78] *Id.* ch. I, § 5. See note 186 *infra*. In the remaining island groups of the Trust Territory, copra production by unincorporated taxpayers is exempt from tax. Udui, *supra* note 75, at 506.

[79] Commonwealth of the Northern Mariana Islands Tax Act of 1979, Pub. L. No. 1-30, ch. I, § 4(a), 1st N. Marianas Leg., 3d Sess. See note 188 *infra*.

[80] *See* text accompanying notes 186-91 *infra*.

[81] I.R.C. § 931 (also applicable to domestic corporations). Income derived from non-U.S. sources but received in the United States is not exempt. *Id.* § 931(b). *See generally* 1 R. Rhoades & M. Langer, Income Taxation of Foreign Related Transactions §§ 4.11-.12 (1980) [hereinafter cited as Rhoades' Income Taxation].

[82] I.R.C. § 931(c).

the Marianas.[83] If an individual resides in the Marianas,[84] however, he need only file one return with and pay income tax to the Marianas, and he will thereby fulfill his United States tax obligations.[85] Since the Covenant empowers the Marianas to rebate any taxes paid by reason of Marianas-source income,[86] an individual Marianas resident who is a United States citizen could receive, in effect, a partial exemption from United States income tax.[87] The effect of this "exemption" would depend on the extent to which the Marianas elect to rebate taxes which they have collected under the Internal Revenue Code and the extent to which the remaining local taxes sop up some of those rebates.

The Marianas regime[88] presents a potentially significant tax incentive for individual United States citizens since the flat rate of six percent is quite low compared with United States rates, even taking into consideration the fact that the former is assessed on gross wages. Only in those relatively rare occasions when an individual has unusually high deductions would his United States tax rate be less than the Marianas rate. Thus, if one takes as an extreme example two taxpayers, both of whom are married and earn $50,000, but one of whom resides in the Marianas and derives his salary from the Marianas whereas the other lives in the United States and earns U.S.-source personal service income, the following tax consequences might be contrasted:

TABLE 1

	United States	Mariana Islands
Wages	$50,000	$50,000
Less: Zero Bracket Amount	3,400	
	46,600	
Less: Personal Exemptions (2)	2,000	
Taxable Income	44,600	
Tax	11,304[a]	3,000[b]
After-Tax Income	38,696	47,000

[a]43-percent marginal bracket
[b]Flat 6 percent

This is obviously a simplified example. But even if one includes the deductions which normally would be expected (for example, interest on a home mortgage, medical expenses, charitable contributions) in excess of

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[83] Rev. Rul. 80-167, 1980-1 C.B. 176.
[84] Residence is determined as of the end of a taxable year. I.R.C. § 935(b)(2).
[85] *Id.* 935(b)(1)(B). *See also* text accompanying notes 22-27 *supra*.
[86] *See* note 13 *supra*.
[87] *See* text accompanying notes 71-74 *supra*.
[88] *See* text accompanying note 76 *supra*; note 184 *infra*.

the zero-bracket amount, the Marianas resident in the above example still would remain better off from a tax standpoint unless the United States resident can claim deductions of nearly $30,000![89]

This tax concession is clearly an incentive for wealthy Americans to move to the Marianas,[90] but the hitch is that the rebate and alternative tax can apply only to Marianas-source income. This is in contrast to section 931 of the Internal Revenue Code, which exempts all non-U.S.-source income from United States taxation.[91] Since the Marianas must collect the full United States tax on all non-Marianas-source income and may not rebate any taxes attributable to such income, only United States citizens who are able to find jobs in the Marianas or start their own businesses there and derive a significant portion of their earnings from the Marianas would be substantially benefitted.[92]

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[89] TABLE 2

	U.S.	Marianas
Wages	$50,000.00	$50,000.00
Less: Personal Exemptions (2)	2,000.00	
	48,000.00	
Less: Deductions (Including Zero-Bracket Amount)	28,937.50	
Taxable Income	19,062.50	50,000.00
Tax	3,000.00	3,000.00
After-Tax Income	47,000.00	47,000.00

Unfortunately, as it is unclear whether the Marianas qualify as a "possession," it is uncertain whether Marianas employers will be relieved of the obligation to withhold United States income tax on the wages of their United States citizen employees. If the Marianas are a "possession," then remuneration paid to a United States citizen generally will not be considered wages and no withholding would be required, I.R.C. § 3401(a)(8)(b). Presumably, withholding will be required and the Marianas then will rebate the amount withheld, clearly creating extra work for the local tax authorities.

[90] Early in 1980 Congress enacted legislation that appeared to eliminate any taxpayer advantage derived from the rebate and alternative tax scheme. Act of Mar. 12, 1980, Pub. L. No. 96-205, § 205, 94 Stat. 84. The legislation raised serious questions regarding Congress' unilateral attempt to change the meaning and effect of the rebate provision of the Covenant, *see id.* § 205(c), and the extent to which the Commonwealth actually would govern itself. Conflict was averted when Congress essentially rescinded the controversial provisions in December 1980, Act of Dec. 24, 1980, Pub. L. No. 95-596, § 303(a)-(b), 94 Stat. 3477. See note 73 *supra*.

[91] Guam does not have such a clear limitation on its rebate authority. Thus, it is still "an unresolved issue whether Guam has the authority to rebate Guam taxes on foreign earned income." TREASURY REPORT, *supra* note 13, at 25. Guam currently rebates 75 percent of the taxes it collects on the income of United States citizens residing in Guam as long as such income is earned outside of the United States or its territories. *Id. See also* note 13 *supra*.

[92] In reality, the final result is not necessarily very much different from that which arises under section 931 of the Internal Revenue Code, which does not exempt U.S.-source income either. In addition, section 931 applies only when at least 80 percent of the taxpayer's gross income is derived from sources within a United States possession within the last three years and at least 50 percent of his gross income is derived from the active conduct of a trade or business in a possession. I.R.C. § 931(a)(1)-(2). Hence, only 20 percent of a taxpayer's income may be nonpossession income (none of which may be U.S.-source) if he intends to

In the case of citizens of a United States possession who are not otherwise United States citizens, taxes ordinarily will be levied as if such persons were nonresident aliens.[93] The nonresident alien status is not accorded, however, to those citizens of Guam, and thus of the Marianas as well, who are not United States citizens.[94] Instead, they are to be taxed in accordance with sections 935 and 7654 of the Internal Revenue Code.[95]

The major distinction in taxation between these two regimes would appear to arise in the event a Marianas resident or a Marianas citizen who is not a United States citizen[96] receives U.S.-source income.[97] If section 932(a) of the Code were to apply as it does in the case of qualified "possessions," such U.S.-source income would be taxed at a flat thirty-percent rate pursuant to section 871(a), as long as the income is "not effectively connected" with the conduct of a United States trade or business.[98] When the income in question is connected with a United States trade or business, the regular graduated rate schedules and capital gains tax of sections 1 and 1201(b) would apply.[99]

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qualify for a section 931 exemption.

[93] *See* I.R.C. § 932(a).

[94] *Id. See* note 10 *supra*.

[95] *See* I.R.C. § 932(c).

[96] Under section 301 of the Covenant, all Marianas-born or domiciled individuals meeting certain conditions are automatically United States citizens. COVENANT, *supra* note 1, at art. III, § 301. They may renounce their United States citizenship (but retain their status as a national) by filing a declaration under oath to that effect within six months after the termination of the Trusteeship Agreement or within six months of reaching 18 years of age. *Id.* § 302, art. X, § 1003(c). Only those persons who file such a declaration apparently would be concerned with the distinction between sections 932 and 935 of the Code. All other persons born in the Marianas subsequent to termination of the Trusteeship Agreement are automatically United States citizens, *id.* art. III, § 303, art. X, § 1003(c), and apparently cannot retain separate Marianas citizenship if they renounce their United States citizenship. Furthermore, upon expatriation for the purpose of avoiding United States taxes, such persons still may be subject to taxation as United States citizens on their U.S.-source income for ten years following their loss of citizenship. *See* I.R.C. § 877.

[97] This should not occur often in light of the general low level of income in the Marianas which leaves its citizens little for investment in the United States. The minimum wage is $1.35 per hour, and the average private-sector wage is well under $4,000. Interview with Robert L. Garland, General Counsel, Office of the Representative to the United States for the Commonwealth of the Northern Mariana Islands, in Washington, D.C. (Dec. 29, 1980). *Cf.* "Explanation of the Covenant," in *Hearing, supra* note 9, at 390 (current income levels in Marianas make impact of United States tax rates as local taxes insignificant); Section-by-Section Analysis, *supra* note 9, in *Hearing, supra* note 9, at 646 (although United States tax rates are higher than Trust Territory rates, the Marianas taxpayers' total tax burden will not increase because of progressive structure of United States rates).

[98] I.R.C. § 871(a)(1).

[99] *See id.* § 871(b); Treas. Reg. § 1.871-8(b)(2) (1974). It should be noted that compensation from a United States employer for services rendered in a possession would not be U.S.-source income, I.R.C. § 862(a)(3), unless the amount is received in the United States, *id.* § 931(b). Thus, only those individual residents of a United States possession wealthy enough to invest in United States securities, property, or business ventures are likely to be recipients of U.S.-source income.

The result is not really any different by reason of the applicability of sections 935 and 7654, because the the intent of those provisions is merely to reassign the administrative burden of tax collections and not to change the tax liability at stake.[100] But the Covenant calls for the promulgation of the Internal Revenue Code as the local territorial income tax of the Marianas,[101] and U.S.-source income may not be rebated by the Marianas.[102] Therefore, a Marianas resident will be taxed at the regular graduated rate schedules in effect in the United States instead of at the United States nonresident alien withholding rates, regardless of whether the income is effectively connected with a United States trade or business.[103] In some instances, such treatment may prove more favorable than if section 932 of the Code were to apply; in other instances, less favorable.

For example, the ownership of United States real estate or securities will attract a thirty-percent withholding tax on gross receipts—assuming the owner is not thereby engaged in a United States trade or business—under section 932 (unless the election to be taxed on a net basis is applicable under section 871(d)), whereas a Marianas resident may deduct the expenses attributable to such income and thereby lower his effective tax rate. On the other hand, United States insurance premiums received by a Marianas resident will be taxable at ordinary rates, whereas under section 932 they might be received tax free if the recipient is not engaged in a United States insurance business.[104] Hence, it is difficult to ascertain in advance whether one tax regime will prove more beneficial than the other. Much depends upon the type of income being derived from the United States. In most instances of active United States investment, there should be no difference in the tax result. In the case of passive investment (for example, in securities), the tax effect will depend entirely on the investor's tax bracket and whether significant expenses were incurred in deriving the income.

Because rebates of non-Marianas-source income are not allowed, even if the income is not derived from the United States,[105] there is no incentive for a non-United States citizen to use the Marianas to invest in foreign securities or business since the income so generated will be subject to the

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[100] See note 103 *infra*.

[101] *See* text accompanying note 9 *supra*.

[102] *See* note 13 *supra*.

[103] In one respect section 935 will play a substantive role in distinguishing the tax treatment of Marianas residents from that of possessions residents in that the section deems the United States to be a part of the Marianas for purposes of the latter's tax treatment. *See* I.R.C. § 935(c)(2); note 10 *supra*. Hence, U.S.-source income will be treated as domestic-source income for Marianas tax purposes. This has the effect, for example, of precluding a Marianas resident from claiming a foreign tax credit under sections 901 through 904 by reason of his U.S.-source income. *See* Treas. Reg. § 1.935-1(c)(1)(ii) (1975).

[104] *See* I.T. 1359, I-1 C.B. 292 (1922); IRS Priv. Ltr. Rul. 7942078, [1979] FED. TAXES PRIVATE LETTER RULINGS (P-H) ¶ 4349.

[105] *See* note 13 *supra*.

same tax (after being offset by foreign tax credits) as if the investor were residing in the United States. As a further disincentive (of sorts), non-United States citizens residing in the Marianas no longer will qualify for the exemption from United States income tax on income derived from certain United States savings bonds, or at least from those acquired once the Marianas are no longer a part of the Trust Territory of the Pacific Islands.[106] Finally, they now will be subject to the United States tax on self-employment income.[107]

B. Corporations

It was not until after the approval of the Marianas Covenant that Congress enacted the Tax Reform Act of 1976 which, *inter alia*, added section 936 to the Internal Revenue Code.[108] Under section 936, a qualified United States corporation may receive up to a full forty-six percent foreign tax credit against the United States taxes imposed on its non-U.S.-source income derived from the active conduct of a trade or business in a United States possession,[109] notwithstanding whether any tax is in fact paid to the possession government. This credit may be elected[110] by a qualified company in lieu of the foreign tax credits allowable elsewhere in

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[106] *See* I.R.C. § 872(b)(4). It had been agreed that this Code provision would be amended to continue its application to the Marianas even under the latter's new political status, at least with respect to bonds purchased before the establishment of the Commonwealth. Joint Communique, *supra* note 41, at 8, *reprinted in Hearing*, *supra* note 9, at 189. No such amendment has been enacted as yet.

[107] I.R.C. § 1402(b), as applied to the Marianas pursuant to COVENANT, *supra* note 1, at art. VI, § 601(c), *quoted in* note 10 *supra*.

[108] Pub. L. No. 94-455, § 1051(b), 90 Stat. 1520 (1976). For an overall description of possessions corporation tax treatment prior to the advent of section 936, see Benjamin, *Tax Aspects of Operating a Possessions Corporation in Puerto Rico*, 2 INT'L TAX J. 197 (1976). For a policy analysis of this tax concession, see S. REP. No. 94-938, 94th Cong., 2d Sess. 277-82, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3707-13; FEDERAL TAX REFORM FOR 1976, at 143-52 (S. Surrey, P. McDaniel, & J. Pechman eds. 1976).

The congressional purpose behind the enactment of section 936 was to "assist the U.S. possessions in obtaining employment-producing investments by U.S. corporations, while at the same time encouraging those corporations to bring back to the United States the earnings from these investments to the extent they cannot be reinvested productively in the possession." S. REP. No. 94-938, 94th Cong., 2d Sess. 279, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3709-10; *accord*, H.R. REP. No. 94-658, 94th Cong., 1st Sess. 255 (1975).

[109] Amounts received in the United States by a domestic corporation are treated as U.S.-source income regardless of their ultimate source. I.R.C. § 936(b). This rule applies only to the initial receipt of funds in the United States, but it will apply even in the event of a temporary initial remittance to the United States. *Compare* Rev. Rul. 67-330, 1967-2 C.B. 260, *with* Rev. Rul. 58-486, 1958-2 C.B. 392. The funds subsequently may be remitted to the United States after initial receipt elsewhere. *See* Rev. Rul. 73-6, 1973-1 C.B. 347.

[110] I.R.C. § 936(e) (Puerto Rico and possession tax credit).

the Internal Revenue Code.[111] In order to qualify, the corporation must have derived eighty percent or more of its gross income over the preceding three-year period from sources within a possession and fifty percent or more of its gross income from the active conduct of a trade or business within a possession during that same period.[112] In effect, the section 936 credit results in a form of tax sparing,[113] since it grants a credit for taxes which may or may not have been levied by and paid to a possession government. It is therefore a very favorable incentive.

For purposes of a section 936 credit, a "possession" is defined to include Puerto Rico and not to include the Virgin Islands.[114] Unfortunately, no further clue is provided as to which territories qualify as possessions, nor are the Marianas or Guam specifically included or excluded from this classification for the purposes of this section of the Internal Revenue Code.[115]

Guam and the Marianas are excluded from the class of "possessions" for section 931 purposes.[116] In addition, since Guam and the United States are treated as one geographic and governmental unit under section 935(c),[117] a United States taxpayer cannot claim a foreign tax credit based on his Guam-source income.[118] Sections 931 and 935, however, ap-

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[111] *See* I.R.C. §§ 901-908. Note especially I.R.C. §§ 901(g), 936(c) (denying a foreign tax credit for taxes paid by a possessions corporation during a period in which it has elected the benefits of section 936). *See, e.g.*, Rev. Proc. 80-12, 1980-1 C.B. 616.

[112] I.R.C. § 936(a)(2).

[113] *See generally* Liebman, *supra* note 5. It might be noted that the use of a credit mechanism differentiates section 936 from the exclusion of income under section 931, *see* POSSESSIONS REPORT, *supra* note 13, at 71.

[114] I.R.C. § 936(d)(1).

[115] According to the Treasury Department, Guam is included as a "possession" for section 936 purposes (although it is not clear upon what authority), whereas it remains uncertain — even to the Treasury Department — whether the Marianas qualify as such. TREASURY REPORT, *supra* note 13, at 23 n.*, 27, 39. The intention during negotiations, however, was that the Marianas should qualify for this privilege. *See* Joint Communique, *supra* note 41, at 8, *reprinted in Hearing, supra* note 9, at 189 (agreement that the section 931 tax credit—at that time applicable to corporations as well as to individuals—would be accorded the Marianas). To the extent that Guam does qualify as a possession under section 936, recent language of the Internal Revenue Service indicates that the same treatment in every instance will be accorded the Marianas because of the pertinent Covenant provisions, Rev. Rul. 80-167, 1980-1 C.B. 176.

[116] Rev. Rul. 80-167, 1980-1 C.B. 176. For purposes of section 931, the term "possession of the United States" includes the Panama Canal Zone, American Samoa, Wake Island, and Midway Island, Treas. Reg. § 1.931-1(a)(1), T.D. 7385, 1975-2 C.B. 298, T.D. 7283, 1973-2 C.B. 79; [1980] 6 STAND. FED. TAX REP. (CCH) ¶ 4359.01. In addition, Palmyra, Johnston Island, Kingman Reef, Howland Island, Baker Island, and Jarvis Island are considered possessions with respect to individuals for at least some tax purposes. INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, PUB. NO. 570, TAX GUIDE FOR U.S. CITIZENS EMPLOYED IN U.S. POSSESSIONS 1 (1979).

[117] *See* Rev. Rul. 80-167, 1980-1 C.B. 176, 177; 1 RHOADES' INCOME TAXATION, *supra* note 81, at § 4.12[2], at 4-50 to -52.

[118] Treas. Reg. § 1.935-1(c)(1)(ii)(A) (1975). He may, however, deduct the amount of taxes

ply to individuals rather than to corporations. Thus, in the absence of specific exclusionary language, such as that for the Virgin Islands, it might reasonably be argued that the Marianas and Guam do qualify as "possessions" for purposes of the section 936 credit.[119] An amendment to the statute or, at least, an Internal Revenue Service (IRS) ruling would be required to obtain a dispositive answer.

If clarifying legislation or a favorable ruling were to be enacted or issued, a qualified United States corporation could take advantage of the tax advantages inherent in the section 936 concession without having to create a separate Marianas-incorporated subsidiary to take advantage of the Covenant rebate. In addition, such a company conceivably could use its Marianas business as an umbrella to shelter activities in other Pacific possessions, since the possession credit is not limited on a possession-by-possession basis. Rather, the terms of section 936 read in such a manner as to imply an overall credit for activities in all possessions.[120] Thus, extending the applicability of section 936 to the Marianas would serve to increase the availability of tax benefits for investment in the Marianas.

Unfortunately, even if a ruling is issued on this point, there still remains a question as to how to apply Code section 936 in the context of the Marianas Covenant. In theory, if the Internal Revenue Code is applicable within the Marianas as a local territorial income tax, a Marianas corporation which qualifies for the possession tax credit may then seek to claim it against the tax due to the Marianas under the Internal Revenue Code. This anomaly arises because of the double-edged effect of the "mirror-image" system. If the Marianas are substituted wherever the words "United States" are used, the United States should, strictly speaking, be substituted wherever the words "Commonwealth of the Northern Mariana Islands" appear, and since the latter words do not appear expressly in

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paid to Guam, with the exception of income taxes. *Compare* I.R.C. § 164(a), *with* I.R.C. § 275(a).

[119] Although the Northern Marianas will not be treated as a "possession" for purposes of section 931, Rev. Rul. 80-167, 1980-1 C.B. 176, the regulations defining possessions for that section are not necessarily applicable to other sections of the Code which employ the term, 1 RHOADES' INCOME TAXATION, *supra* note 81, at § 4.12[2], at 4-53. Specific rulings have in the past indicated that "sovereignty" is the key to possession status, *see, e.g.*, Rev. Rul. 70-193, 1970-1 C.B. 163, *as modified by* Rev. Rul. 80-167, 1980-1 C.B. 176. Thus, where the United States shares sovereignty or elects not to exercise it, possession tax treatment is denied. Clark & Sparrow, *Tax Advantages of Operating Through a Possessions Corporation*, in U.S. TAX. OF INT'L OPERATIONS (P-H) ¶¶ 7514, 7514.3 (Feb. 14, 1979) (discussing rulings determining that Canton Island and the Ryukyus are not possessions). Under this test, the Marianas should qualify as a possession since the Covenant provides for the Marianas to "become a self-governing commonwealth . . . in political union with and *under the sovereignty* of the United States of America." COVENANT, *supra* note 1, at art. I, § 101 (emphasis added).

[120] *See* Rev. Rul. 71-13, 1971-1 C.B. 217 (interpreting section 931). *Cf.* I.R.C. § 904(a) (using "overall" tax credit limitation formula as opposed to the prior "per country" limitation).

the Internal Revenue Code (at least not yet), section 601(c) of the Covenant would substitute the "United States" wherever "Guam" appears.[121]

On its face, such a result would seem to defeat the intent of allowing the Marianas to collect the tax revenues due under the Internal Revenue Code. In effect, such a result could require that the Marianas grant a tax holiday for investment in the United States if the mirror-image theory is interpreted so as to treat the latter as a possession of the Marianas.[122] In addition, the Marianas might be forced to grant the section 936 credit to investment by Marianas corporations in other "possessions" of the United States if the status of the United States is attributed to the Marianas.[123] The result would further add to the anomaly of one developing area being forced to grant tax-sparing credits to support the economic development of other developing territories.

This theoretical dilemma may be resolved in a number of fashions. First, if, under the mirror-image system, section 936(b) is read to treat amounts received in the Marianas as Marianas-source income, section 936(a)(1) will be read to exclude such income from possession tax credit treatment. This only provides a limited resolution to the dilemma since there is no reason a taxpayer must structure its transactions to repatriate income earned from other "possessions."

A more sweeping resolution might be achieved by invoking the conflict between sections 601(a) and 601(c) of the Covenant.[124] The first Covenant provision places the Marianas in the stead of the United States, whereas the second allows them to claim the benefits accorded to Guam. The congressional intent of the Covenant was, in a case such as this, to give the Marianas the advantages of a developing territory and not the responsibilities of the United States. Thus, section 601(c) should take precedence over section 601(a). At least if the mirror-image system is applied to the Marianas as it applies to Guam, rather than as it has at times been strictly applied to the Virgin Islands, the Marianas could take advantage of the legislative history surrounding the enactment of Code section 935, a legislative history which has been interpreted as relieving Guam "of

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[121] *Cf.* Vitco, Inc. v. Virgin Islands, 560 F.2d 180 (3d Cir. 1977), *cert. denied,* 435 U.S. 980 (1978) (approving two-way substitution approach to mirror-image system). See notes 122-23 *infra.*

[122] For a thorough discussion of the inconsistencies in the mirror-image system, see G. DANIELSON, BUSINESS OPERATIONS IN THE U.S. VIRGIN ISLANDS A-4, A-20 to -24 (TAX MNGM'T (BNA) Portfolio No. 336-2nd, 1978) [hereinafter cited as DANIELSON]. *See also* 45 Fed. Reg. 45924 (1980) (IRS proposed revocation of regulation effectively overruling the Third Circuit decision, *see* note 121 *supra,* regarding exemptions for Virgin Islands residents from withholding tax liability on U.S.-source income); *id.* at 63296 (notice of public hearing on proposed revocation).

[123] One commentator has noted that this is the result which logically follows from applying the two-way substitution approach of the Third Circuit, *see* notes 121-22 *supra,* to the regulation defining "possessions," Treas. Reg. § 1.931-1(a), T.D. 7385, 1975-2 C.B. 298, T.D. 7283, 1973-2 C.B. 79. DANIELSON, *supra* note 122, at A-15.

[124] *See* note 10 and text accompanying note 8 *supra.*

some of the more onerous features of the mirror theory."[125] Unfortunately, this is not a readily available solution since section 601(a) of the Covenant is broadly written, whereas section 601(c) may apply only where the result is not manifestly incompatible with the intent of the Covenant or the Code. Although section 601(c) would appear to reflect more accurately the intent of the Covenant in this respect, it is a subservient provision and not one which takes precedence over other provisions in cases of conflict.[126]

Whether fortunately or unfortunately, this theoretical dilemma is not likely to be resolved in the near future for three reasons. First, Congress has delayed the imposition of the Internal Revenue Code until the 1983 taxable year.[127] Second, there is still a serious split in the strictness with which the mirror-image system is to be applied.[128] Third, in light of the decision of the Marianas to rebate fully the Internal Revenue Code taxes collected on Marianas-source income,[129] there would be no case of a section 936 credit being applied against a tax on such income. Nor is the section 936 tax creditable against a purely local tax such as the Marianas tax on gross business revenue.[130]

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[125] DANIELSON, *supra* note 122, at A-24. *But see* Sayre & Co. v. Riddell, 395 F.2d 407, 409 (9th Cir. 1968) (disallowing variations in statutory definitions in order to make the mirror-image system more equitable as applied to a Hawaii partnership in Guam).

[126] *But see* Guam v. Koster, 362 F.2d 248 (9th Cir. 1966) (authorizing Guam to promulgate regulations which would modify United States income tax provisions "manifestly inapplicable or incompatible" with the intent of the Organic Act; that is, where there are ambiguous or inconsistent provisions of the Code which require administrative interpretation). Query the effect and applicability of Maestre v. Commissioner, 73 T.C. 337 (1979), holding that the enforcement of section 933 of the Internal Revenue Code is not precluded by reason of the Compact between the United States and Puerto Rico since the Compact did not prevent Congress from subjecting American citizens who are Puerto Rican residents to United States laws, including the Internal Revenue Code.

[127] Act of Dec. 24, 1980, Pub. L. No. 96-597, 94 Stat. 3477. See note 73 *supra*. The Carter Administration publicly supported the passage of such an extension, *Senate Hearing*, *supra* note 43, at 124 (statement of H. David Rosenbloom), but the Governor and senate president of the Commonwealth originally opposed the delay. *Id.* at 155-56 (statements of Gov. Carlos S. Camacho and Hon. Lorenzo I. Guerrero).

[128] The Ninth Circuit generally has refused to apply a strict mirror-image system to individuals but not to corporations. *Compare* Manning v. Blaz, 479 F.2d 333 (9th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) (non-Guamanian United States citizen, not a resident of Guam), *with* Sayre & Co. v. Riddell, 395 F.2d 407 (9th Cir. 1968) (Hawaii partnership in Guam). The Third Circuit has adopted the opposite approach for the Virgin Islands. *See e.g.*, Great Cruz Bay, Inc. v. Wheatley, 495 F.2d 301 (3d Cir. 1974); Chicago Bridge & Iron Co. v. Wheatley, 430 F.2d 973 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). It has been suggested that Guam cases are persuasive authority for Virgin Islands income tax cases (where not otherwise in contradiction to existing precedent) because of the similarity in both jurisdictions' mirror-image tax systems, DANIELSON, *supra* note 122, at A-7, but the Virgin Islands mirror-image system is the most complicated of all the territorial tax codes, TREASURY REPORT, *supra* note 13, at 39.

[129] *See* notes 73-74 *supra* and accompanying text.

[130] *See* note 190 *infra*.

The only instance in which the issue still may arise in the context of a rebate and alternative tax regime is if a Marianas corporation earns income both in the Marianas and in other United States possessions. The tax on the income earned in the other possessions may not be rebated by the Marianas under section 602 of the Covenant,[181] and yet, if the Internal Revenue Code is in force, a corporate taxpayer might attempt to claim a full credit under section 936 for the Marianas income tax (as opposed to gross business revenue tax) due on such non-Marianas-source income, even if no tax is paid in the other possession(s). Although it very well may be that companies established in the Marianas will engage in business in other island groups within the Pacific Basin, some of which may qualify as United States possessions,[182] the willingness of the Marianas to rebate entirely the federal income tax indicates that the Commonwealth probably would not attempt to challenge the exercise of the section 936 credit by its taxpayers as long as the latter pay the gross business revenue tax.

III. Analysis of the Marianas Tax Regime from an Administrative and Policy Viewpoint

A. Problems of Administration

The most significant issue which has arisen in the area of possessions taxation is that of the effective administration of the tax systems enacted in or imposed upon these territories. According to a recent report prepared by the Office of the Comptroller General, for example, the Government of Guam has been losing millions of dollars because of its inability to assess effectively and collect its territorial income tax.[183] According to this report, delinquent Guam taxes have risen from $2.9 million in 1969 to over $15 million in 1978.[184] The latter figure was equivalent to "16 percent of the total local revenues that Guam collected in 1978."[185]

In a subsequent Treasury Department report covering the Virgin Islands, the Marianas, American Samoa, and Guam,[186] the local territorial tax systems of all four jurisdictions were severely criticized. The Treasury Department concluded that "the territorial income tax systems appear to

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[181] *See* note 13 *supra*.

[182] *See* note 116 *supra*. The recently negotiated Compact with the remaining island groups of the Trust Territory would treat them as "possessions" for United States tax purposes as well. *See* note 202 *infra*.

[183] U.S. Comptroller General, The Government of Guam's Administration of Its Income Tax Program, Rep. No. GGD-80-3 (Oct. 3, 1979), GAO Letter B-194332, enclosure I [hereinafter cited as Guam Audit]; *see Senate Hearing*, *supra* note 43, at 38, 40 (statement of Gov. Paul M. Calvo).

[184] Guam Audit, *supra* note 133, at 3.

[185] *Id.*

[186] Treasury Report, *supra* note 13.

be failing to fulfill their basic, revenue-raising objective,"[137] in large part because "poor records of administration and compliance have widened the gap between the law and actual practice."[138] The recent performances of Guam and the Virgin Islands were particularly cited. The Virgin Islands tax administration was adjudged "lax in its tax enforcement and collection activity,"[139] with primary blame being placed on an inadequately staffed (in terms of both quality and quantity) revenue service.[140] Guam was cited for lacking procedures to identify nonfilers, to insure timely collection of taxes, and to cross-check income tax return information with previously filed withholding statements.[141]

Although no clear conclusions were drawn with regard to the Marianas, the same problem of tax administration undoubtedly exists there are well.[142] In particular, the Treasury has noted that the "IRS is not well positioned to prevent the evasion of U.S. taxes by individuals with dubious claims to residence in a territory."[143] It was probably in part for this reason, as well as because "[t]he Internal Revenue Code is exceedingly complex and the territorial tax administrations do not have the resources to enforce the Code effectively,"[144] that a bill was introduced in Congress which would provide for the Treasury Department to administer directly the territorial tax systems.[145] The bill was passed by the House of Representatives in May 1979 and was then sent to the Senate Committee on Energy and Natural Resources.[146]

At hearings held on October 10, 1979, however, the International Tax Counsel of the Treasury Department expressed the Treasury's view that the IRS should not take direct administrative responsibility for the territorial tax systems.[147] This is the same view espoused by leaders of Guam,[148] the Virgin Islands,[149] and the Northern Marianas.[150] Instead,

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[137] *Id.* at 1.

[138] *Id.* at 3.

[139] *Id.* at 35 (footnote omitted).

[140] *Id.*

[141] *Id.* at 35-36.

[142] *See* S. REP. No. 96-476, 96th Cong., 1st Sess. 11 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 467, 474.

[143] TREASURY REPORT, *supra* note 13, at 40.

[144] *Id.*

[145] H.R. 3756, 96th Cong., 1st Sess., §§ 203 (Northern Marianas), 301 (Guam), 402 (Virgin Islands), *reprinted in Senate Hearing, supra* note 43, at 2. These provisions were deleted before the bill was enacted, Act of Mar. 12, 1980, Pub. L. No. 96-205, 94 Stat. 84.

[146] CLERK OF THE HOUSE OF REPRESENTATIVES, 96TH CONG., 1ST SESS., CALENDARS OF THE UNITED STATES HOUSE OF REPRESENTATIVES 88 (final ed. 1980).

[147] *Senate Hearing, supra* note 43, at 123-25 (statement of H. David Rosenbloom).

[148] *Id.* at 38-40 (statement of Gov. Paul M. Calvo); Honolulu Advertiser, Feb. 21, 1980, at A-3, col. 3.

[149] *Senate Hearing, supra* note 43, at 130-32 (statements of Hon. Melvin H. Evans and Gov. Juan Luis); 80-1 TAX MNGM'T INT'L J. (BNA) 24 (Jan. 1980).

[150] *Senate Hearing, supra* note 43, at 154-56 (statements of Gov. Carlos S. Camacho and Hon. Lorenzo I. Guerrero).

the Treasury position seemed to be that a complete overhaul of the territorial tax system should be adopted in order to eliminate the main inconsistencies which currently exist.[151]

On the administrative end, the suggestion seemed to be to offer more assistance to the local tax authorities in their efforts to administer their own tax systems. The Puerto Rico model was pointed to as one in which assistance in training local personnel has been successful and has allowed for a smooth transition to a competent local staff of administrators.[152] Similar efforts have taken place between the United States and developing countries.[153] Conceivably, the tax administration agreements which currently exist between the IRS and the various "possessions" also could be strengthened, particularly in order to provide for greater mutual assistance in the area of tax evasion and fraud, and to establish mutual agreement procedures to allocate income under section 482.[154]

Aside from such technical assistance, the "possessions" have argued that the basic fault lies with the imposition of the Internal Revenue Code on developing economies with which it is not compatible. The Virgin Islands, for example, have indicated that changes in the Internal Revenue Code aimed at assisting the lower income groups in the United States have severely affected their own revenue-raising ability since they have fewer high-income taxpayers to pick up the slack than does the United States.[155]

The Treasury Department has admitted that the reforms had a greater impact on the Virgin Islands income tax base than on the United States

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[151] *See id.* at 123-24 (statement of H. David Rosenbloom). In the case of Guam, section 935 relieves Guam residents of liability for United States income tax. Yet the United States continues to withhold tax on pensions paid to retired military and civil service personnel resident in Guam and on salaries paid to servicemen who are citizens of Guam, without covering such tax collections into the Guam treasury, TREASURY REPORT, *supra* note 13, at 22. This is because the withholding tax provisions of the Internal Revenue Code have not been properly meshed with section 935. *Id.* at 22-23.

[152] *See Senate Hearing, supra* note 43, at 124 (statement of H. David Rosenbloom).

[153] The IRS, for example, provides technical assistance to many developing countries through its Foreign Tax Assistance Staff, funded by the United States Agency for International Development. *See* Oldman & Surrey, *Technical Assistance in Taxation in Developing Countries*, in MODERN FISCAL ISSUES: ESSAYS IN HONOR OF CARL S. SHOUP 278 (R. Bird & J. Head eds. 1972).

[154] *See, e.g.*, Ann. 78-113, 1978-30 I.R.B. 21 (conclusion of a new Agreement on Coordination of Tax Administration with the Department of the Treasury of Puerto Rico, providing for exchange of tax information and cooperative audits); IRS New Release No. IR-1926 (1977), *reprinted in* [1978] 9 STAND. FED. TAX REP. (CCH) ¶ 6348 (Double Taxation Addendum to Agreement on Coordination of Tax Administration between the IRS and the Virgin Islands Department of Finance). *See generally* 31 TAX LAW. 849, 852 (1978).

[155] *See* Pflaum, *Changes In Federal Tax Law Adversely Affect Islands*, Virgin Islands Daily News, Sept. 2, 1979, *reprinted in* TREASURY REPORT, *supra* note 13, at app. at 42. Dr. Peter E. Pflaum is director of the Virgin Islands Bureau of Public Administration. See note 97 *supra*.

base[156] but—based on statistical analyses—has concluded that the decline in tax revenues is not primarily the result of the imposition of the mirror-image system. Instead, the negative impact arises principally from "(1) deficiencies in tax administration, (2) insufficient incentives to local tax efforts, and (3) the territorial tax-incentive programs."[157] These conclusions and the statistical basis from which they were derived have not been without criticism.[158]

The Senate Committee on Energy and Natural Resources expressed concern over the Comptroller General's Report on territorial tax administration but declined for the present to mandate federal collection of local taxes.[159] When the legislation emerged, it contained elements of the Puerto Rico model by authorizing the Secretary of the Treasury to offer cost-free training of local personnel of the Northern Marianas in tax administration and by mandating the establishment of an information service to educate local taxpayers about their tax obligations.[160] This, combined with subsequent legislation delaying implementation of the Internal Revenue Code until 1983,[161] may unfortunately only postpone problems without resolving them. The problems are in fact broader than mere tax administration since they involve a number of basic policy objectives which are at stake in the Marianas' quest for economic development.

B. Policy Considerations

Although it is generally recognized that economic development may entail significant disadvantages, particularly with regard to socio-cultural effects,[162] the primary goal of nearly every developing country, no doubt including the Commonwealth of the Northern Mariana Islands, is economic development. In some countries, such development may not be pursued in a rational manner in the sense that various conflicting goals are not optimized or growth for its own sake is sought without attention being devoted to the long-term institutional needs of the populace, on the

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[156] *See* TREASURY REPORT, *supra* note 13, at 32-33.

[157] *Id.* at 34-35.

[158] 79-12 TAX MNGM'T INT'L J. (BNA) 40 (Dec. 1979).

[159] S. REP. No. 96-476, 96th Cong., 1st Sess. 11 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 467, 474.

[160] Act of Mar. 12, 1980, Pub. L. No. 96-205, § 204, 94 Stat. 84. See note 200 *infra*.

[161] Act of Dec. 24, 1980, Pub. L. No. 96-597, § 303, 94 Stat. 3477.

[162] *See generally* Lewis, *Is Economic Development Desirable?*, in ECONOMIC DEVELOPMENT: CHALLENGE AND PROMISE 17 (S. Spiegelglas & C. Welsh eds. 1970) [hereinafter cited as ECONOMIC DEVELOPMENT]. The Covenant attempts to deal with at least one aspect of this problem by prohibiting the transfer of land to persons not of Marianas "descent" in order to protect the cultural traditions which surround the ownership of land in the Islands. COVENANT, *supra* note 1, at art. VIII, § 805(a). *See generally* Willens & Siemer, *supra* note 2, at 1389-92, 1406.

one hand, or the resources available to sustain such growth, on the other hand.[163]

Problems of this sort often arise when developing economies seek to apply as models those steps taken by other countries, regardless of the fact that such models may be entirely inapplicable under very different settings.[164] Problems of this sort also tend to arise when the route and pace of development is dictated by political considerations. This may lead to uneven or so-called enclave development in which one sector of the economy, group of people, or geographic region is neglected in favor of another sector, group, or region.[165]

These problems were implicitly recognized during the recent Pacific Basin Development Conference which set for itself the goal of analyzing the entire panoply of problems, alternatives, and constraints facing the insular territories of the Pacific Basin.[166] Various alternatives to specific problems were ranked for feasibility based on a set of factors which included cost, efficacy, ecological and socio-cultural environmental disruption, and available resources. The aim was to arrive at a regional five-year investment plan which would attempt to achieve a balanced growth in several sectors—fisheries, ocean resource development, trade, and tourism—while at the same time improving the infrastructure (telecommunications; ports; local, regional, and international transportation; energy sources; and municipal services) so as to support the proposed sectoral development.

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[163] As opposed to a mere absolute increase in an economic indicator such as per capita GNP, economic development entails both an increase in the usual indicators and a simultaneous change in the surrounding institutional and environmental conditions which will enable such growth to become self-sustaining.

[164] *Cf.* E. SCHUMACHER, SMALL IS BEAUTIFUL 161-79 (1973) (advocating "intermediate technology" for developing countries); Howe, *The Developing Countries in a Changing International Economic Order: A Survey of Research Needs*, in THE FUTURE OF THE INTERNATIONAL ECONOMIC ORDER: AN AGENDA FOR RESEARCH 197, 200-01 (C. Bergsten ed. 1973) (noting effect of Western values in misdirecting development efforts in third-world countries where socio-economic conditions made such values inapplicable).

[165] An often cited example of such development was the guano trade in Peru. Labor, capital, and entrepreneurial skills were imported to develop the phosphate resources, but these inputs never were absorbed by the host country. Instead, earnings were remitted to Great Britain which was exploiting the resource. Even in the case of indigenous investment, an enclave can develop if the wealthy investors spend their income on luxury imports instead of on productive imports or domestically produced goods and services. *See, e.g.*, Levin, *The Export Economies*, in ECONOMICS OF TRADE AND DEVELOPMENT 11-34 (J. Theberge ed. 1968). Although some technology and skills may seep through to the local economy, development in other sectors often will be inhibited unless the government intervenes to tax the enclaves (thereby redistributing income) and to improve factor mobility, particularly that of labor. *See generally* Caves, *Trade and Development—A Traditional View* (pt. 1), 13 ECON. DEV. & CULTURAL CHANGE No. 1, at 103, 106 (1964). If the proper precautions are taken and sufficient "linkages" exist between the various sectors of the economy, the theory is that growth in the "leading sectors" should spur demand for increased output elsewhere in the economy. H. BRUTON, PRINCIPLES OF DEVELOPMENT ECONOMICS 81 (1965).

[166] *See* note 3 *supra*.

It is not within the scope of this discussion to analyze in detail the methods and means which should be followed by the Marianas for achieving the desired development. Instead, this section will attempt merely to point out a number of policy considerations as they might bear on the tax system to be imposed upon or enacted by the Commonwealth.

Admittedly, there are many economists and tax lawyers who believe that a country's tax system should be neutral in its effects on economic and business decisionmaking in a free-market system.[167] There are, however, very few, if any, countries which do not utilize the taxation mechanism to some extent as one of several fiscal tools available for the promotion or discouragement of certain modes of economic behavior.[168] In fact, several studies clearly have indicated a close relationship between a country's tax policies and the inflow of foreign direct investment which is so vital to capital-starved Less Developed Countries.[169]

Tax policy primarily operates to effect the rate of savings and investment, particularly the latter.[170] Professor Paul A. Samuelson has noted that "[t]o break out of a vicious circle of poverty and underdevelopment, capital formation is needed."[171] Other economists have noted that because such capital formation cannot always be generated internally, it

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[167] *See, e.g.*, Surrey, *The DISC Proposal To Subsidize Exports*, in 1 COMMISSION ON INT'L TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 579 (1971) [hereinafter cited as PAPERS].

[168] *See, e.g.*, Hong, *Singapore's New Tax Incentives*, 33 BULL. INT'L FISCAL DOCUMENTATION 386 (1979); Mann, *Puerto Rico: The New Tax Exemption Law*, 33 BULL. INT'L FISCAL DOCUMENTATION 8 (1979); Siong, *Indonesia: Tax Incentive Package To Support the Third Five-Year Development Plan (1979-1984)*, 34 BULL. INT'L FISCAL DOCUMENTATION 95 (1980). *See generally* Lent, *Tax Incentives in Developing Countries* (1970), in READINGS ON TAXATION IN DEVELOPING COUNTRIES 363 (R. Bird & O. Oldman eds., 3d ed. 1975) [hereinafter cited as TAXATION IN DEVELOPING COUNTRIES]. Developed countries also make use of the tax system to spur investment. *See, e.g.*, Denayer, *Belgium: Tax Incentives for 1979*, 18 EUROPEAN TAX. 421 (1978). Even the United States has used tax incentives to achieve certain policy goals, the DISC (Domestic International Sales Corporations) provisions of sections 991 to 999 of the Internal Revenue Code being a case in point. *See* Nolan, *Export Tax Incentives*, in 1 PAPERS, *supra* note 167, at 571.

[169] *See, e.g.*, Thoburn, *Exports and Economic Growth in West Malaysia*, 25 OXFORD ECON. PAPERS (n.s.) 88, 107 (1973) (70% of the export income earned by the foreign-owned rubber estates and tin mines is initially retained in Malaysia, and federal tax policy helped to channel profits back to the country for the development of the Malaysian economy); POSSESSIONS REPORT, *supra* note 13, at 26 (studies have concluded that the use of tax holidays in Puerto Rico "has been crucial in inducing firms to locate . . . their operations" there).

[170] The relatively low rate of current savings characteristic of developing countries is often considered a crucial element of the "vicious circle" in which such countries find themselves. P. ELLSWORTH, THE INTERNATIONAL ECONOMY 519 (4th ed. 1969) [hereinafter cited as ELLSWORTH]. Of course, the rate of savings is a factor which is closely related to the rules of domestic taxation. *See, e.g.*, Murthy, *Taxation and Savings: Some New Empirical Evidence in the Indian Economy, 1960-1976*, 33 BULL. INT'L FISCAL DOCUMENTATION 498 (1979).

[171] P. SAMUELSON, ECONOMICS 745 (7th ed. 1967).

often must be induced or attracted from outside sources.[172] Thus, a primary function of the Marianas tax system might be said to be the inducement of a foreign capital inflow,[173] channelled and planned so as to maximize the benefits to the Marianas and yet minimize the inevitable economic distortions, cultural and social upheaval, and ecological and environmental despoliation of the Islands. To this end, there are two somewhat segregable issues: the form and substance of the Marianas internal tax legislation, and the bilateral tax arrangements it negotiates with the United States.

With regard to the first issue—the Marianas domestic tax rules—a question which inevitably arises is whether such rules should foster the development of a tax-haven status. Although some tax concessions are clearly in order to induce certain types of investments, it is probably not advisable for the Marianas to become a tax haven, like its "neighbors" Nauru and New Hebrides, either by eliminating all taxes[174] or by lowering or eliminating taxes on non-Marianas-source income, as the tax havens of Liberia, Panama, Costa Rica, and Hong Kong have done.[175]

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[172] *See* ELLSWORTH, *supra* note 170, at 521. Basically, the low rate of savings prevents sufficient local capital formation to increase productivity. Consequently, incomes remain low and insufficient to generate the necessary savings; hence, the "vicious circle of poverty." The low rate of domestic savings specifically has been noted as a problem in Puerto Rico. *See* POSSESSIONS REPORT, *supra* note 13, at 52. The same is true for Micronesian territories such as the Marianas. *Cf.* Marks, *Micronesians must end U.S. dependence*, Sunday Star-Bulletin & Advertiser, Oct. 15, 1978, at H-3, col. 1 (Micronesian dependence on United States dollar resulting from huge increase in spending over last two decades has produced enormous government bureaucracy and no economic base). *See generally* Bauer, *Is There a Vicious Circle of Poverty?*, in ECONOMIC DEVELOPMENT, *supra* note 162, at 4.

[173] It should be noted that the tax system may not only play a positive role in providing investment incentives in the form of tax holidays or other concessions, but also may play the more passive role of helping to stabilize the economy—the traditional Keynesian role of fiscal policy—in order that disincentives to foreign direct investment are ameliorated. *See, e.g.*, G. MYRDAL, AN INTERNATIONAL ECONOMY 244-46 (1956). *Cf.* Colm & Geiger, *Public Planning and Private Decision Making in Economic and Social Development* (1962), in COMPARATIVE ECONOMIC SYSTEMS 416, 427 (M. Bornstein ed. rev. ed. 1969) (fiscal and monetary policies including price and wage controls and control of credit availability constitute positive stimulation of private sector in developing countries). One of the few active investors in the Marianas has been the Republic of Nauru which, through the Nauru Local Government Finance Corporation, has invested nearly $7 million in a high-rise office building on Saipan, Honolulu Star-Bulletin, Feb. 15, 1979, at G-5, col. 5. Continental Airlines has invested in a Saipan hotel. Honolulu Advertiser, June 22, 1979, at B-12, col. 1.

[174] *See* Freud, *Nauru—A New Pacific Tax Haven*, in U.S. TAX. OF INT'L OPERATIONS (P-H) ¶ 8507 (Apr. 25, 1979) (no income, capital gains, property, corporate, or inheritance taxes in Nauru); Freud, *The New Hebrides—An Established and Unique Base for Foreign Operations*, in *id.* at ¶ 8501 (Sept. 22, 1976) (no income, capital gains, property, corporate, estate, or inheritance taxes "apart from 'Added Value' tax on certain subdivisional schemes" in New Hebrides); McQuade, *The Smallest, Richest Republic in the World*, FORTUNE, Dec. 1975, at 132; Rollo, *New Hebrides Legal Entities*, 6 TAX PLAN. INT'L 13 (1979).

[175] *See generally* M. LANGER, PRACTICAL INTERNATIONAL TAX PLANNING (2d ed. 1979); Langer, *A Survey of Current Developments in Foreign Tax Havens*, in FOREIGN TAX PLANNING 115 (PLI Course Handbook Series No. 95, 1976).

The Marianas need tax revenues to build up their infrastructure, and the indigenous population lacks sufficient capital to raise much of this revenue by itself.[176] Thus, the most likely sources of tax revenue are the resident aliens associated with the United States military and outside investors, particularly those engaged in trades or businesses for which 100-percent tax concessions are unnecessary or undesirable.

Furthermore, the Marianas are not likely to become such a popular tax haven that the influx of incorporation and agents fees will make up for the foregone tax revenues. Like the New Hebrides or the Seychelles,[177] relatively unsuccessful tax havens when compared with Bermuda, the Bahamas, or Hong Kong, the Marianas are too isolated and lack the necessary communications and commercial (banking, legal and financial services) infrastructure to attract a significant quantity of tax-haven businesses.[178] A prerequisite for a tax haven is good telex, telephone, and air communications with developed countries.[179] It would entail a major effort and financial sacrifice for the Marianas to improve their accessibility while at the same time foregoing tax revenues.

In addition, tax-haven status primarily would enrich one small segment of the populace—lawyers and accountants—and provide jobs only for office workers. This is a typical form of enclave development and would ignore the agricultural or fishing resources which might be developed. Moreover, the United States Government would be extremely sensitive to the creation of a tax haven in the Marianas[180] and undoubtedly would take some action to preclude such a development or to limit its effectiveness.[181] Thus, to echo an earlier theme,[182] the tax-haven model would be

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[176] Takeuchi, *Guam and Northern Marianas: Different pasts, similar problems*, Honolulu Advertiser, Dec. 28, 1979, at A-18, col. 1; Honolulu Star-Bulletin, Mar. 17, 1980, at A-4, col. 2. See note 178 *infra*.

[177] *See* 79-11 TAX HAVEN & SHELTER REP. 4 (Nov. 1979).

[178] *See generally*, Langer, *Tax Havens of the World*, 24 BULL. INT'L FISCAL DOCUMENTATION 423 (1970). As a part of the Pacific Basin Development Conference, *see* note 3 *supra*, specific improvements in the Marianas infrastructure were discussed, such as using photovoltaic cell-powered radio communications to link the various islands in the Marianas, establishing a "911" emergency number system, creating a Marianas flag airline to improve chartered and scheduled air service with Guam, Japan, and Taiwan, in particular, and the construction of a second airport as well as a convention center. CONFERENCE WORKBOOK, *supra* note 3, at 2A-10 to -12, 2C-18 to -19. Infrastructure improvements are perhaps the most sorely needed investments in the Marianas. *See* note 176 *supra*.

[179] Pepper, *From Tax Haven to Fiscal Paradise* (pt. 1), 31 BULL. INT'L FISCAL DOCUMENTATION 31, 33 (1977).

[180] Mr. H. David Rosenbloom expressly stated that the postponement of the application of the Internal Revenue Code to the Marianas would not create a tax haven there. *Senate Hearing*, *supra* note 43, at 125 (statement of H. David Rosenbloom).

[181] As an example of a "mild" form of retaliatory action which would be envisioned, one can refer to the IRS attack on what the agency perceives as the abusive use of Puerto Rican tax exemptions. The IRS is using section 482 to allocate income back to the United States affiliate of the local manufacturer, and, as a consequence, Puerto Rico is concerned that new companies will be discouraged from investing there and old companies discouraged from

an inappropriate one for the Marianas to emulate.

Once it is accepted that the internal tax system should be one which optimizes the collection of tax receipts and yet offers ample incentives for investment, the determination of how to structure a system which achieves this optimal mix should take into consideration a number of other policy objectives. The first might be that the tax laws be structured so as to raise revenue, to as great an extent as possible, from those persons most able to pay. For this purpose, the present tax structure[183] may not be sufficiently progressive since it is relatively flat.[184] It would, however, require an economic analysis beyond the scope of this discussion to determine if that is in fact the case.

In any event, the tax structure avoids the complexities of the Internal Revenue Code which would be too unwieldy for the Marianas at this stage in their development. At the same time, the rates are sufficiently low (leaving aside the fact that being a tax on gross salaries means that the effective tax rate is higher for purposes of comparison with comparable United States taxpayers) so as not to be a disincentive for the attraction of qualified foreign technicians and professionals whose presence may be required on the Islands. In light of the present inordinate depen-

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expanding their operations. POSSESSIONS REPORT, *supra* note 13, at 18-23; *see, e.g.*, IRS Priv. Ltr. Rul. 8002009 (1979), [1980] FED. TAXES PRIVATE LETTER RULINGS (P-H) ¶ 155. *See generally* B. WOODS, BUSINESS OPERATIONS IN PUERTO RICO A-56 to -57 (TAX MNGM'T (BNA) Portfolio No. 139-3rd, 1979); Wall St. J., Feb. 14, 1980, at 5, col. 1. *See also* Rev. Proc. 63-10, 1963-1 C.B. 490, *as amplified by* IRS Manual 42 (10)(11) (Aug. 2, 1976).

[182] *See* text accompanying note 164 *supra*.

[183] *See* text accompanying notes 74-76 *supra*.

[184] The tax on wages and salaries is:

TABLE 3

Gross Annual Wages and Salaries	Tax
(a) $5,000 or less	0
(b) $5,001 to 7,000	3% of amount over $5,000
(c) $7,001 to 15,000	Tax in (b) plus 4% of amount over $7,000
(d) $15,001 to 22,000	Tax in (b) and (c) plus 5% of amount over $15,000
(e) Over $22,000	Tax in (b), (c), and (d) plus 6% of amount over $22,000.

Commonwealth of the Northern Mariana Islands Tax Act of 1979, Pub. L. No. 1-30, ch. I, § 2, 1st N. Marianas Leg., 3d Sess. (reenacting T.T. CODE tit. 77, § 252 (Cum. Supp. 1975), as applied to the Commonwealth).

It might be noted that this new tax is certainly more progressive than the one which existed under the pre-Commonwealth Code in which the wage/salary tax was a flat 2 percent on all income, with a $1,000 deduction for taxpayers earning less than $5,000 per year. T.T. CODE tit. 77, § 252 (Cum. Supp. 1975). *But cf.* Tenorio v. Trust Territory, 7 T.T. 592 (H.C.A.D. 1978) (tax on gross revenues of slot machine owner based on amount taxpayer actually took from machine less amount paid out to players from machine and jackpot payoffs). A surtax of up to 100 percent could be levied upon the approval of the appropriate district legislature (the Mariana Islands, Marshall Islands, Palau, Ponape, Yap, and Truk). T.T. CODE tit. 77, § 280 (Cum. Supp. 1975).

dence on Government payrolls and revenue, there may be a great deal to be said for encouraging private employment with such a low-tax system.[185]

With regard to the corporate tax system, the selective incentives in the areas of agriculture and fisheries[186] would appear well conceived since they aim to develop the resources available to the Islands.[187] Incentives also are granted to banks and lending institutions by way of a reduced tax rate.[188] This form of preferential treatment would appear to meet the need of fostering capital accumulation,[189] although here, too, the efficacy of such a measure would require testing by rigorous analysis.

Other businesses are subject to taxation at higher (although still relatively flat) rates. Again, in order to judge the system's effectiveness in raising income, one must recall that these taxes are levied on gross reve-

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[185] According to 1976 estimates, more than one half of the civilian labor force of the Marianas worked for the government sector, which in turn was the largest "industry," generating 29 percent of local revenues. *Trade Objectives and Issue Paper*, in CONFERENCE WORKBOOK, *supra* note 3. Private jobs are particularly scarce due to the absence of local credit or foreign investment. *See* Honolulu Advertiser, July 24, 1978, at B-8, col. 1.

[186] The tax on businesses in those sectors is reduced to one percent of gross revenues in excess of $20,000. *See* note 78 *supra*. Tourism is also encouraged. Casino gambling has been sanctioned and air service improved. *See* Takeuchi, *An erratic beginning for Northern Marianas*, Honolulu Advertiser, Dec. 26, 1979, at A-17, col. 1.

[187] Fish (tuna, wahoo, rainbow runner, mahi mahi, marlin) and marine products (lobster, crab, squid, sea cucumber) are among the primary resources of the Marianas. The lagoons and reefs offer potential sites for developing an aquaculture (seaweed and algae) and mariculture (oyster, clam, shrimp, prawn) industry. *Fisheries Objectives and Issue Paper*, in CONFERENCE WORKBOOK, *supra* note 3. One of the more interesting final recommendations of the Pacific Basin Conference was to develop the precious coral resources of the Marianas by allocating $75,000 for an initial survey which it is hoped will spur private investment in this field. In the long term, however, the Marianas should probably seek to establish a structure of "mutually supporting investments" by encouraging the creation of agricultural processing plants and canneries, thereby increasing their proportion of the "value-added" to the products they export. *See, e.g.*, Nurkse, *International Trade Theory and Development Policy*, in ECONOMIC DEVELOPMENT FOR LATIN AMERICA 234, 249 (H. Ellis ed. 1961). The Palau District Legislature recently enacted a tax incentive law which is aimed in that direction. Under that law, exporters are exempt from the gross revenue tax on products manufactured, processed, assembled, and packaged in Palau and instead only pay a one-percent export tax on *net* profits from their export business. Udui, *supra* note 75, at 507.

[188] The tax rate is equal to the greater of four percent of net income or one percent of gross revenue. *See* note 79 *supra*.

[189] Throughout the Pacific Basin Development Conference, *see* note 3 *supra*, the lack of funding and finance was cited as a major constraint for initiating much needed projects. *See* note 185 *supra*.

nues,[190] and therefore the effective tax on profits is more substantial. This means that the system may not be foregoing too much tax revenue, but, at the same time, the business tax also may impose the disadvantage of deterring the inflow of some foreign capital if large expenditures cannot be deducted in some form from the resultant income stream. It is difficult to reach any definitive judgments in this regard without undertaking a thorough empirical study. Nevertheless, on a simplistic level it might at least be said that the disallowance of deductions eliminates the danger that concessions will be converted into loopholes.[191]

Among the other policy objectives to be borne in mind when analyzing the optimal mix of tax incentive and tax collection are the goals of balanced growth, economic stability—both in terms of a consistent, high level of employment and a reasonable degree of price stability—and redistribution of income.[192] There is considerable debate as to how best to achieve these often disparate objectives, but economists generally agree that the role of the tax system is crucial in their attainment. Unfortunately, even the Treasury Department lacks the necessary data to undertake an analysis of the Marianas tax-incentive program.[193]

These same basic policy objectives—and others could be added—also will be affected by the bilateral arrangements with the United States as contained in the Covenant. Again, although a detailed study of invest-

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TABLE 4

Gross Annual Revenue	Tax
(a) $5,000 or less	0
(b) $5,001 to 50,000	1% of amount over $5,000
(c) $50,001 to 100,000	Tax in (b) plus 2% of amount over $50,000
(d) $100,001 to 250,000	Tax in (b) and (c) plus 3% of amount over $100,000
(e) Over $250,000	Tax in (b), (c), and (d) plus 4% of amount over $250,000.

Commonwealth of the Northern Mariana Islands Tax Act of 1979, Pub. L. No. 1-30, ch. I, § 3, 1st N. Marianas Leg., 3d Sess. (reenacting T.T. CODE tit. 77, § 258 (Cum. Supp. 1975), as applied to the Commonwealth).

Under the prior tax system, the business tax was $40 if gross revenue was less than or equal to $10,000, plus one percent of gross revenue in excess of $10,000 per year; business earnings of less than $2,000 per year were exempt. T.T. CODE tit. 77, § 258 (Cum. Supp. 1975). Surtaxes of up to 100 percent could be imposed by the local district legislature. *See* note 184 *supra*. *Compare* Tenorio v. Trust Territory, 7 T.T. 592, 600 (H.C.A.D. 1978) (gross revenue is amount owner-taxpayer actually took from slot machines less the amount paid out to players in winnings and jackpots), *with* Ponape Fed'n of Cooperative Ass'ns v. Peterson, 7 T.T. 465, 469 (H.C.T.D. 1975) (petitioners are subject to gross revenues tax either because the tax is not levied upon gross or net *profits* or because the petitioner is not a nonprofit organization).

[191] *See* Heller, *Fiscal Policies for Underdeveloped Countries* (1954), in TAXATION IN DEVELOPING COUNTRIES, *supra* note 168, at 5, 14.

[192] *See* COLUMBIAN COMM'N ON TAX REFORM, FISCAL REFORM FOR COLUMBIA 7-15 (M. Gillis ed. 1971).

[193] *See* TREASURY REPORT, *supra* note 13, at 37 n.*.

ment in the Marianas must be conducted to derive any concrete conclusions, it would seem that the overall effect of the Covenant is to provide a positive incentive for United States citizens and corporations to engage in business in the Marianas. The greatest incentive is shrouded in uncertainty, however, since even the Treasury Department admits that the availability of a section 936 credit for corporate investment in the Marianas is unclear.[194] This uncertainty in the law obviously must be clarified before one is likely to see any significant surge in United States investment in the Mariana Islands. Once that uncertainty is eliminated, the incentive mix for United States investment will be, for the most part, determined by the Marianas domestic tax legislation, as described above. Within the parameters established by the applicability of section 936, United States investors could invest in Marianas businesses and pay no tax to the United States, regardless of the Marianas tax rate. The amount of tax revenue derived from such investment will depend upon the amount of tax concessions granted by the Marianas.

IV. CONCLUSIONS

The Covenant between the United States and the Northern Mariana Islands generally establishes a very favorable tax regime for the latter in its commonwealth status *vis-a-vis* the former. It provides the basic framework within which the Marianas are permitted to exercise a great deal of flexibility to structure their own tax system so as to raise revenue at the same time they attempt to encourage investment and capital inflow. The framework does not, however, resolve all the problems of a developing territory.

The biggest deficiency is the failure to state clearly that the "possessions" corporation tax credit of section 936—a cornerstone for the encouragement of United States investment—will apply to the Marianas.[195] This deficiency should be remedied by legislation.[196]

The second major deficiency is the inability of the Marianas to administer effectively a tax system as convoluted and unwieldy as the Internal Revenue Code.[197] The fact that the federal income tax may be rebated (in large part) only partially resolves the problem of applying the Code to a

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[194] *Id.* at 27. *See also* S. 2017, 96th Cong., 1st Sess. (1979).

[195] *See* Part IIB *supra.*

[196] One of the topics discussed at the Pacific Basin Development Conference, *see* note 3 *supra*, was "Territory Economic Development Policy Considerations," which included a discussion of how United States tax and tariff regulations and related federal laws affect the region. *See* CONFERENCE WORKBOOK, *supra* note 3, at 3A-2. This type of overall reexamination is crucial for the future development of the Marianas. *See* Takeuchi, *An erratic beginning for Northern Marianas*, Honolulu Advertiser, Dec. 26, 1979, at A-16, col. 1; Pacific Business News, Sept. 3, 1979, at 2, col. 2.

[197] *See* Part IIIA *supra.*

developing economy for which it is unsuited. The Marianas nevertheless must collect and administer the tax, utilizing the complicated IRS tax forms which are wholly inapplicable to local conditions. This deficiency is temporarily resolved by the passage of legislation which delays the imposition of the Internal Revenue Code in the Marianas.[198] A longer term solution is required, however, because it is unlikely that a scattered group of islands with only 16,700 persons[199] will have, in so short a time, a tax administration which is prepared to cope with what must be the world's most complex tax system.

The third deficiency is that more attention to local tax policy is necessary. Admirable as the Marianas local tax code may be for the present, the commonwealth tax administrators will require assistance if they are to engage in the kind of detailed economic analyses required to plan for and implement the tax reforms which may be necessary to "fine tune" the system.[200] The collection of data needed to analyze fully the successes and failures of the present system alone will require significant resources in terms of money and manpower. No doubt the IRS will arrange to assist such work, but initial efforts toward formal "institutionalized" cooperation and technical assistance programs must emanate from the Marianas.[201]

Lastly, although not a deficiency from the viewpoint of the Marianas, the question raised in the introductory remarks probably should be answered in the negative. It does not appear that the tax provisions of the Covenant portend any shift in the overall approach of the United States toward assisting developing areas by the granting of tax incentives. The negotiations with the other island groups within the Trust Territory have yielded tax concessions similar, in certain respects, to those granted the Marianas.[202] But it is unlikely that the Treasury Department will extend

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[198] *See* note 73 *supra*.

[199] *See* note 3 *supra*.

[200] *See* McIntyre & Oldman, *Institutionalizing the Process of Tax Reform*, 15 HARV. INT'L L.J. 399 (1974). *See also* Surrey, *Tax Administration in Underdeveloped Countries* (1958), in TAXATION IN DEVELOPING COUNTRIES, *supra* note 168, at 479. A recent General Accounting Office report criticized the Federal Government for failing to provide adequate technical assistance in the Marianas' attempt to run their economy. Honolulu Star-Bulletin, Mar. 17, 1980, at A-4, col. 2. *See also* TREASURY REPORT, *supra* note 13, at 3 (substantial deficiencies in Guamanian tax administration). The 1980 congressional legislation may reduce these problems in the Marianas, *see* text accompanying note 160 *supra*.

[201] *See* Act of Mar. 12, 1980, Pub. L. No. 96-205, § 204, 94 Stat. 84.

[202] On January 11, 1980, a Compact of Free Association was initialed in Hawaii, as part of which the Governments of Palau, the Marshall Islands, and the Federated States of Micronesia would have the authority to enact their own tax legislation. *See* Takeuchi, *End nears for U.S.' trusteeship in Pacific*, Honolulu Advertiser, Jan. 28, 1980, at A-11, col. 1; Zimmerman, *Successful Micronesian Talks*, Honolulu Star-Bulletin, Jan. 16, 1980, at A-14, col. 2. Those of their citizens domiciled in their respective territories are to be exempt from United States tax on fixed or determinable income, and all residents will be subject to tax pursuant to section 935. The statutory treatment accorded to "possessions" is expressly made applicable to each of these territories by means of the aforementioned Compact.

such treatment to developing countries in formal tax treaties.

The Trust Territory is viewed as a unique case, in part because of the special political relationship between the component territories and the United States, and in part because of the obligations imposed on the United States under the Trusteeship Agreement to promote the economic development of these islands.[203] Thus, although special concessions may be included from time to time in future United States tax treaties, such concessions are likely to be very limited in scope and pinpointed to specific problems.[204] Attempts to negotiate broader tax-sparing provisions in United States tax treaties with developing countries have remained unsuccessful,[205] and recently the International Tax Counsel of the Treasury Department emphatically reiterated that "it is firm United States policy not to use tax treaties to accord tax sparing or other incentives for foreign investment, as compared with investment in the United States."[206]

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[203] Under the Trusteeship Agreement, the United States has the obligation to "foster the development of such political institutions as are suited to the trust territory" and to "promote the economic advancement and self-sufficiency of the inhabitants." Trusteeship Agreement for the Former Japanese Mandated Islands, Apr. 2-July 18, 1947, United States-United Nations, art. VI, paras. 1-2, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. These objectives have been recognized as imposing a binding commitment on the United States. *See, e.g.*, Saipan v. United States Dep't of Interior, 502 F.2d 90, 103 & n.7 (9th Cir. 1974), (Trask, J., concurring), *cert. denied*, 420 U.S. 1003 (1975); Porter v. United States, 496 F.2d 583, 587-88 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975).

[204] For example, the Philippines are permitted to accord certain tax incentives or concessions only to Philippines citizens and in so doing will not be deemed to have violated the nondiscrimination provisions of the treaty, nor will such action invoke the penalty provisions of the Internal Revenue Code, *see* I.R.C. §§ 891, 896. Convention Respecting Taxes on Income, Oct. 1, 1976, United States-Philippines, art. 24, § 5, *reprinted in* 2 TAX TREATIES (CCH) ¶ 6627. Korean residents temporarily present in Guam (as nonimmigrant aliens) are exempt from paying United States social security tax. Convention for the Avoidance of Double Taxation, June 4, 1976, United States-Republic of Korea, art. 25, _ U.S.T. _, T.I.A.S. No. 9506, *reprinted in* 1 TAX TREATIES (CCH) ¶ 4828. The purpose of this provision is to place Korean residents, and the firms which hire them, on an equal footing with Philippines residents and their Guam employers who have been accorded this concession by statute, I.R.C. § 3121(b)(18); Treas. Reg. § 31.3121(b)(18)-1 (1964). It might also be noted that the Philippines benefit from another statutory provision whereby wages and salaries paid to United States citizens employed by a foreign government or international organization may be exempt from United States taxation but only if such persons are also citizens of the Republic of the Philippines. *See* I.R.C. § 893. These concessions undoubtedly stem from the Philippines' prior status as a United States territory, *see* Treaty of Paris, Dec. 10, 1898, United States-Spain, 30 Stat. 1754, T.S. No. 343.

[205] *See* Liebman, *supra* note 5, at 303-05 & nn. 28-30. *See also* Amador, *The Korea-U.S. Income Tax Treaty and The Third World*, 80-3 TAX MNGM'T INT'L J. (BNA) 11 (Mar. 1980).

[206] Rosenbloom, *Trends in Tax Treaties Between the United States and Developing Countries*, in UN DRAFT MODEL TAXATION CONVENTION 18, 19 (1979) (Proceedings of a Seminar held in Copenhagen in 1979 during the 33rd Congress of the International Fiscal Ass'n) [hereinafter cited as UN DRAFT]. *Accord, Hearings on Tax Treaty Policy Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 2d Sess., *reprinted in* DAILY TAX REP. (BNA) No. 84, at J-1, J-6 (Apr. 29, 1980) (statement of H. David

Despite the trend in other developed countries to grant more generalized tax incentives for investment in developing countries,[307] the broad tax concessions granted to the Marianas would not appear to signal a more liberal policy on the part of the United States. There is thus little to be learned by a developing country tax negotiator viewing the Covenant, exept that the United States has drawn a clear distinction between territories with which it has a close political affiliation and those with which it has not.

Rosenbloom) (treaties favoring foreign over domestic investment are disfavored by the Administration and unlikely to be ratified).

[307] *See, e.g.*, Griffioen, *Trends in Treaties Between European Countries and Developing Countries*, in *UN Draft*, *supra* note 206, at 22; Jehle, *German Federal Republic: The New Developing Countries Tax Law*, 19 EUROPEAN TAX. 349 (1979); Liebman, *supra* note 5, at 307 nn. 32 & 33; Zagaris, *Canada and Barbados Sign a New Income Tax Treaty*, TAXES INT'L No. 7, at 4-5 (Mar. 1980).

APPENDIX

COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA

[Taxation and Related Provisions]

ARTICLE VI

REVENUE AND TAXATION

SECTION 601. (a) The income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax on the first day of January following the effective date of this Section, in the same manner as those laws are in force in Guam.

(b) Any individual who is a citizen or a resident of the United States, of Guam, or of the Northern Mariana Islands (including a national of the United States who is not a citizen), will file only one income tax return with respect to his income, in a manner similar to the provisions of Section 935 of Title 26, United States Code.

(c) References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof or of this Covenant.

SECTION 602. The Government of the Northern Mariana Islands may by local law impose such taxes, in addition to those imposed under Section 601, as it deems appropriate and provide for the rebate of any taxes received by it, except that the power of the Government of the Northern Mariana Islands to rebate collections of the local territorial income tax received by it will be limited to taxes on income derived from sources within the Northern Mariana Islands.

SECTION 603. (a) The Northern Mariana Islands will not be included within the customs territory of the United States.

(b) The Government of the Northern Mariana Islands may, in a manner consistent with the international obligations of the United States, levy duties on goods imported into its territory from any area outside the customs territory of the United States and impose duties on exports from its territory.

(c) Imports from the Northern Mariana Islands into the customs territory of the United States will be subject to the same treatment as imports from Guam into the customs territory of the United States.

(d) The Government of the United States will seek to obtain from foreign countries favorable treatment for exports from the Northern Mariana Islands and will encourage other countries to consider the Northern Mariana Islands a developing territory.

SECTION 604. (a) The Government of the United States may levy excise

taxes on goods manufactured, sold or used or services rendered in the Northern Mariana Islands in the same manner and to the same extent as such taxes are applicable within Guam.

(b) The Government of the Northern Mariana Islands will have the authority to impose excise taxes upon goods manufactured, sold or used or services rendered within its territory or upon goods imported into its territory, provided that such excise taxes imposed on goods imported into its territory will be consistent with the international obligations of the United States.

SECTION 605. Nothing in this Article will be deemed to authorize the Government of the Northern Mariana Islands to impose any customs duties on the property of the United States or on the personal property of military or civilian personnel of the United States Government or their dependents entering or leaving the Northern Mariana Islands pursuant to their contract of employment or orders assigning them to or from the Northern Mariana Islands or to impose any taxes on the property, activities or instrumentalities of the United States which one of the several States could not impose; nor will any provision of this Article be deemed to affect the operation of the Soldiers and Sailors Civil Relief Act of 1940, as amended, which will be applicable to the Northern Mariana Islands as it is applicable to Guam.

SECTION 606. (a) Not later than at the time this Covenant is approved, that portion of the Trust Territory Social Security Retirement Fund attributable to the Northern Mariana Islands will be transferred to the Treasury of the United States, to be held in trust as a separate fund to be known as the "Northern Mariana Islands Social Security Retirement Fund". This fund will be administered by the United States in accordance with the social security laws of the Trust Territory of the Pacific Islands in effect at the time of such transfer, which may be modified by the Government of the Northern Mariana Islands only in a manner which does not create any additional differences between the social security laws of the Trust Territory of the Pacific Islands and the laws described in Subsection (b). The United States will supplement such fund if necessary to assure that persons receive benefits therefrom comparable to those they would have received from the Trust Territory Social Security Retirement Fund under the laws applicable thereto on the day preceding the establishment of the Northern Mariana Islands Social Security Retirement Fund, so long as the rate of contributions thereto also remains comparable.

(b) Those laws of the United States which impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System will upon termination of the Trusteeship Agreement or such earlier date as may be agreed to by the Government of the Northern Mariana Islands and the Government of the United States become applicable to the Northern Mariana Islands as they apply to Guam.

(c) At such time as the laws described in Subsection (b) become applicable to the Northern Mariana Islands:

(1) the Northern Mariana Islands Social Security Retirement Fund will be transferred into the appropriate Federal Social Security Trust Funds;

(2) prior contributions by or on behalf of persons domiciled in the Northern Mariana Islands to the Trust Territory Social Security Retirement Fund or the Northern Mariana Islands Social Security Retirement Fund will be considered to have been made to the appropriate Federal Social Security Trust Funds for the purpose of determining eligibility of those persons in the Northern Mariana Islands for benefits under those laws; and

(3) persons domiciled in the Northern Mariana Islands who are eligible for or entitled to social security benefits under the laws of the Trust Territory of the Pacific Islands or of the Northern Mariana Islands will not lose their entitlement and will be eligible for or entitled to benefits under the laws described in Subsection (b).

SECTION 607. (a) All bonds or other obligations issued by the Government of the Northern Mariana Islands or by its authority will be exempt, as to principal and interest, from taxation by the United States, or by any State, territory or possession of the United States, or any political subdivision of any of them.

(b) During the initial seven year period of financial assistance provided for in Section 702, and during such subsequent periods of financial assistance as may be agreed, the Government of the Northern Mariana Islands will authorize no public indebtedness (other than bonds or other obligations of the Government payable solely from revenues derived from any public improvement or undertaking) in excess of ten percentum of the aggregate assessed valuation of the property within the Northern Mariana Islands.

ARTICLE VII

UNITED STATES FINANCIAL ASSISTANCE

. . . .

SECTION 703. (a) The United States will make available to the Northern Mariana Islands the full range of federal programs and services available to the territories of the United States. Funds provided under Section 702 will be considered to be local revenues of the Government of the Northern Mariana Islands when used as the local share required to obtain federal programs and services.

(b) There will be paid into the Treasury of the Government of the

Northern Mariana Islands, to be expended to the benefit of the people thereof as that Government may by law prescribe, the proceeds of all customs duties and federal income taxes derived from the Northern Mariana Islands, the proceeds of all taxes collected under the internal revenue laws of the United States on articles produced in the Northern Mariana Islands and transported to the United States, its territories or possessions, or consumed in the Northern Mariana Islands, the proceeds of any other taxes which may be levied by the Congress on the inhabitants of the Northern Mariana Islands, and all quarantine, passport, immigration and naturalization fees collected in the Northern Mariana Islands, except that nothing in this Section shall be construed to apply to any tax imposed by Chapters 2 or 21 of Title 26, United States Code.

THE HAWAII RULES OF EVIDENCE

Addison M. Bowman*

On January 1, 1981, the new Hawaii Rules of Evidence[1] took effect "in the courts of the State of Hawaii."[2] Applicable generally in civil and criminal cases, the rules are a comprehensive codification of principles of evidence law resulting from a joint endeavor of the Judiciary of Hawaii and the Hawaii Legislature.[3] The intent of the rules is "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[4] Another goal is to achieve uniformity in the treatment of evidence among the courts of the State.[5] The purpose of this article is to describe the

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[1] HAWAII REV. STAT. ch. 626 (Supp. 1980). All the rules are collected in *id.* § 626-1 and are cited throughout this article as HAWAII R. EVID.

[2] HAWAII R. EVID. 101. The rules apply to all courts in all proceedings except as provided in *id.* 1101. See Part IX *infra*.

[3] The cooperative approach was designed in part to avoid a separation of powers struggle between the legislative and judicial branches of government. S. STAND. COMM. REP. No. 22-80, 10th Hawaii Leg., 2d Sess. 1-3 (1980); Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. HAWAII L. REV. 1, 36-38 (1979) [hereinafter cited as Richardson]. Initial impetus for evidence rules came from former State Representative Katsuya Yamada, who sponsored a bill in 1977, H.B. 22, 9th Hawaii Leg., 1st Sess. (1977). Legislative action was deferred pending study by a special Hawaii Judicial Council committee chaired by Honorable Masato Doi. Committee membership included Walter G. Chuck, David J. Dezzani, Marie N. Milks, Hideki Nakamura, Raymond J. Tam, and Stephen D. Tom. The author served as reporter to the committee and was ably assisted in preparing drafts and commentaries by John A. Spade. The judicial council committee proposed a draft of evidence rules that became H.B. 1009, 10th Hawaii Leg., 1st Sess. (1979). Legislative action was again deferred pending interim study by a joint committee co-chaired by State Senator Dennis E. O'Connor and State Representative Dennis R. Yamada, the respective chairmen of the senate and house judiciary committees. Interim committee membership included State Senator Patricia F. Saiki and Representatives Russell Blair, Herbert J. Honda, Donna Ikeda, Kenneth Lee, Yoshiro Nakamura, and Katsuya Yamada. The author served as reporter to the interim committee, whose final product became S.B. 1827-80, 10th Hawaii Leg., 2d Sess. (1980).

[4] HAWAII R. EVID. 102. *Accord*, FED. R. EVID. 102.

[5] CONF. COMM. REP. No. 80-80, 10th Hawaii Leg., 2d Sess. 2-3 (1980).

rules generally, to suggest interrelationships that may not be fully apparent, and to underscore instances in which the rules effect changes in existing Hawaii law.

I. General Provisions

Article I provides guidance for the courts in construing the rules and in determining questions of admissibility generally. The Federal Rules of Evidence[6] served as the model for the Hawaii rules, and many of the rules are identical with or closely track their federal counterparts. The interpretive commentary accompanying the federal rules[7] thus will be useful in construing many of the Hawaii rules. In addition, the Hawaii rules have their own commentaries, which are published together with the rules in the Hawaii Revised Statutes.[8] Hawaii rule 102.1 provides that these commentaries "may be used as an aid in understanding the rules, but not as evidence of legislative intent."

Rule 102.1 is similar to a Hawaii Penal Code provision that limits the effect of the penal code commentary.[9] The principal purpose of these provisions, according to the relevant penal code commentary, is to express "the strong judicial deference given legislative committee reports and other evidence of legislative intent authored by the Legislature or its staff."[10] In other words, legislative committee reports,[11] where applicable,

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[6] Fed. R. Evid. 101 to 1103, *reprinted in* 28 U.S.C. app. (1976 & Supp. III 1979). Preliminary drafts of proposed federal evidence rules are found in 46 F.R.D. 161 (1969), and 51 F.R.D. 315 (1971). On November 20, 1972, the Supreme Court prescribed Federal Rules of Evidence for United States Courts and Magistrates, Reporter's Note, 409 U.S. 1132 (1973); 56 F.R.D. 184 (1972), which were thereafter modified and, as modified, finally approved by Congress in 1975, Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. Some of the Hawaii rules, especially those relating to matters of privilege, are based on the Supreme Court's 1972 proposals. Sources are in all instances noted in the Hawaii rules' commentaries.

[7] 28 U.S.C. app., at 539-605 notes (1976) (Notes of Advisory Committee on Proposed Rules). In addition, there are House, Senate, and Conference Committee Reports to the federal rules. H.R. Conf. Rep. No. 93-1597, S. Rep. No. 93-1277, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098, 7051; H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075. *See generally Symposium—The Federal Rules of Evidence*, 71 Nw. U.L. Rev. 634 (1976). For a comprehensive treatment of the federal rules, see 1-5 J. Weinstein & M. Berger, Weinstein's Evidence (1978-1980) [hereinafter cited as Weinstein's Evidence].

[8] *See* S.B. 1827-80, S.D. 1, H.D. 1, C.D. 1, 10th Hawaii Leg., 2d Sess. § 16 (1980).

[9] Hawaii Rev. Stat. § 701-105 (1976).

[10] *Id.* commentary.

[11] The legislative history of the Hawaii rules is reflected in the original bill and each draft of the legislation which finally emerged as S.B. 1827-80, S.D. 1, H.D. 1, C.D. 1, 10th Hawaii Leg., 2d Sess. (1980). The legislative reports are S. Spec. Comm. Rep. No. 2, H. Spec. Comm. Rep. No. 4, S. Stand. Comm. Rep. No. 22-80, H. Stand. Comm. Rep. No. 712-80, Conf. Comm. Rep. No. 80-80, 10th Hawaii Leg., 2d Sess. (1980). The senate report points out that "[a]lthough the commentary to the Hawaii Rules of Evidence will not reflect legislative intent, it will provide discussions of the origin and supporting authorities for each rule, and in

are to be given primary and controlling weight in ascertaining legislative intent, and the commentaries are secondary in importance and authority. The Hawaii Supreme Court recently pointed out in reference to the penal code construction provision that "the commentary while not evidence thereof . . . is nevertheless expressive of the legislative intent."[12] Moreover, the evidence rules commentaries, unlike the penal code commentaries, were modified during the legislative session and were distributed to the legislators before their final action on the evidence rules package.[13]

Except in articles III and V, each of the commentaries specifies whether the rule is identical with or differs from its federal rule counterpart and, where different, identifies the precise language variation. This mechanism provides the reader with an immediate answer to the question whether, and to what extent, the counterpart federal rule and its accompanying commentary and history will be useful as a further guide to statutory construction. In addition, each commentary cites relevant prior Hawaii statutory and decisional law and indicates whether the prior law is preserved, modified, or entirely superseded by the new rule.

Article III, dealing with presumptions, is largely based on the California Evidence Code treatment of presumptions,[14] and the article III commentaries refer to the relevant California code provisions.[15] Article V, which contains the privilege rules, resembles the Uniform Rules of Evidence[16] and the United States Supreme Court's proposed privilege rules[17] which were not approved by Congress but which contained commentaries that are appropriately mentioned in the article V commentaries.[18] In short, there is a wealth of useful constructional material available to the consumers of this comprehensive legislative product.

Rule 103, entitled "Rulings on evidence," governs the procedural context for proffers, objections, and judicial rulings concerning items of evidence in general. In addition, the rule establishes a harmless error standard by specifying that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party

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that manner function to provide the desired detailed discussions of these rules." S. STAND. COMM. REP. No. 22-80, 10th Hawaii Leg., 2d Sess. 6-7 (1980).

[12] State v. Alo, 57 Hawaii 418, 426-27, 558 P.2d 1012, 1017 (1976), *cert. denied*, 431 U.S. 922 (1977); *see* State v. Aiu, 59 Hawaii 92, 98, 576 P.2d 1044, 1049 (1978); State v. Anderson, 58 Hawaii 479, 483 n.5, 572 P.2d 159, 162 n.5 (1977); State v. Nobriga, 56 Hawaii 75, 77, 527 P.2d 1269, 1273 (1974).

[13] Receipt of the commentaries was acknowledged in the conference committee report immediately preceding passage of the rules, CONF. COMM. REP. No. 80-80, 10th Hawaii Leg., 2d Sess. 10 (1980).

[14] *See* CAL. EVID. CODE §§ 600-669 (West 1966 & Supp. 1980).

[15] *See, e.g.*, HAWAII R. EVID. 301 commentary.

[16] UNIFORM RULES OF EVIDENCE, in 13 UNIFORM LAWS ANNOTATED 209 (West 1980).

[17] *See* Fed. R. Evid. 501-513, 56 F.R.D. 230-61 (1972). The history of the federal rules is described briefly in note 6 *supra*.

[18] *See, e.g.*, HAWAII R. EVID. 502 commentary.

is affected."[19] This provision mirrors comparable standards found in the Hawaii Supreme Court's civil and criminal procedure rules.[20] Rule 103 is designed primarily to assure an adequate record, for appellate purposes, of any objection to the action of the trial court on an evidence point. If the trial court admits the questioned evidence, there must be "a timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context."[21] If the trial court excludes proffered evidence, "the substance of the evidence . . . [must be] made known to the court by offer or . . . [be] apparent from the context within which questions were asked."[22] The rule also directs the trial judge to conduct jury trials "so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."[23] These elementary precepts are familiar to all experienced trial lawyers, but their recitation in the rules is designed to upgrade the general practice before trial courts and to facilitate informed appellate review of evidence points.

Rule 104, entitled "Preliminary questions," governs those situations where the judicial determination of admissibility of a particular evidence item depends upon the existence of specified foundational facts. For example, many of the privilege rules in article V apply only when the conversation or communication in issue was intended to be confidential when spoken.[24] Likewise, witnesses are qualified to testify, under rule 602, only when their testimony derives from "personal knowledge of the matter." Similarly, rule 804's exceptions to the hearsay ban require a preliminary determination that the declarant is "unavailable as a witness" as that phrase is defined in rule 804(a).[25] Rule 104(a) specifies that such preliminary factual determinations are to be made by the judge and that in making such determinations "the court is not bound by the rules of evidence except those with respect to privileges."[26]

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[19] *Id.* 103(a). The timing of the court's ruling may contribute to the prejudicial effect of improper testimony. *See* Chung v. Kaonohi Center Co., No. 6190, slip op. at 4-6 (Hawaii Sup. Ct. Oct. 8, 1980).

[20] HAWAII R. CIV. P. 61; HAWAII R. PENAL P. 52(a).

[21] HAWAII R. EVID. 103(a)(1).

[22] *Id.* 103(a)(2).

[23] *Id.* 103(c).

[24] *See* text accompanying notes 122, 127-32 *infra*.

[25] See text accompanying notes 244-65 *infra*.

[26] Rule 104(b), entitled "Relevancy conditioned on fact," establishes a limited exception to rule 104(a)'s allocation of preliminary fact determinations to the judge's province. In a few situations, the most obvious of which is the identification or authentication requirement as applied to real evidence in article IX, the relevance of a particular item, such as a document, to a lawsuit depends entirely upon a foundational fact. In the document situation, the fact is authorship, which is determinative of relevance, not in the rule 401 sense but in an absolute sense; authorship is, however, also a condition of admissibility under rule 901. In this circumstance rule 104(b) entrusts the preliminary fact determination to the jury:

Entrusting preliminary questions to the court is standard common-law practice, but the question of applicability of the rules at this stage is a matter about which the common-law courts were unsettled.[27] The commentary to rule 104(a) quotes from the commentary to identical federal rule 104(a): "[T]he judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay. This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence."[28] Thus, for example, a hearsay statement offered as an "excited utterance" under rule 803(b)(2) may itself evidence the relevant foundational precondition that "the declarant was under the stress of excitement" when she spoke.[29] Rule 104(c) requires that preliminary questions concerning admissibility of confessions be held outside the jury's hearing, and that other preliminary determinations similarly be removed from jury notice "when the interests of justice require or, when the accused is a witness, if he so requests."[30]

Rule 105 deals with the situation, not infrequently encountered, where evidence "is admissible as to one party or for one purpose but not admissible as to another party or for another purpose." A typical instance is the case where a party's prior admission is offered against him under rule 803(a)[31] in a lawsuit involving multiple parties. As to other parties, the statement in question is inadmissible hearsay, and rule 105 accordingly provides that "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." An example of evidence admissible for one purpose but not another is a prior inconsistent oral statement used to impeach the credibility of a witness under rule 613. The statement may be considered only in the credibility assessment and not to establish the truth of its contents,[32] and the jury should be so instructed pursuant to rule 105.

"When the *relevancy* of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." HAWAII R. EVID. 104 (b) (emphasis added). *See generally* Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980).

[27] *See* MCCORMICK ON EVIDENCE § 53, at 122-23 n.91 (E. Cleary ed. 2d ed. 1972 & Supp. 1978).

[28] 28 U.S.C. app., at 542 note (1976) (Notes of Advisory Committee on Proposed Rules), *quoted in* HAWAII R. EVID. 104(a) commentary.

[29] See note 229 *infra*.

[30] *See also* HAWAII R. EVID. 412(c)(2) (in camera hearing on admissibility of rape victim's prior sexual conduct); HAWAII REV. STAT. § 707-742(a)(3) (Supp. 1979) (repealed 1980) (closed hearing). See text accompanying notes 100-04 *infra*.

[31] See text accompanying notes 219-25 *infra*.

[32] See text accompanying notes 170-75, 210-15 *infra*.

II. JUDICIAL NOTICE

Article II governs those situations where a court may declare a relevant fact or a proposition of law established without receiving evidence or proof. Rule 201 deals with judicial notice of adjudicative facts, and rule 202 is concerned with judicial notice of law.

Factual elements of claims or defenses are established typically through the introduction of evidence, and the rules of evidence are designed generally to provide criteria and standards for admissibility determinations. Judicial notice of facts, however, dispenses with the requirement of evidence and enables the court to "instruct the jury to accept as conclusive any fact judicially noticed."[33] The criterion for such an action, according to rule 201(b), is that the fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In other words, a fact judicially noticed must be virtually indisputable. In *Almeida v. Correa*,[34] an appeal from a determination of paternity, the trial court had instructed the jury that, subject to individual variations, the duration of a pregnancy is 270 days. This instruction was challenged on appeal because no evidence had been introduced to establish the proposition. The Hawaii Supreme Court approved the instruction because it "properly covered matters that were appropriate for judicial notice."[35] "A fact is a proper subject for judicial notice," concluded the court, "if it is common knowledge or easily verifiable."[36] Rule 201 is to the same effect.

Rule 201, as its title points out, deals with judicial notice only of "adjudicative" facts. As the commentary indicates, adjudicative facts are the facts relevant to the dispute between the parties. Another type of judicial notice, not treated in these rules or in the federal rules, concerns "legislative" facts, which include all the material that a court may consider when exercising its lawmaking function.[37]

Almeida v. Correa again provides a useful example. In holding that a child cannot be exhibited to the jury for a resemblance comparison with the putative father on the issue of paternity, the supreme court surveyed the literature of genetics and physical anthropology to determine the general relevance of resemblance evidence. Although the dissent argued that none of this literature had been subjected to adversary treatment at the

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[33] HAWAII R. EVID. 201(g). "In a criminal case, [however,] the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." *Id.*

[34] 51 Hawaii 594, 605, 465 P.2d 564, 571 (1970), *discussed in* Part IV *infra*.

[35] *Id.*, 465 P.2d at 572.

[36] *Id.*

[37] *See* MCCORMICK ON EVIDENCE § 331 (E. Cleary ed. 2d ed. 1972 & Supp. 1978).

trial or appellate level,[38] the majority quoted Justice Oliver Wendell Holmes: "[T]he court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law."[39] In *State v. Brighter*,[40] the court sustained a presumption contained in the Hawaii Penal Code against constitutional attack by noticing a New York legislative report that lent considerable support to the penal code provision. *Almeida* and *Brighter* exemplify the kind of material that trial and appellate courts may consider when making law, construing statutes, or deciding constitutional questions, but that should be distinguished from adjudicative facts treated in rule 201.

Rule 202, entitled "Judicial notice of law," enables the court to consider the common law, Federal and State Constitutions, statutes, ordinances, court rules and regulations, and foreign, international, and maritime law. Previous Hawaii statutory law was to the same effect except that foreign law was required to be pleaded and proved and could not be judicially noticed.[41]

III. PRESUMPTIONS

Article III, which closely resembles comparable provisions in the California Evidence Code,[42] states the law of presumptions in civil and criminal cases. Rule 301 sets forth definitions that are applicable only to the rules in this article. Rules 302 through 304 govern the operation of presumptions in civil cases. Rule 305 creates presumptions within the meaning of article III in instances where external statutes provide that "a fact or a group of facts is prima facie evidence of another fact."[43] Rule 306 controls the operation of all presumptions in criminal proceedings.

Inferences are a staple ingredient in our adversary factfinding system, and they invariably involve assumptions of ultimate facts that triers of fact are invited to draw from basic facts proved by the parties. Items of inferential proof are commonly referred to as circumstantial evidence, and the pervasive question of relevance, addressed in article IV, is concerned with the strength of the connection between basic and ultimate facts. Presumptions are a species of inference, but the distinction between the two is an important one. Inferences are permissive: "The trier of fact

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[38] 51 Hawaii at 606, 465 P.2d at 572 (Kobayashi, J., dissenting).

[39] *Id.* at 597 n.1, 465 P.2d at 567 n.1 (quoting Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924)).

[40] 61 Hawaii 99, 107-08, 595 P.2d 1072, 1077-78 (1979), *discussed in* text accompanying notes 59-62 *infra*.

[41] HAWAII REV. STAT. ch. 623 (1976) (repealed 1980).

[42] See note 14 *supra*. *See generally Symposium—Rebuttable Criminal and Civil Presumptions: California's Statutory Dichotomy*, 9 U. CAL. D. 647 (1976).

[43] *E.g.*, HAWAII REV. STAT. § 707-761(2) (Supp. 1979) (extortionate credit transaction). See text accompanying notes 57-62 *infra*.

may logically and reasonably make an assumption from another fact or group of facts found or otherwise established in the action, but is not required to do so."[44] Presumptions are coercive: once the basic facts are established, the trier of fact is compelled to find the ultimate fact unless evidence of the nonexistence of the ultimate fact has been introduced.[45] For example, rule 303(c)(10) provides that "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."[46] If the proponent establishes to the satisfaction of the trier of fact that a letter was addressed correctly and mailed properly, and if no evidence of nonreceipt of the letter is presented, then the court must instruct the trier of fact to find that the addressee received the letter. It is in this sense that rule 301(1) defines a presumption as "a rebuttable assumption of fact . . . that the law requires to be made . . . from another fact or group of facts found or otherwise established in the action." In other words, a presumption necessarily imposes a burden of production of evidence to escape a directed verdict or finding of the fact presumed. The reason, as Dean Charles T. McCormick pointed out, lies in an assumption about the strength of the connection between basic and presumed facts.[47]

The principal difficulty with presumptions arises when the party against whom a presumption operates offers evidence of the nonexistence of the ultimate or presumed fact. One school of thought, reflected in the federal rules' treatment of presumptions, holds that in this circumstance the presumption is converted automatically into a permissive inference and has no impact on the previously allocated burden of proof with respect to the ultimate fact.[48] The contending theory is reflected in the Uni-

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[44] HAWAII R. EVID. 301(2)(B). This is precisely the operational force of the doctrine of res ipsa loquitur, which raises a rebuttable inference of negligence, *see, e.g.*, Stryker v. Queen's Medical Center, 60 Hawaii 214, 587 P.2d 1229 (1978); Turner v. Willis, 59 Hawaii 319, 582 P.2d 710 (1978) (both cases deal with jury instructions), *discussed in* Koshiba, *Torts and Workers' Compensation, 1978 Survey of Hawaii Law*, 2 U. HAWAII L. REV. 209, 223-26 (1979), and should lead to a directed verdict where the evidence inescapably compels the inference of negligence, Winter v. Scherman, 57 Hawaii 279, 283, 554 P.2d 1137, 1140 (1976).

[45] The Statement applies only to presumptions in civil cases; criminal presumptions, which are always permissive, are discussed in text accompanying notes 56-62 infra.

[46] *Cf.* State v. Martin, No. 6934, slip op. at 12-13 (Hawaii Sup. Ct. Aug. 19, 1980) (upholding conviction based on evidence showing social security payments were correctly addressed to defendant to prove receipt of funds in theft prosecution for welfare fraud).

[47] *See* MCCORMICK ON EVIDENCE § 343, at 807 (E. Cleary ed. 2d ed. 1972) [hereinafter cited as MCCORMICK].

[48] Although the federal rule provides that a presumption imposes "the burden of going forward with evidence to rebut or meet the presumption," FED. R. EVID. 301, the Conference Report on the rule says that the effect is only "to get a party past an adverse party's motion to dismiss," H.R. CONF. REP. No. 93-1597, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7099. Even in the absence of rebutting evidence, the court should instruct the jury that "it may presume the existence of the presumed fact." *Id.* Thus, federal rule 301 arguably does not even create a presumption in the Hawaii rule sense. Professor David W. Louisell points out that the quoted language "seems to confuse presump-

form Rules of Evidence: "[A] presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."[49] The California scheme of presumptions commended itself to the drafters of the Hawaii rules because it recognizes both sorts of presumptions in a comprehensive classification system. Thus, Hawaii rule 302 specifies that in civil cases "a presumption imposes on the party against whom it is directed either (1) the burden of producing evidence, or (2) the burden of proof."[50] Accordingly, rule 303 sets forth those presumptions that impose only the burden of producing evidence, and rule 304 lists those that impose or shift the burden of proof.

Why two schemes when one arguably would do? The reason is found in the arguments advanced by the competing schools of thought. Some presumptions, such as the one concerning receipt of a letter, have been established because, in addition to probability considerations, direct evidence of the ultimate fact is typically in the possession of the party against whom the presumption operates. These presumptions are designed primarily to shift the burden of producing evidence of the nonexistence of the presumed fact, but as soon as such evidence appears, the underlying policy has been implemented and there is no reason to shift the burden of proof. Presumptions of this class are defined in rule 303(a)[51] and collected in rule 303(c). The collection is not exclusive because presumptions are creatures of common-law evolution. Accordingly, subsection (c) lists fifteen presumptions and provides for inclusion of all others "established by law that fall within the criteria of subsection (a) of this rule."[52] Subsection (b) defines the effect of a burden-of-production presumption:

> [T]he trier of fact [is required] to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case no instruction on presumption shall be given and the trier of fact shall determine the existence or nonexistence of the presumed

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tions with inferences," Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, 289 (1977) (footnote omitted). Professor Louisell recommends that the courts disregard the Federal Conference Report because it "misapprehends the very issue to which it is addressed." *Id.* at 320. He recommends a comprehensive scheme for instructing juries about presumptions under federal rule 301. *Id.* at 305-20.

[49] UNIFORM RULE OF EVIDENCE 301, in 13 UNIFORM LAWS ANNOTATED 227 (West 1980). *See generally* Mueller, *Instructing the Jury Upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301*, XII LAND & WATER L. REV. 219 (1977) (advocating the uniform rule).

[50] HAWAII R. EVID. 302(a)(1)-(2).

[51] "A presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of producing evidence." *Id.* 303(a).

[52] *Id.* 303(c).

fact from the evidence and without regard to the presumption.[53]

On the other hand, a number of presumptions are designed to implement important public policies. A good example is found in rule 304(c)(7), establishing a presumption of death in the case of "[a] person who is absent for a continuous period of five years, during which time he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry." This presumption is found also in the probate code,[54] and it facilitates the settlement and distribution of estates. The illustrative presumptions collected in rule 304(c) impose the burden of proof on the party against whom one of them operates: "Except as otherwise provided by law or by these rules, proof by a preponderance of the evidence is necessary and sufficient to rebut a presumption established under . . . [rule 304]."[55] Rule 304(a) establishes the criterion for classification of unspecified presumptions that should be similarly treated, "implement[ation of] a public policy other than, or in addition to, facilitating the determination of the particular action in which the presumption is applied."

Litigants and judges should thus have little difficulty with civil presumptions under article III. The more commonly invoked ones are collected in rules 303(c) and 304(c). Other presumptions can be readily classified according to the criteria of rules 303(a) and 304(a). Finally, the roles of court and trier of fact are specified in rules 303(b) and 304(b).

Rule 306 is the exclusive vehicle for criminal presumptions. Subsection (b) provides that presumptions operating against the prosecution impose "either (1) the burden of producing evidence, or (2) the burden of proof,"[56] and the references are to rules 303 and 304. In other words, presumptions against the State are governed by the civil standards just discussed. Presumptions against the accused, "recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt,"[57] are the subject of rule 306(a).

Rule 306(a)(3) makes clear that presumptions against an accused differ markedly from presumptions in civil proceedings: "The court may not direct the jury to find a presumed fact against the accused." The result is that presumptions against the accused become special inferences that are commended to the jury by the court: "[T]he court shall instruct the jury that, if it finds the basic facts beyond a reasonable doubt, it may infer the presumed fact but is not required to do so."[58] This mandate comports

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[53] *Id.* 303(b).

[54] HAWAII REV. STAT. § 560:1-107(3) (1976).

[55] HAWAII R. EVID. 304(b).

[56] *Id.* 306(b).

[57] *Id.* 306(a)(1).

[58] *Id.* 306(a)(3).

with the due process standard recently enunciated by the Hawaii Supreme Court in *State v. Brighter*,[59] a case where the appellant had been convicted with the assistance of a statutory provision to the effect that the presence of drugs in a motor vehicle "is prima facie evidence of knowing possession thereof by each and every person in the vehicle at the time the drug was found."[60] Applying this provision, the trial court had instructed the jury that "[p]rima facie evidence of a fact is evidence which if accepted in its entirety by the trier of fact, is sufficient to prove the [presumed] fact, provided that no evidence negativing the fact, which raises a reasonable doubt in the mind of the trier of fact, is introduced."[61] This instruction, the *Brighter* court held, tended impermissibly to shift the burden of proof to the appellant and thus violated due process: "[Since] only *permissive* inferences may arise under . . . [the statutory prima facie evidence provision], the jury should have been given a clarifying instruction to the effect that it *could*—but was not *required* to—find the element of knowing possession upon proof of the underlying facts."[62]

IV. Relevance and Related Rules

Article IV defines the concept of relevance, establishes the general admissibility of relevant evidence, and includes a number of specialized rules. Relevance is the basic precondition for the receipt of all evidence. Relevance is necessary but not always sufficient.[63] Rule 401 defines "rele-

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[59] 61 Hawaii 99, 595 P.2d 1072 (1979). *Cf.* Sandstrom v. Montana, 442 U.S. 510 (1979) (due process violated by jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," where intent was element of crime charged).

[60] Hawaii Rev. Stat. § 712-1251(1) (1976).

[61] 61 Hawaii at 110, 595 P.2d at 1079.

[62] *Id.* at 111, 595 P.2d at 1080 (original emphasis). *Brighter* in addition held that the presumption of knowing possession is constitutionally valid only as applied to "dealership quantities" of drugs:

> Therefore, we would require that the prosecution establish beyond a reasonable doubt that the quantity of drug involved is clearly greater than a quantity which may be possessed for personal use. . . . Absent such a determination, a jury would not be justified in concluding that the statutory inference should be applied.

Id. at 109-10, 595 P.2d at 1079. *Brighter* also addressed the question of the requisite strength between basic and ultimate facts in order to sustain a criminal presumption against constitutional attack. On this point, *compare id.* at 104-05, 109, 595 P.2d at 1076, 1078, *with* County Court v. Allen, 442 U.S. 140, 163-67 (1979) (reasonable doubt standard not constitutionally required where presence of firearm in automobile creates permissive presumption of illegal possession by all occupants).

[63] Hawaii R. Evid. 402: "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." *Compare* Michel v. Valdastri, Ltd., 59 Hawaii 53, 575 P.2d 1299 (1978) (error to disallow evidence that defendant violated Occupational Safety and Health Law (OSHL) to show negligence), *with* Taira v. Oahu Sugar Co., No. 6528 (Hawaii Ct. App. Sept. 12, 1980) (OSHL regulations and expert testimony regarding safety precautions of defendant

vant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[64] This definition mirrors the standard recently articulated by the Hawaii Supreme Court.[65]

A question of relevance was one of the points on appeal in *State v. Irebaria*,[66] where the defendants were arrested in an auto at 3:10 a.m. and charged with an armed robbery that had occurred at 2:10 a.m. Among the evidence of guilt admitted by the trial court were the following items: (1) Testimony that one of the robbers carried a .22 caliber pistol and fired a shot during the robbery; (2) testimony that the other robber carried a .38 caliber revolver during the robbery; (3) a .22 caliber bullet fragment and a spent .22 caliber cartridge case found at the scene of the robbery; and (4) a .38 caliber revolver, a .22 caliber pistol, and some .38 and .22 caliber cartridges, all recovered from the trunk of the auto in which the defendants were arrested. Appealing a robbery conviction, appellant challenged the receipt of the evidence recovered from his auto on the ground that it had no relevance because no scientific evidence had been presented to identify the weapons found in the auto as the robbery weapons; moreover, the prosecution did not establish that the seized weapons even could be fired.

The *Irebaria* court rejected appellant's contention because the argument confused the concepts of relevance and sufficiency. Relevance, noted the court, requires only that the evidence possess a "legitimate tendency to establish a controverted fact."[67] "A brick is not a wall,"[68] quoted the court as it likened individually relevant items to building bricks and the sufficiency-of-evidence standard to a wall. The questioned items were not necessarily sufficient to support conviction but were relevant because of their tendency to identify appellant as one of the robbers. "The suffi-

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properly excluded as irrelevant).

[64] HAWAII R. EVID. 401; *accord*, FED. R. EVID. 401. *See* Kim v. State, ___ Hawaii ___, 616 P.2d 1376 (1980) (welfare records showing public school student's propensity for violence properly excluded as irrelevant to issue of awareness in suit against State for negligent supervision resulting in serious injury to plaintiff, a classmate, because school authorities had no access to same records). So defined, relevance incorporates the old concept of materiality. Relevance was previously defined as "the tendency of the evidence to establish a material proposition." MCCORMICK, *supra* note 47, at § 185, at 435 (footnote omitted). The new definition includes the notion of materiality by specifying that the ultimate fact be "of consequence to the determination of the action." HAWAII R. EVID. 401. Accordingly, as the commentary points out, "the words 'material' and 'materiality' do not appear in these rules." *Id.* commentary.

[65] "Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable." State v. Smith, 59 Hawaii 565, 567, 583 P.2d 347, 349 (1978).

[66] 55 Hawaii 353, 519 P.2d 1246 (1974).

[67] Bonacon v. Wax, 37 Hawaii 57, 61 (1945), *quoted in* 55 Hawaii at 356, 519 P.2d at 1249.

[68] MCCORMICK, *supra* note 47, at § 185, at 436, *quoted in* 55 Hawaii at 356, 519 P.2d at 1249.

ciency standard should apply only when all the bricks of individually insufficient [but relevant] evidence are in place and the wall itself is tested."[69] Rule 401 is to the same effect because it requires only that the proffered item have "any tendency" to establish or negate a consequential fact.

Suppose, however, that the *Irebaria* defendants had been arrested in possession of the same arsenal not one hour but one year following commission of the offense. The evidence would possess minimal relevance, and minimal relevance is all that rules 401 and 402 require. Rule 403, however, states an important qualifying principle that serves as a counterbalance to the general permissiveness of rules 401 and 402: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[70] It could be argued with some force that the minimal relevance on the legitimate issue of identity is substantially outweighed by the danger that the jury would be swayed in its decisional process by consideration of the general bad character of the defendants as gunslingers with some apparent use for guns, a consideration strictly forbidden by the general character evidence ban of rule 404.[71]

Almeida v. Correa,[72] discussed earlier in connection with the concept of judicial notice, provides another example. The principal question addressed by the Hawaii Supreme Court in *Almeida* was whether, in a paternity case, the exhibition of the child to the jury for resemblance comparison with the putative father had sufficient relevance. After a careful review of scientific principles in the fields of genetics and physical anthropology, the court held that such an exhibition would be useless to a determination of paternity and could "only serve to expose . . . [the putative father] to proven dangers."[73] In a footnote the court said that it was un-

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[69] 55 Hawaii at 356, 519 P.2d at 1249. *Cf.* State v. Lloyd, 61 Hawaii 505, 606 P.2d 913 (1980) (police officer's assertion that seeds found in defendant's closet were marijuana seeds constituted insufficient evidence of the fact).

[70] HAWAII R. EVID. 403. *Compare* State v. Huihui, 62 Hawaii ___, 612 P.2d 115 (1980) (suggestion that defendant had prior criminal record by referring to "police mug photographs" in questioning witness regarding pretrial identification constituted reversible error), *with* State v. Pulawa, 62 Hawaii ___, 614 P.2d 373 (1980) (reference to "mug shot" was harmless error), *and* State v. Antone, 62 Hawaii ___, ___, 615 P.2d 101, 107 (1980) (failure to object to evidence of defendant's prior arrest record for same type of crime was harmless in bench trial), *and* State v. Kahinu, 53 Hawaii 536, 498 P.2d 635 (1972), *cert. denied*, 409 U.S. 1126 (1973) (reference to prior arrest was harmless error where court immediately gave cautionary instruction).

[71] *Cf.* People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466 (1930) (reversible error to admit evidence that defendant owned weapons, which were not used in the alleged crime, to persuade jury of his murderous propensity).

[72] 51 Hawaii 594, 465 P.2d 564 (1970), *discussed in* Part II *supra*.

[73] *Id.* at 603, 465 P.2d at 571. The court determined that the issue of *specific* resemblance

necessary to "balance probative weight against jury sympathy where there is no probative weight in an exhibition to a layman,"[74] thus eschewing reliance on the maxim expressed now in rule 403. Perusal of the *Almeida* opinion, however, suggests that the rule 403 principle would have been an equally appropriate ground for decision, especially in view of the fact that some other jurisdictions allow exhibition of the child in a paternity case.[75] The case also illustrates an obvious difficulty: relevance and prejudicial impact necessarily imply a degree of subjective judgment when all is said and done. Although the court relied on scientific exegesis in *Almeida*, most relevance questions require common-sense thinking about the relationships of things to other things.

Another situation with significant potential for prejudice is presented when the court considers admitting evidence with a limiting instruction under rule 105.[76] Here the issue is whether probative value is substantially outweighed by the danger that the trier of fact will disregard the instruction and go on to consider the evidence for the forbidden purpose, evaluated with regard to the likelihood that such improper consideration will skew the result. Unfair prejudice, as the commentary to rule 403 points out, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[77] Rule 403 thus calls upon the court to anticipate and to evaluate the jury's probable mental operations with respect to a proffered item of evidence. Moreover, this judgment needs to take into account the relationship between the proffered item and other items already admitted or anticipated in evidence, in addition to the general atmosphere at trial. It is for these reasons that the 403 balance is addressed to the discretion of the trial court. Rules 401, 402, and 403 are fundamental and pervasive. They are the backbone of the entire body of evidence law.

Rules 404 and 405 are concerned with character evidence. That a person behaved in a certain way on a particular occasion could be shown, given the rule 401 definition, by evidence of her general character or propensity to behave that way on any like occasion. Character could be proved in two ways: witnesses could be called to state their opinion of the person's character or their knowledge of her reputation for a particular trait of character, or evidence could be offered that on occasions other than the one in question she behaved in a manner consistent with the proponent's theory of her behavior on the occasion in question.[78] Rule

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is relevant in determination of paternity but only where resemblance is measured scientifically. Therefore, only expert testimony on the issue would be admissible. *Id.* at 602-03, 465 P.2d at 570-71.

[74] *Id.* at 603 n.11, 465 P.2d at 570 n.11.

[75] McCormick, *supra* note 47, at § 212, at 526 n.20.

[76] See the discussion of rule 105 in Part I *supra*.

[77] Hawaii R. Evid. 403 commentary (quoting 28 U.S.C. app., at 550 note 1976)).

[78] Specific instances of prior conduct are a species of character evidence because the connection between the prior conduct and the conduct in issue requires an intervening infer-

404, however, interposes a general bar, with limited exceptions, to character evidence because, as the commentary to the rule explains:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good . . . [woman] and to punish the bad . . . [woman] because of their respective characters despite what the evidence in the case shows actually happened.[79]

So understood, rule 404 represents a specialized application of the 403 principle.

The exceptions to rule 404(a)'s character evidence exclusion are that (1) the accused in a criminal case can offer evidence of a personal trait inconsistent with commission of the crime charged,[80] (2) the character of certain crime victims can be proved by accused[81] in criminal cases,[82] and (3) the character of witnesses to be untruthful or, in limited circumstances, to testify truthfully can be proved under rules 608 and 609.[83] In these limited instances, rule 405 specifies that the proof may be by reputation or by direct opinion evidence but generally not by instances of conduct on other occasions. The common law did not allow proof of character by opinion, and, consistent with federal rule 405, this rule thus effects a change in Hawaii law.[84]

Rule 404(b) precludes the use of specific instances of conduct ("other crimes, wrongs, or acts") "to prove the character of a person in order to show that he acted in conformity therewith."[85] The rule typically bars the

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ence or assumption of character or propensity for that particular kind of behavior.

[79] HAWAII R. EVID. 404 commentary (quoting 28 U.S.C. app., at 551 note (1976) (Notes of Advisory Committee on Proposed Rules) (quoting CAL. LAW REVISION COMM'N, RECOMMENDATION & STUDIES 615 (1964))).

[80] HAWAII R. EVID. 404(a)(1).

[81] *Id.* 404(a)(2). Proof of character of rape and sex assault victims, however, is governed exclusively by rule 412. See text accompanying notes 100-04 *infra*. It thus appears that rule 404(a)(2) relates primarily to self-defense claims in homicide and assault cases, *e.g.*, State v. Lui, 61 Hawaii 328, 603 P.2d 151 (1979).

[82] In Feliciano v. City & County of Honolulu, 62 Hawaii ___, 611 P.2d 989 (1980), a civil action for assault and battery brought under the theory of respondeat superior, the court approved evidence of the reputation of plaintiffs for violence to support the employer's assertion that its police officers reasonably feared bodily harm and to evidence plaintiffs' character and propensity to be aggressive. Although the analogy to rule 404(a)(2) in *Feliciano* is powerful because of the similarity between civil and criminal assault cases, rule 404 does not support the *Feliciano* result.

[83] HAWAII R. EVID. 404(a)(3). See text accompanying notes 146-67 *infra*.

[84] *See* State v. Faafiti, 54 Hawaii 637, 642-44, 513 P.2d 697, 701-02 (1973) (no error where trial court refused to admit testimony either as evidence of defendant's reputation in the community or as personal opinion testimony as to accused's character).

[85] *Cf.* Warshaw v. Rockresorts, Inc., 57 Hawaii 645, 562 P.2d 428 (1977) (evidence of prior golf cart accidents properly excluded in damage suit based on negligence, breach of warranty, and strict liability theories).

prosecutor from proving that the defendant committed other crimes to evidence his probable commission of the one charged.[86] Many exceptions have been engrafted to the rule: other crimes evidence "may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident."[87] Illustrative of these exceptions is *State v. Apao*,[88] where the defendant was charged with the murder of a man "known by . . . [the defendant] to be a witness in a murder prosecution."[89] At trial the State was permitted to prove that the prior murder prosecution involved the current victim as witness and Apao as defendant. The Hawaii Supreme Court held that this evidence was properly admitted to evidence Apao's motive to kill the man who testified against him in the previous case. The holding is consistent with rules 403 and 404(b) because the prejudicial impact of the evidence did not outweigh its legitimate value in the two-step inference from prior crime to motive to present guilt.

The Hawaii Supreme Court has previously employed two formulations of the "other crimes" rule; one, an exclusionary rule with exceptions resembling rule 404(b); the other, an apparently more permissive device allowing general admissibility "except when . . . [the evidence] shows merely criminal disposition."[90] Federal rule 404(b) adheres to the exclusionary formulation with exceptions, and the Hawaii rule is similar but was adapted[91] to embrace the essential spirit of both formulations. In any event, the precise language of the rule, as the Hawaii court has recognized, should always yield to the trial court's paramount obligation in assessing "relevancy to proof of an element of the crime charged, balanc[ing] . . . probative value against prejudicial effect, and [using] . . . the exception categories primarily as indices of relevancy."[92] The court thus recognized that the principles now codified in rules 403 and 404(b) are interdependent in the consideration of "other crimes, wrongs, or acts" evidence.

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[86] *See, e.g.*, State v. Pokini, 57 Hawaii 17, 548 P.2d 1397 (1976).

[87] HAWAII R. EVID. 404(b). *See* State v. Thompson, 1 Haw. App. _, 613 P.2d 909 (1980) (evidence that defendant forged check endorsement of one hospital patient admissible to prove element of intent in forgery prosecution involving another patient's check).

[88] 59 Hawaii 625, 586 P.2d 250 (1978).

[89] *Id.* at 627, 586 P.2d at 253.

[90] People v. Peete, 28 Cal. 2d 306, 314, 169 P.2d 924, 929 (1946), *quoted in* State v. Iaukea, 56 Hawaii 343, 349, 537 P.2d 724, 729 (1975). *See* State v. Agnasan, 62 Hawaii _, 614 P.2d 393 (1980); State v. Murphy, 59 Hawaii 1, 8-11, 575 P.2d 448, 454-56 (1978).

[91] The permissive sentence in the federal rule reads: "It may, however, be admissible *for other purposes*, such as proof of motive . . . ." FED. R. EVID. 404(b) (emphasis added). The Hawaii formulation substitutes "where such evidence is probative of any other fact that is of consequence to the determination of the action," HAWAII R. EVID. 404(b), for the italicized phrase in the federal rule.

[92] State v. Iaukea, 56 Hawaii 343, 351, 537 P.2d 724, 730 (1975).

The Hawaii drafters also added "modus operandi" to the catalog of rule 404(b) exceptions. This is an appropriate addition because in a given case the details of commission of the prior crime and of the crime charged may be so strikingly similar and distinctive "as to be like a signature."[93] Dean McCormick cautioned, however, that "much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts."[94] This is because repetitious criminality demonstrates nothing more than forbidden bad character or propensity. The theory of the modus operandi exception is that two crimes may possess such distinctive similarities as to mark them the probable handiwork of the same person, thereby identifying the defendant as the present culprit.[95]

Most of the remaining rules in article IV state settled principles.[96] For example, rule 406 provides that when prior instances of conduct amount to a habit or "routine practice," then evidence of the habit or practice is admissible "to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

"Subsequent remedial measures," such as equipment repairs or employee discharges, effected after an occurrence currently being litigated, generally are prohibited by rule 407 to prove "negligence or culpable conduct in connection with the event." Rule 407 contains exceptions[97] and goes beyond federal rule 407 in allowing subsequent remedial measures to prove "dangerous defect[s] in products liability cases." As the commentary points out, this action codifies the result reached by the California Supreme Court in *Ault v. International Harvester Co.*,[98] where the trial court admitted subsequent repairs made to the International Scout in a

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[93] MCCORMICK, *supra* note 47, at § 190, at 449 (footnote omitted).

[94] *Id.*

[95] *See, e.g.*, Payne v. United States, 294 F.2d 723, 725-26 (D.C. Cir.), *cert. denied*, 368 U.S. 883 (1961); 2 WEINSTEIN'S EVIDENCE, *supra* note 7, at ¶ 404[09], at 404-52 to -55 (1980).

[96] Rule 408 bars evidence of "compromise or offers to compromise"; rule 409 excludes evidence of "payment of medical and similar expenses"; rule 410 interdicts evidence of withdrawn guilty pleas, nolo contendere pleas, and plea bargaining statements; and rule 411 bans evidence of liability insurance on the issue of negligence. *See also* State v. Alberti, 61 Hawaii 502, 605 P.2d 937 (1980) (where withdrawal of guilty plea was pending in federal court, admissions made to support plea are admissible in subsequent state prosecution for related offense arising out of the same conduct but would not be admissible after federal court approved withdrawal).

[97] Impeachment is one of the exceptions. *Accord*, Long Mfg., N.C., Inc. v. Nichols Tractor Co., 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978) (post-accident warning letter to customers admissible to impeach defendant's witness who testified to safety of tractor design in wrongful death action based on negligence theory).

[98] 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). Plaintiff claimed that the manufacturer's use of aluminum rather than malleable iron in construction of the gear box constituted a design defect that caused the gear box to break and the vehicle to lurch out of control and plunge 500 feet to the bottom of Nine Mile Canyon Road. Defendant substituted iron for aluminum in the manufacture of Scout gear boxes three years after the accident occurred.

products liability case. The California court recognized that the general exclusion of subsequent repairs evidence is designed to encourage, or at least not discourage, the making of repairs but held that the principle had no applicability in products liability cases:

> The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.[99]

Rule 412 tracks a recent addition to the federal rules[100] and sharply limits evidence of the previous sexual behavior of rape and sex assault victims.[101] Prior Hawaii law entrusted the determination of admissibility of this kind of evidence to the discretion of the trial court,[102] and the evidence was sometimes admitted to establish that the victim consented to the alleged crime of rape or sodomy. Rule 412 excludes evidence of past sexual behavior of sex assault victims with persons other than the accused[103] but leaves open the door to evidence of prior sexual conduct with the accused in cases where the defense of consent is raised. This rule take precedence over the general victim character provision of rule 404(a)(2),[104] and recognizes that the evidence now excluded had little or no relevance on the consent issue. Moreover, the evidence was degrading to rape and sex assault victims, and its availability was thought to deter significant numbers of them from reporting these crimes.

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[99] *Id.* at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

[100] Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, *reprinted in* 28 U.S.C. app., at 1231 (Supp. III 1979) (FED. R. EVID. 412).

[101] Rule 412 also flatly prohibits "reputation or opinion evidence of the past sexual behavior" of such victims. See note 30 *supra* and accompanying text.

[102] HAWAII REV. STAT. § 707-742 (1976 & Supp. 1979) (repealed 1980). *See* State v. Iaukea, No. 6440 (Hawaii Sup. Ct. Aug. 29, 1980).

[103] The only exceptions are instances where the evidence is offered "upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury," HAWAII R. EVID. 412(b)(2)(A); and where the evidence is "constitutionally required to be admitted," *id.* 412(b)(1). *Cf.* Davis v. Alaska, 415 U.S. 308 (1974) (confrontation clause protects defendant's right to cross-examine juvenile regarding his status as a probationer in order to show witness' bias); Giles v. Maryland, 386 U.S. 66 (1967) (vacating post-conviction affirmance where trial court barred evidence of rape prosecutrix' status as probationer and relevant sexual history); State v. Jones, No. 6321, slip op. at 6-11 (Hawaii Sup. Ct. Oct. 7, 1980) (trial court properly excluded evidence of rape victim's prior sexual experience with another person as irrelevant to consent defense and witness' credibility).

[104] See text accompanying notes 78-84 *supra*.

V. PRIVILEGES

Article V contains a comprehensive set of privilege rules that clarify but do not modify significantly previous Hawaii law. The federal rules contain no specific rules on privilege, although the original package of proposed federal rules, submitted by the United States Supreme Court to the Congress in 1972, contained thirteen privilege rules[105] upon which the Hawaii rules are largely based. For a number of reasons, Congress scuttled the proposed privilege rules in favor of a single standard,[106] federal rule 501, that entrusts the matter of privilege in the federal courts to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[107] The Uniform Rules of Evidence, on the other hand, contain a set of twelve privilege rules,[108] most of which are textually similar to the unenacted federal rules and to the rules contained in Hawaii's article V.

Rule 501 states the basic principle that no privileges are to be recognized "[e]xcept as otherwise required by the Constitution of the United States, the Constitution of the State of Hawaii, or provided by Act of Congress or Hawaii statute, and except as provided in these rules or in other rules adopted by the Supreme Court of the State of Hawaii." This truism embodies the idea that every person must respond to court process and provide relevant evidence unless a specific privilege can be established.[109] The article V collection includes the well-established lawyer-cli-

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[105] Fed. R. Evid. 501-513, 56 F.R.D. 230-61 (1972).

[106] The original privilege rules were the most controversial part of the Supreme Court's submission, see note 6 *supra*. Critics charged that the privilege rules were matters of substance and, as such, without the Court's power to prescribe "practice and procedure" rules; that the rules impinged on state law and policy and hence violated the principle of federalism; and that the rules would "freeze" the federal privilege law. Specific provisions were attacked. "The controversy convinced Congress that codification of privileges was dangerous and might forestall passage of the rules." 2 WEINSTEIN'S EVIDENCE, *supra* note 7, at ¶ 501[01], at 501-17 (1980) (footnote omitted). The result was enactment of a single rule, FED. R. EVID. 501, *discussed in* text above. For a discussion of relevant judicial rulemaking power in Hawaii, see Richardson, *supra* note 3, at 33-38.

[107] FED. R. EVID. 501. The rule also provides that, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." *Id.*

[108] UNIFORM RULES OF EVIDENCE 501-512, in 13 UNIFORM LAWS ANNOTATED 248-66 (West 1980).

[109] *See* Trammel v. United States, 445 U.S. 40, 50 (1980); United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 686, 688 (1972). In addition rule 501 bars common-law development of new privileges. *Compare* Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (common-law news reporter privilege), *with In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961) (declining to create news reporter privilege). The recently adopted constitutional amendment protecting the right to privacy, HAWAII CONST. art. I, § 6, may provide an independent basis for excluding evidence. The 1978 amendment is a combination of similar provisions in the Alaska and Montana constitutions, Comm. on Bill of Rights, Suffrage and Elections, Informational Panel Minutes, 3d Hawaii Const. Conv. 1 (1978) (remarks of Professor Jon Van Dyke) (on file at Hawaii State Archives). *See* ALASKA

ent,[110] physician-patient,[111] spousal,[112] clergywoman-penitent,[113] political vote,[114] trade secret,[115] self-incrimination,[116] and informer's identity[117] privileges. In addition, rule 504.1 presents a psychologist-client privilege, applicable to psychologists certified under the Hawaii statutes[118] and their patients or clients. The purpose of these rules is to facilitate communication and to protect privacy.[119]

The lawyer-client, physician-patient, psychologist-client, and clergyman privileges, found in rules 503, 504, 504.1, and 506, respectively, are similar in nature. All provide that the person who seeks advice or counselling is the holder and beneficiary of the privilege and that both parties to the privileged material may claim the privilege but only on behalf of the holder.[120] Accordingly, all provide that the definition of the professional person includes not only one authorized or certified to engage in his calling but also one "reasonably believed" by the client or patient to be so authorized.[121] All specify that the subject matter of the privilege is limited to confidential communications, and all define confidential communications as those made privately and "not intended to be disclosed" to other persons except when disclosure would be in furtherance of the

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CONST. art. I, § 22; MONT. CONST. art. II, § 10. The Alaska Supreme Court rejected a criminal defendant's claimed psychotherapist privilege for lack of state action, Allred v. State, 554 P.2d 411 (Alaska 1976) (establishing common-law psychotherapist privilege but finding it inapplicable under the circumstances), but the Montana Supreme Court has invoked the exclusionary rule even to protect against invasion of privacy by private parties, State v. Coburn, 165 Mont. 488, 530 P.2d 442 (1974); State v. Brecht, 157 Mont. 264, 485 P.2d 47 (1971). *See also* State v. Boynton, 58 Hawaii 530, 574 P.2d 1330 (1978) (declining to decide whether searches by private parties may be subject to the exclusionary rule as in *Coburn*).

[110] HAWAII R. EVID. 503. For an extensive discussion of the question whether a client's whereabouts is privileged material, see Sapp v. Wong, 62 Hawaii _, _, 609 P.2d 137, 140-41 (1980) (information not privileged under the circumstances).

[111] HAWAII R. EVID. 504.

[112] *Id.* 505.

[113] *Id.* 506.

[114] *Id.* 507.

[115] *Id.* 508.

[116] *Id.* 509.

[117] *Id.* 510.

[118] *Id.* 504.1(a)(2). *See* HAWAII REV. STAT. ch. 465 (1976 & Supp. 1979), *as amended by* Act 91, 1980 Hawaii Sess. Laws 141. See text accompanying note 121 *infra*.

[119] The privilege rules constitute a major qualification to the rule 402 maxim that all relevant evidence is admissible, *see* note 63 *supra*. Because of this, and because the specific privileges also create exceptions to the limiting principle of rule 501, construction of the privilege rules will call for balancing the privilege policies against the general propositions of rules 402 and 501. Specific privilege policies are elaborated in the commentaries to the individual privilege rules. Article five, of course, contains the only evidence rules binding upon the court in hearing preliminary matters, *see* text accompanying note 26 *supra*.

[120] In the case of lawyers, rule 503(c) directs: "The person who was the lawyer or the lawyer's representative at the time of the communication shall claim the privilege on behalf of the client unless expressly released by the client."

[121] HAWAII R. EVID. 503(a)(3), 504(a)(2), 504.1(a)(2), 506(a)(1).

object of the consultation.[123] All except the clergyman privilege contain a standard list of exceptions. Finally, all provide that the privilege survives the death of the privilege holder.

The lawyer-client privilege applies to corporations when they seek or obtain professional legal services.[125] There is a good deal of case law on the question who, among all the employees of a corporation, embodies or speaks for the corporation when interviewed by a lawyer, as contrasted with employees who are interviewed merely as witnesses to events about which the corporation may anticipate litigation. Rule 503 answers this question by specifying that "representative[s] of the client" include only those "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."[124] This formulation is recommended in the Uniform Rules of Evidence,[125] and it resembles the "control group" test rejected in 1981 by the Supreme Court in *Upjohn Co. v. United States*.[126]

The spousal privilege has two discrete aspects. Rule 505(a), applicable only in criminal cases, provides "the spouse of the accused [with] a privilege not to testify against the accused." This modifies prior Hawaii law, which allowed either the accused or the testifying spouse to invoke the criminal disqualification,[127] thereby flatly barring testimony. The Hawaii drafters were persuaded by the recent United States Supreme Court decision in *Trammel v. United States*,[128] which held, as a matter of common-law development, that a criminal accused could not prevent his spouse from testifying against him. The purpose of the privilege is the protection of marital harmony, and the *Trammel* Court reasoned that whenever one spouse is willing to testify against the other in a criminal case "there is probably little in the way of marital harmony for the privilege to pre-

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[123] *Id.* 503(a)(5), 504(a)(3), 504.1(a)(3); *accord,* 506(a)(2).

[124] *Id.* 503(a)(1).

[125] *Id.* 503(a)(2).

[125] UNIFORM RULE OF EVIDENCE 502(a)(2), in 13 UNIFORM LAWS ANNOTATED 249 (West 1980).

[126] 49 U.S.L.W. 4093 (U.S. Jan. 13, 1981) (No. 79-886). Hawaii's rule is based on City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485-86 (E.D. Pa.), *petition for mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963), which denied the privilege where the matter discussed with the corporation's attorney was very important to the highest management level, and the employee had no substantial decisionmaking role in it.

[127] HAWAII REV. STAT. § 621-18 (1976) (repealed 1980), provided that spouses were not "competent or compellable" to give evidence against each other in criminal cases, except where the offense involved a crime against the person of the other spouse or either of their children. *See* Territory v. Alford, 39 Hawaii 460 (1952), *aff'd,* 205 F.2d 616 (9th Cir. 1953) (wife competent to testify against husband accused of forcing her into prostitution).

[128] 445 U.S. 40 (1980). The petitioner's spouse had been granted use immunity to testify against her husband who was charged with importing and conspiring to import heroin. Upon her return from Thailand, Mrs. Trammel was arrested in Hawaii after a customs search revealed she was carrying four ounces of heroin. She was later named as an unindicted co-conspirator in her husband's case.

serve."[129] For this reason, Hawaii rule 505(a) provides that the disqualification "may be claimed only by the spouse who is called to testify." Rule 505(b), applicable in civil as well as criminal cases, creates a privilege for "confidential marital communications"[130] and specifies that either spouse "has a privilege to refuse to disclose and to prevent any other person from disclosing [such a] communication."[131] The exception to the privileges of rule 505(a) and (b) applies whenever one spouse is charged with a crime against the other or against other household members.[132]

Rule 511 generally provides that a privilege is waived if the holder "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Rule 512 bars evidence of privileged material if "disclosure was (1) compelled erroneously, or (2) made without opportunity to claim the privilege." Finally, rule 513 prohibits comment by court or counsel about the fact that a person, "whether in the present proceeding or upon a prior occasion," claimed a privilege.[133] Since no inferences may be drawn by the trier of fact concerning a privilege claim, rule 513(c) specifies that "any party exercising a privilege (1) is entitled to an instruction that no inference may be drawn therefrom, or (2) is entitled to have no instruction on the matter given to the jury." This latter entitlement effects a change in Hawaii law, because the supreme court had held, in *State v. Baxter*,[134] that it was not reversible error for the trial court to deliver such a cautionary instruction even over the objection of an accused who availed himself of the self-incrimination privilege not to testify. The new rule embodies Justice Kazuhisa Abe's dissenting view in *Baxter* to the effect that the decision about the cautionary instruction should belong to the privilege claimant, especially since the instruction is viewed by many trial lawyers as a more-detrimental-than-beneficial spotlighting of the privilege claim.[135]

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[129] *Id.* at 52. *Cf. In re* Grand Jury Empanelled Oct. 18, 1979, 49 U.S.L.W. 2066 (3d Cir. June 26, 1980) (co-conspirator spouse entitled to claim privilege).

[130] HAWAII R. EVID. 505(b). Such a privilege was previously recognized by statute, HAWAII REV. STAT. § 621-19 (1976) (repealed 1980). The Supreme Court in *Trammel* acknowledged the same independent privilege for confidential communications, 445 U.S. at 51, and expressly noted that its ruling did not "disturb" that well-established law, *id.* at 45 n.5.

[131] HAWAII R. EVID. 505(b)(2).

[132] *Id.* 505(e). This comports with prior statutory and case law, *see* note 127 *supra*.

[133] HAWAII R. EVID. 513(a). The Hawaii Supreme Court had previously prohibited comment in a civil case on the assertion of the self-incrimination privilege, Kaneshiro v. Belisario, 51 Hawaii 649, 652, 466 P.2d 452, 454 (1970). In criminal cases, prohibition of comment about the accused's assertion of the self-incrimination privilege is a constitutional imperative, *see* Griffin v. California, 380 U.S. 609 (1965). The prosecution may, however, comment upon the failure of defendant to offer the spouse as a witness to any fact material to the defense. State v. Hassard, 45 Hawaii 221, 228, 365 P.2d 202, 206 (1961).

[134] 51 Hawaii 157, 454 P.2d 366 (1969), *cert. denied*, 397 U.S. 955 (1970); *accord*, Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978).

[135] 51 Hawaii at 161, 454 P.2d at 368 (Abe, J., dissenting).

VI. WITNESSES AND IMPEACHMENT

Article VI covers competency, impeachment, and other matters relating to witness interrogation. One of the most innovative provisions in the entire Code is rule 607: "The credibility of a witness may be attacked by any party, including the party calling him." Previous practice precluded a party from impeaching her own witnesses except in limited circumstances.[136] She was said to vouch for the credibility of the witnesses she called, and impeachment hardly comports with the voucher notion. Another formulation of the voucher concept considered a party to be "bound" by the testimony of her witnesses. The notion of being bound, however, did not prevent a party from calling witnesses who would testify at variance with each other. In a somewhat circular way, the notions of vouching and being bound were mainly effectuated in the impeachment limitation. Dean McCormick viewed this limitation as "a serious obstruction to the ascertainment of truth" in the context of modern litigation where parties do not choose their witnesses but rather take them where they find them.[137] Federal rule 607, with which the Hawaii rule is identical, abandoned the limitation as "based on false premises."[138] Most of the states that have reexamined evidence rules since 1975, when the federal rules were promulgated, have similarly interred the own-witness impeachment bar.[139] No grievances have been heard. The burials have been quiet and dignified.

Rules 601 through 606 relate to witness competency and largely restate existing law. Rule 601 proclaims that "[e]very person is competent to be a witness except as otherwise provided in these rules." Rule 602 requires that witnesses testify from personal knowledge of the subject matter of their testimony, and rule 603 mandates an "oath or affirmation administered in a form calculated to awaken . . . [the witness'] conscience and impress his mind with his duty to . . . [testify truthfully]." Because of the apparent sweep of rule 601, the Hawaii drafters incorporated, in rule 603.1, a provision from the California Evidence Code disqualifying as a witness any person who is incapable of expressing himself or incapable of understanding the truth-telling obligation.[140] This provision, as the commentary points out, will be primarily applicable to youthful and mentally infirm witnesses.[141]

Rules 605 and 606 render judges and jurors incompetent to testify in the trials in which they sit. Rule 606(b) governs juror testimony about

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[136] HAWAII REV. STAT. § 621-25 (1976) (repealed 1980).

[137] MCCORMICK, *supra* note 47, at § 38, at 77.

[138] 28 U.S.C. app., at 561 note (1976).

[139] The statutes are collected in 3 WEINSTEIN'S EVIDENCE, *supra* note 7, at ¶ 607[10] (Supp. 1979).

[140] *See* CAL. EVID. CODE § 701 (West 1966); HAWAII R. EVID. 603.1 commentary.

[141] *See* State v. Antone, 62 Hawaii _, _, 615 P.2d 101, 106-07 (1980).

jury deliberations:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

This is a modification of the federal rule which additionally prohibits testimony concerning "any matter or statement occurring during the course of the jury's deliberations."[142] The Hawaii rule will allow testimony about events that occur in the jury room, the disqualification being limited to testimony about the "effect" of such events on jurors' deliberative reasoning. The difference is suggested by *Kealoha v. Tanaka*,[143] where a deliberating jury repaired to the Halekulani Hotel, consumed alcoholic beverages, and thereafter returned a hasty verdict. Although the *Kealoha* holding did not relate to juror competency,[144] the case is mentioned here because the jurors would not be competent to testify about their drinking activities under the federal rule but would qualify under the Hawaii rule. Both rules would bar testimony concerning the *effect* of the drinking on the deliberations, however. The policy, according to the commentaries to both rules, is to promote "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[145] The Hawaii drafters nevertheless concluded that objective forms of juror misconduct should not be insulated from subsequent scrutiny.

Rules 608, 609, 609.1, and 613 govern impeachment. Rules 608 and 609 define the scope of permissible character attacks on witness credibility.[146] Rule 608 permits a credibility attack through opinion or reputation evidence of the character of a witness for lack of veracity, and, to rebut such an attack, allows credibility support by opinion or reputation evidence of character for truthfulness.[147] Rule 608(b) prohibits the use of extrinsic evidence to prove a witness' prior behavior as it may bear on his credibility but approves cross-examination concerning such prior behavior. This formulation is often expressed as follows: The cross-examiner may inquire about the witness' employment, prior conduct, and other collateral circumstances bearing on credibility but is concluded by the answers and

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[142] FED. R. EVID. 606(b).

[143] 45 Hawaii 457, 370 P.2d 468 (1962).

[144] The court held that consumption of liquor by the jurors did not, as a matter of law, constitute prejudice requiring a new trial and affirmed its earlier opinion that the record did not show actual prejudice in this case. *Id.* at 468, 473-74, 370 P.2d at 475, 477.

[145] 28 U.S.C. app., at 560 note (1976) (Notes of Advisory Committee on Proposed Rules), *quoted in* HAWAII R. EVID. 606 commentary.

[146] Rules 608 and 609 are among the exceptions to the general exclusion of character evidence, HAWAII R. EVID. 404(a)(3). See text accompanying notes 78-95 *supra*.

[147] HAWAII R. EVID. 608(a).

may not contradict them by calling other witnesses.[148]

In *Cozine v. Hawaiian Catamaran, Ltd.*,[149] the Hawaii Supreme Court held that the trial court's refusal to allow cross-examination about a false affidavit constituted reversible error because the witness could "be cross-examined as to specific acts affecting her credibility."[150] The *Cozine* court emphasized, however, that "[s]uch cross-examination rests in the discretion of the court, and is reviewable only for abuse of discretion."[151] Rule 608(b) expressly commits control of this kind of questioning to the court's discretion, and the commentary to rule 403 refers specifically to rule 608(b) as a prime example of the need for a discretionary balance of relevance, prejudicial impact, and jury confusion. False statements under oath, the subject matter of impeachment in *Cozine*, are devastatingly relevant to credibility, but other conduct, collateral in the sense that it bears no relation to the substantive issues in the litigated case, invariably calls for a critical assessment of relevance to credibility and counterbalancing factors. Thus, "[a] witness may not be questioned as to his involvement with drugs solely to show he is unreliable or lacks veracity."[152] The same assessment must inform the decision whether to allow impeachment by prior criminal conviction under rule 609.

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is inadmissible except when the crime is one involving dishonesty."[153] The use of the words "inadmissible except" in rule 609(a) implicitly suggests the discretionary nature of the prior-conviction impeachment decision. So understood, the rule codifies the result in *Asato v. Furtado*,[154] where the Hawaii Supreme Court approved the trial court's action disallowing impeachment by prior conviction for careless driving because the conviction bore "no rational relation to . . .

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[148] *See* McCormick, *supra* note 47, at § 42, at 84.

[149] 49 Hawaii 77, 412 P.2d 669 (1966), *discussed in* Part VII *infra*. Plaintiff, a passenger on a commercial catamaran chartered by her husband, sought damages for injuries she sustained when the mast broke and struck her on the head. Defendant appealed a jury award of $12,750 for plaintiff. In a pretrial affidavit, plaintiff asserted that she had made diligent efforts to obtain business records to support the medical costs she claimed. The sworn statement apparently conflicted with a pretrial deposition where plaintiff admitted she only asked one drug store for the information and neglected to request relevant records from her physicians.

[150] *Id.* at 101, 412 P.2d at 685.

[151] *Id.* (footnote omitted).

[152] State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390 (1980). Defendant sought to cross-examine the prosecution witness, who had been granted immunity to testify in the rape and robbery prosecution, regarding the witness' use and possible sale of marijuana.

[153] Hawaii R. Evid. 609(a). Rule 609(c) permits the impeachment use of juvenile convictions "to the same extent as . . . criminal convictions under subsection (a) of this rule." In State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390 (1980), the court held that a deferred acceptance of guilty plea is not a conviction and therefore may not be used to impeach a witness even if the crime involved is relevant to the issue of the witness' veracity.

[154] 52 Hawaii 284, 474 P.2d 288 (1970).

[the] witness' credibility."[155] The *Asato* holding is unexciting, but the dicta are powerful:

> [W]e think it unwise to admit evidence of any and all convictions on the issue of credibility. We hold that admission of such evidence should be limited to those convictions that are relevant to the issue of truth and veracity. A perjury conviction, for example, would carry considerable probative value in a determination of whether a witness is likely to falsify under oath. We also think that other crimes that fall into the class of crimes involving dishonesty or false statement would have some value in a rational determination of credibility.[156]

On the other hand, the court said that offenses "like murder or assault and battery"[157] should not be admitted:

> It is hard to see any rational connection between, say, a crime of violence and the likelihood that the witness will [not] tell the truth. In addition, there is the danger that a moralistic jury might decide not to believe a witness who has been convicted of a serious crime, even though the crime has no rational connection to credibility.[158]

Use of the word "dishonesty" in the rule 609 formulation is intended to invoke the *Asato* wisdom. Does the word embrace theft crimes, which seem to fall in the middle of the spectrum from murder to perjury? Possibly so,[159] but a bright-line answer to this type of question is totally at war with the essentially discretionary nature of the rule 609 decision, which should take into account all aspects of the particular trial setting in which the impeachment is proposed. Another factor of obvious significance is the age of the prior conviction.[160] The idea of discretion is not simply

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[155] *Id.* at 295, 474 P.2d at 296. The conviction, based on a jury verdict, involved the same traffic accident giving rise to the civil suit for damages in *Asato*. While the prior conviction could not be used to *impeach* the defendant, the court held that it was admissible evidence on the issue of defendant's negligence, although not *conclusive* proof thereof. *Id.* at 290-92, 474 P.2d at 293-94. *See also* Michel v. Valdastri, Ltd., 59 Hawaii 53, 574 P.2d 1299 (1978) (error to disallow evidence that defendant violated Occupational Safety and Health Law to prove negligence); note 63 *supra*.

[156] 52 Hawaii at 293, 474 P.2d at 295.

[157] *Id.*

[158] *Id.*

[159] *See* S. STAND. COMM. REP. No. 22-80, 10th Hawaii Leg., 2d Sess. 10 (1980): "For example, a conviction for assault would not be available for impeachment but a conviction for larceny could be used to impeach." Under a similar formulation contained in federal rule 609(a)(2), *compare* United States v. Donoho, 575 F.2d 718, 721 (9th Cir.), *vacated and remanded pursuant to Memorandum of Solicitor General*, 439 U.S. 811 (1978) (permissible impeachment with petty theft by false representation where appellant had taken gun from his employer), *with* United States v. Ortega, 561 F.2d 803, 805-06 (9th Cir. 1977) (impermissible impeachment with misdemeanor shoplifting conviction for taking two bottles of vodka).

[160] The federal rule imposes an arbitrary, ten-year time limit on prior convictions used to impeach, although the court may exercise discretion to admit the evidence so long as the

to modify the usual standard of appellate review but rather to invest in trial judges an appropriate latitude for multi-factor, contextual decisionmaking.

Rule 609 restates the Hawaii Supreme Court's due process holding in *State v. Santiago*,[161] prohibiting impeachment of the accused by prior conviction.[162] To what extent, it might be asked, does *Santiago* limit cross-examination of the accused with respect to other collateral events under rule 608(b)? The answer is supplied by *State v. Pokini*,[163] where the court approved questioning of the defendant concerning his employment and income sources. The accused, concluded the *Pokini* court, "may be cross-examined on collateral matters bearing upon his credibility, the same as any other witness."[164] The matter is discretionary with the trial court, "[b]ut there are obvious limitations beyond which the court may not allow the examiner to venture."[165]

One such limitation will bar questions about prior criminal conduct of the accused for which no conviction was had.[166] In the first place, such evidence has even less relevance to veracity than have prior convictions, which carry their own assurance that the subject events really occurred.[167] Moreover, if *Santiago* flatly bars use of convictions, then, with even stronger force, it would bar other evidence of the same kinds of conduct

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adverse party has written notice of the proponent's intent. FED. R. EVID. 609(b). The Hawaii drafters wisely rejected any time limits, recognizing that the age factor may have varying significance depending on the kind of criminal activity presented, as well as other factors in the case.

[161] 53 Hawaii 254, 260, 492 P.2d 657, 661 (1971). The prosecutor had elicited testimony from defendant regarding a prior conviction for burglary in the first degree. This was one of four points raised on appeal and resolved in favor of defendant. The court reversed defendant's conviction for murder of a police officer who was investigating a call of domestic trouble when a gun struggle ensued which resulted in the officer's shooting death.

[162] Rule 609's impeachment bar does not apply where the accused "has himself introduced testimony for the purpose of establishing his credibility as a witness." The *Santiago* court reserved this question: "While we would hesitate to erect a trap under which an unwary defense lawyer's introduction of some trivial evidence concerning the accused's credibility may unleash a flood of damaging prior convictions, we need not reach those matters in this case." 53 Hawaii at 261, 492 P.2d at 661.

[163] 57 Hawaii 17, 548 P.2d 1397 (1976). The court reversed defendant's conviction for conspiracy to murder because of prejudicial conduct of the court and because a transcript containing highly prejudicial details of defendant's involvement in other murders had been admitted into evidence, thereby depriving him of his constitutional right to a fair trial.

[164] *Id.* at 22, 548 P.2d at 1400. *Cf.* United States v. Havens, 100 S. Ct. 1912 (1980) (illegally seized evidence (t-shirt) admissible to impeach defendant's trial testimony in response to cross-examination even though it did not contradict direct examination testimony); State v. Gomes, 59 Hawaii 572, 584 P.2d 127 (1978) (impeachment use of illegally seized pistol permissible where defendant testified on direct examination that police found no weapons).

[165] 57 Hawaii at 22, 548 P.2d at 1400.

[166] *See* note 152 *supra* and accompanying text.

[167] Indeed, the court will not even allow impeachment use of deferred acceptance of guilty pleas, *see* note 153 *supra*, which provoke little doubt that the accused committed the crime involved.

offered for the same purpose of character attack concerning credibility. This result is commended in the commentary to rule 608.

Rule 609.1, which has no federal rule counterpart, governs impeachment by evidence of bias, interest, or motive. The principal purpose of this rule is to restate the result in *State v. Murphy*,[168] where the Hawaii Supreme Court decided that, as a precondition to allowing extrinsic evidence of a witness' bias, interest, or motive, the impeaching material must be brought to the attention of the witness on cross-examination. The *Murphy* court explained:

> First, the foundational cross-examination gives the witness a fair opportunity to explain statements or equivocal facts which, standing alone, tend to show bias. Second, such cross-examination lends expediency to trials, for if the facts showing bias are admitted by the witness, the introduction of extrinsic evidence becomes unnecessary.[169]

Impeachment and support of witnesses' credibility through evidentiary use of their prior statements are the subjects of rule 613. On the impeachment side, several modifications of present practice are effected concerning the foundation that must be established during examination-in-chief of a witness as a condition to extrinsic proof of her prior inconsistent statements. To begin with, rule 613(b) provides that the foundation is required on "direct or cross-examination," in order to achieve consistency with the own-witness impeachment allowance of rule 607.[170] Regarding the nature of the foundation, "(1) the circumstances of the [prior inconsistent] statement [must be] brought to the attention of the witness, and (2) the witness [must be] asked whether [s]he made the statement."[171] A previous statute barred extrinsic evidence where the witness "distinctly" admitted having made the inconsistent statement,[172] but the reason for

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[168] 59 Hawaii 1, 575 P.2d 448 (1978). Appellant was convicted of murdering a young woman whose body was found in the laundry room of the Waikiki Gateway Hotel. The hotel's assistant manager testified that he saw appellant enter the same elevator as the deceased, which was the last time the victim was seen alive. Defendant sought to show that the witness was biased in favor of the prosecution by proving that he had refused to talk about the case with an investigator from the public defender's office. Because the defense attorney did not cross-examine the assistant manager about the incident with the investigator and because there were no exceptional circumstances which would have made foundational questioning unduly burdensome, the court held that it was not error for the trial court to preclude the defense from calling the investigator to testify on the matter.

[169] *Id.* at 18, 575 P.2d at 459-60.

[170] See text accompanying notes 136-39 *supra*.

[171] HAWAII R. EVID. 613(b). See note 225 *infra*. The foundation requirement, noted the court in State v. Pokini, 57 Hawaii 26, 29, 548 P.2d 1402, 1405, *cert. denied*, 429 U.S. 963 (1976), "is for the purpose of rekindling the witness' memory."

[172] HAWAII REV. STAT. § 621-23 (1976) (repealed 1980); *see* State v. Napeahi, 57 Hawaii 365, 368-75, 556 P.2d 569, 572-76 (1976) (defendant met the statutory requirements for producing extrinsic evidence of prior inconsistent statement of prosecution witness but error was harmless because evidence of guilt was overwhelming).

the bar related to a hearsay concept that also has been modified by the new rules.

Heretofore, all prior inconsistent witness statements were hearsay, usable only for impeachment purposes with an instruction so limiting jury consideration of them. Thus, when the witness admitted making the statement she was effectively impeached; no further purpose justified receiving extrinsic evidence of the statement. Indeed, admitting extrinsic evidence would have risked jury use of the statement for substantive purposes in violation of the limiting instruction. Rule 802.1(1), however, now excepts from the hearsay ban most written or recorded prior inconsistent statements that are offered to impeach under rule 613 and allows their use to prove the truth of their contents.[173] Therefore, impeaching parties should not be precluded from proving these statements even when witnesses admit having made them. They are substantively admissible, if relevant, and should be received, subject to the court's general discretionary control under rule 403.[174] Rule 613(b) thus requires only that the witness be confronted with the circumstances and the contents of the prior statement.[175]

Rule 613(c) provides for limited admissibility of prior consistent witness statements to support credibility, and hearsay rule 802.1(2) effects a corresponding hearsay exception.[176] Consistent statements are usable for support only in three circumstances: (1) where they antedate inconsistent statements that have been elicited under subsection (b); (2) where they rebut an assertion that the witness' testimony was recently fabricated or influenced by bias; and (3) where they rebut an imputation to the witness of inaccurate memory. The first ground was taken from the California Evidence Code;[177] the second, from the federal rules;[178] and the third, from a recent Hawaii Supreme Court decision.[179]

Rule 611(a) admonishes the trial court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evi-

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[173] See the discussion of rule 802.1(1) in text accompanying notes 210-15 *infra*.

[174] Courts have always exercised discretion to exclude extrinsic evidence of prior inconsistent statements that relate only to collateral matters, *see* McCORMICK, *supra* note 47, at § 47, and this discretion is preserved in rule 613(b). In addition, since prior inconsistent statements not reduced to writing are not excepted from the hearsay exclusion by rule 802.1(1), courts very well may decide to bar extrinsic evidence in this category when the witness admits having made the statement and is thus effectively impeached.

[175] The final legislative report, CONF. COMM. REP. No. 80-80, 10th Hawaii Leg., 2d Sess. 9 (1980) (discussing rule 613(b)), notes that, although the cross-examiner is not bound to afford the witness an opportunity to explain the impeaching statement, "the opposing counsel [who would ordinarily be the proponent of the witness] may very well ask the witness to explain." Deference to trial strategy explains the elimination of the requirement to allow the impeached witness to explain or deny the statement. *Id.*

[176] *See* text accompanying note 216 *infra*.

[177] CAL. EVID. CODE § 791(a) (West 1966).

[178] FED. R. EVID. 801(d)(1)(B).

[179] State v. Altergott, 57 Hawaii 492, 504-05, 559 P.2d 728, 736-37 (1977).

dence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."[180] Rule 611(b) limits the scope of cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness,"[181] and rule 611(c) interdicts the use of leading questions on "the direct examination of a witness except as may be necessary to develop his testimony."[182] Rule 612 governs the refreshing of witnesses' memories.[183] These rules faithfully track their federal rule counterparts and work no change in existing law.[184]

VII. Opinions and Expert Testimony

Article VII contains seven rules designed to rationalize and liberalize the practice of receiving opinion evidence. Rule 701 concerns lay witness opinions and admits them when "(1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."[185] The remainder treat the subject of expert witness testimony.

The previous practice concerning expert opinion evidence is aptly illustrated by the Hawaii Supreme Court's opinion in *Cozine v. Hawaiian Catamaran, Ltd.*,[186] a negligence action where the plaintiff had been injured when the mast of a catamaran, owned and operated by the defendant, broke and fell on her. At the trial expert testimony was addressed to the cause of the mast failure and the nature and extent of the plaintiff's injuries. The trial court precluded one expert, a marine engineer and naval architect, from giving his opinion that mast failures of the sort then being litigated commonly occurred in the absence of negligence and that the mast probably failed because of latent defects.

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[180] In like vein, rule 614 enables the court to call and to interrogate witnesses itself. *Cf.* State v. Schutter, 60 Hawaii 221, 588 P.2d 428 (1978) (trial court's extensive cross-examination of defense witnesses was improper).

[181] Rule 611(b) also enables the court, "in the exercise of discretion, [to] permit inquiry into additional matters as if on direct examination."

[182] Rule 611(c) also permits leading questions "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." See text accompanying notes 136-39 *supra*.

[183] *See* State v. Altergott, 57 Hawaii 492, 502-04, 559 P.2d 728, 735-36 (1977).

[184] For example, rule 615 states the familiar witness exclusion rule, designed to prevent fabrication of testimony, *see, e.g.*, Harkins v. Ikeda, 57 Hawaii 378, 382-84, 557 P.2d 788, 792 (1976).

[185] Previous law was roughly to the same effect, *compare* State v. Sartain, No. 7104 (Hawaii Sup. Ct. Oct. 24, 1980) (no error for trial court to exclude defendant's opinion that amount of heroin normally contained in a $100 paper would be twice the amount defendant was charged with selling), *with* Tsuruoka v. Lukens, 32 Hawaii 263, 264-65 (1932) (father's opinion of child's physical condition following accident admissible).

[186] 49 Hawaii 77, 412 P.2d 669 (1966).

The appellate court sustained exclusion of the opinion on the grounds that it was not necessary, that it invaded the province of the jury, and that in any event it was addressed to an ultimate question.

> It is a sound principle that expert opinions should not be extended beyond the point of necessity, and that encroachment upon the province of the jury should be avoided if possible. . . . [T]he test of the admissibility of expert evidence is whether the jurors are incompetent to draw their own conclusions from the facts without the aid of such evidence. . . . It was for the jury to determine whether the accident was one which ordinarily does not occur in the absence of negligence. The balance of probability rested with the jury, and there was no necessity of eliciting an expert opinion on this ultimate question.[187]

This grudging approach to the forensic use of experts typifies the attitude of the common-law courts.

The medical expert in *Cozine* had examined the plaintiff before trial in order to testify about her physical condition. He was asked a "very long" hypothetical question[188] based upon the evidence theretofore presented, and he gave his opinion. On cross-examination, however, the physician admitted that he based his opinion not only on the material in the hypothetical question but also on things the plaintiff previously told him.[189] In addition, it appeared that he based his opinion to some extent on reports he had received from other physicians, but the other physicians had not been called to testify. For these reasons the court held that the failure of the trial court to grant the motion to strike the testimony of the witness consituted reversible error.[190] Why error?

> A nontreating medical expert cannot base his opinion on the plaintiff's out-of-court statements as to her past condition, not shown to be the same as the evidence of record. Nor can a medical expert opinion be based on the reports of other doctors, which are not of record and contain matters of opinion. The testimony in question was in violation of these rules.[191]

Simply stated, the court's point was that the basis for the opinion was partly hearsay, and, in any event, was not fully presented in the hypo-

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[187] *Id.* at 92-93, 412 P.2d at 681.

[188] *Id.* at 105, 412 P.2d at 687. The question occupied nearly five pages of trial transcript.

[189] *Id.* at 105-06, 412 P.2d at 687.

[190] *Id.* at 110, 412 P.2d at 690. In Barretto v. Akau, 51 Hawaii 383, 391, 463 P.2d 917, 922 (1969), the court reversed and remanded the case where the trial court had refused to allow *cross-examination* use of a hypothetical question based on facts not yet in evidence. The court noted that the expert's response should be stricken if the facts relied upon were not later proved by the party posing the hypothetical question.

[191] 49 Hawaii at 106, 412 P.2d at 687 (footnote omitted). *Cf.* State v. Davis, 53 Hawaii 582, 589-90, 499 P.2d 663, 669 (1972) (expert property appraiser improperly testified about severance damages based on anonymous engineer's hearsay opinion about a matter that appraiser was not qualified to evaluate as an expert).

thetical question.

The principal purpose of the requirement of a hypothetical question was to ensure that the expert's opinion, to the extent not based upon personal knowledge, would be based entirely upon evidence of record.[192] In short, the rules of evidence were rigorously applied to the basis of expert testimony, even though the experts might have their own rules about the reliability of various kinds of data upon which to base scientific judgments. This approach steadfastly ignored the ability of cross-examiners to sift, and jurors to evaluate, opinions based on hearsay; experts either appreciated the hearsay rule in their practice or would not be heard in court.

Article VII modifies almost every aspect of *Cozine*. Rule 702 addresses the question what is a proper subject matter for expert testimony and scuttles the former "necessity" approach. Expert testimony can be received "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[193] The commentary points out that although rule 702 sets "a broad standard with respect to the scope of expert testimony," the shift is "in degree only" because of the requirement of assistance to the trier of fact.

Rule 703 jettisons the former "basis" limitation: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [underlying the opinion] need not be admissible in evidence." Federal rule 703, which is to the same effect, "is designed to broaden the basis for expert opinions . . . and to bring the judicial practice into line with the practice of the experts themselves when not in court."[194] Under either rule the testimony of the medical expert in *Cozine* would be received, because physicians commonly rely upon information provided by the patient and reports from other professionals.[195] The manner in which the basis is to be presented

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[192] McCORMICK, *supra* note 47, at § 15.

[193] HAWAII R. EVID. 702. The qualifications of experts are discretionary with the court, but rule 702 suggests that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify . . . in the form of an opinion or otherwise." *See, e.g.*, State v. Lloyd, 61 Hawaii 505, 606 P.2d 913 (1980) (police officers may qualify as experts by reason of experience or specialized training).

[194] 28 U.S.C. app., at 571 note (1976).

[195] Hawaii rule 703 contains two safeguards against receipt of utterly untrustworthy opinions. Recognizing the general permissiveness of rules 702 and 703, the Hawaii drafters added the following sentence to rule 703, not contained in the federal counterpart: "The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." HAWAII R. EVID. 703. This seems a desirable counterbalance. Moreover, to the same effect is the rule 703 requirement of reasonable reliance by other experts in the same field: "[A] court would not be justified in 'admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.'" *Id.* commentary (quoting 28 U.S.C. app., at 571 note (1976)). *Accord*, State v. Antone, 62 Hawaii _, 615 P.2d 101 (1980); State v. Chang, 46 Hawaii 22, 374 P.2d 5 (1962) (results of

to the trier of fact is the subject of rule 705.

Consistent with rule 703, rule 705 torpedoes the requirement of a hypothetical question:

> The expert may testify in terms of opinion or inference and give his reasons therefor without disclosing the underlying facts or data if the underlying facts or data have been disclosed in discovery proceedings. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

This rule implicitly entrusts evaluation of expert opinions to adversary treatment, which seems preferable to the former practice for several reasons. To begin with, cumbersome hypothetical questions hardly afforded a meaningful foundation for jury judgment.[196] In most instances the questions were lengthy, technical, and confusing. In any event, the new rule does not foreclose the use of hypotheticals on direct or cross-examination. So long as discovery has been available,[197] however, there is simply no need to require disclosure of the basis on direct. Most proponents, of course, can be expected to elicit the basis, either directly or hypothetically, in order to enhance the force and persuasiveness of the opinion.[198] If the underlying data are not otherwise admissible in evidence, limiting instructions under rule 105 will be in order.[199] If the basis is not fully specified on direct examination, the cross-examiner is free to explore all relevant factors. Rule 702.1 makes clear that an expert witness may be fully cross-examined as to "(1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the matter upon which his opinion is based and the reasons for his opinion."[200]

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polygraph or lie detector test are inadmissible whether offered by the prosecution or the defense).

[196] The hypothetical question requirement was criticized by the court in Barretto v. Akau, 51 Hawaii 383, 388-89, 463 P.2d 917, 921 (1969), *discussed in* note 190 *supra*.

[197] The federal rule allows the proponent to dispense with disclosure of the basis "unless the court requires otherwise," FED. R. EVID. 705, because, as the commentary suggests, disclosure is available in discovery proceedings, *see* 28 U.S.C. app., at 572 note (1976). The Hawaii drafters recognized that pretrial discovery of the basis may not always be available. Experts may be engaged on the eve of trial, or may not be available for deposition. Experts may not submit written reports in advance of trial. Accordingly, Hawaii rule 705 dispenses with the testimonial disclosure requirement "if the underlying facts or data have been disclosed in discovery proceedings." This affords the opponent the same advantage in preparing cross-examination presently enjoyed.

[198] *See, e.g.*, Chung v. Kaonohi Center Co., No. 6190, slip op. at 17-19 (Hawaii Sup. Ct. Oct. 8, 1980). *Cf.* State v. Dillingham Corp., 60 Hawaii 393, 591 P.2d 1049 (1979) (foundation requirements to show similarity of property sales are relaxed where evidence is used to support appraiser's opinion in condemnation action rather than as evidence of comparable sales offered to prove the fair market value of the condemned property).

[199] See the discussion of rule 105 in Part I *supra*.

[200] Rule 702.1, which has no federal rule counterpart, also permits impeachment of an expert by use of scientific texts and treatises whenever a treatise was relied upon by the

Rule 704 establishes that opinion testimony "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The reason usually given for excluding "ultimate" opinions was that they invaded or usurped the jury's function, and this was part of the rationale in *Cozine*.[201] In one limited sense, however, the ultimate issue bar had merit. Witnesses should not be permitted to opine about a defendant's negligence, not because the concept is ultimate but rather because it embraces a legal standard. The question of negligence is for the jury under proper instructions that supply the legal meaning of the term. Accordingly, use of the term by a witness should be prohibited because it risks jury confusion of the witness' subjective notion of the concept with the legal meaning supplied by the court.[202] The question in *Cozine* whether mast failures occur without negligence is therefore objectionable, not because ultimate, but because the answer will not "assist the trier of fact" under rule 702. Moreover, the witness is not qualified to interpret a legal construct. It is believed that courts have in many cases reached proper results by applying the "ultimate issue" test,[203] but the problem always lay in deciding what "ultimate" meant, guided only by the meaningless "invasion" or "usurpation" slogan.[204] The key to rule 704 is that ultimate testimony is no longer objectionable so long as "otherwise admissible." The commentary to the rule quotes from the federal rule commentary:

> Thus the question, "Did T have the [*sic*] capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.[205]

The *Cozine* question should have been formulated to inquire whether mast failures can occur even when catamaran operators exercise the de-

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expert or when it "qualifies for admission into evidence under rule 803(b)(18)." HAWAII R. EVID. 702.1(b)(2). See the discussion of substantive admissibility of treatise material in text accompanying notes 238-42 *infra*.

[201] *See* text accompanying note 187 *supra*.

[202] *See generally* Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080 (1966).

[203] Exclusion of that part of the *Cozine* opinion employing the term "negligence" is an example; however, the expert's opinion that the mast failure was due to latent defects would seem to be admissible under article VII.

[204] In Bright v. Quinn, 20 Hawaii 504, 507 (1911), a witness was asked, "What would you consider to be a safe distance to run from the bough of that tree?" and, "What is the proper distance or space to allow your machine in passing under a tree . . . ?" Disallowance of the questions was sustained because they "in effect called for the opinion of the witness upon the ultimate issue of negligence," *id.* This is exactly the kind of result that is overruled by rule 704, because this is precisely the kind of information the trier of fact needs to decide the negligence question.

[205] HAWAII R. EVID. 704 commentary (quoting 28 U.S.C. app., at 571 note (1976)).

gree of care customarily required in their calling.

VIII. HEARSAY AND THE EXCEPTIONS

Article VIII reorganizes but does not significantly vary the federal hearsay provisions. Rule 801 supplies definitions, and rule 802 states the general exclusion: "Hearsay is not admissible except as provided by these rules, or any other rules prescribed by the Hawaii supreme court, or by statute."[206] Rules 802.1, 803, and 804 provide no fewer than thirty-eight exceptions to the rule! What kind of rule, the reader may be tempted to ask, is it that requires thirty-eight exceptions? Why did not the Hawaii rules innovate and bring simplicity to this opaque area of the law? Part of the answer is that the federal rules presented a formidable obstacle to hearsay law reform. Moreover, lawyers, it seems, always have been charmed by the mysteries and intricacies of hearsay doctrine. It is therefore perhaps appropriate to retain this vestige of mystique and legerdemain.[207]

The stuff of hearsay is out-of-court statements, which include "oral or written assertion[s], or . . . nonverbal conduct of a person, it is is intended by him as an assertion."[208] "Hearsay," according to rule 801(3), "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[209] This circumlocution is necessary to make clear that prior statements of even the witnesses are encompassed in the exclusion. Since the principal policy of the rule, however, is to interdict receipt of untrustworthy utterances that are not subject to cross-examination, and since witnesses are typically available for cross-examination, rule 802.1 excepts a number of prior statements made by witnesses from the ban.

Rule 802.1 is closely related to rule 613, which governs the use of prior witness statements for the limited purposes of impeachment and support.[210] The issue in article VIII is whether the statements can be used substantively, that is, to prove the truth of the matters asserted in them. It will be recalled that rule 613(b) permits a witness to be confronted and

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[206] *See* State v. Bannister, 60 Hawaii 658, 594 P.2d 1078 (1979) (reversing theft conviction where only evidence of amount and value of stolen apparel was based on store manager's hearsay testimony that invoice, which was not in evidence and was not prepared by manager, indicated 53 shorts were missing).

[207] *But cf.* Note, *The Theoretical Foundation of Hearsay Rules*, 93 HARV. L. REV. 1786 (1980) (advocating abolition of hearsay ban).

[208] HAWAII R. EVID. 801(1). The issue of nonverbal conduct is treated in the commentary to this rule. See text accompanying note 217 *infra*.

[209] *See* State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390 (1980) (not error to admit police officer's testimony that defendant's aunt told him she lied because testimony was offered to explain officer's delay in arresting defendant, not for the truth of the statement). The "declarant," according to rule 801(2), is the "person who makes a statement."

[210] See text accompanying notes 174-79 *supra*.

impeached with any prior inconsistent statement made by her, subject to proper foundational questioning.[211] Rule 802.1(1) selects three classes of such statements "offered in compliance with rule 613(b)" and exempts them from the hearsay ban so long as the witness-declarant "is subject to cross-examination concerning the subject matter of . . . [her] statement."

The first class includes statements made while under oath "at a trial, hearing, or other proceeding, or in a deposition;"[212] the second includes written statements "signed or otherwise adopted or approved by the declarant;"[213] and the third includes "substantially verbatim" and contemporaneous recordings of oral statements made by the declarant.[214] The elements common to these three classes are that the statements are written or recorded, that the writings or recordings were reasonably contemporaneous with the actual utterances, and that the writings or recordings closely embody the precise language of the utterances.[215] Ruled out by these formulations are oral statements not recorded contemporaneously or in substantially verbatim form. Such statements, although usable for impeachment under rule 613(b), will require limiting instructions.

Rule 802.1(2) exempts all prior consistent statements by witnesses "offered in compliance with rule 613(c)" from the hearsay exclusion. Rule 613(c) restricts the circumstances in which prior consistent statements can be offered,[216] and rule 802.1(2) simply obviates the need for limiting instructions in those instances. Rule 802.1(3) admits a witness' prior identification "of a person made after perceiving him." Prior identifications, even when nonverbal, would constitute "statements" for hearsay purposes because the conduct is essentially assertive in nature.[217] Rule 802.1(4) ad-

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[211] See text accompanying notes 171-75 *supra*.

[212] HAWAII R. EVID. 802.1(1)(A).

[213] *Id.* 802.1(1)(B).

[214] *Id.* 802.1(1)(C).

[215] Federal rule 801(d)(1)(A) admits substantively only those prior statements given under oath, and Hawaii rule 802.1(1)(A) is taken almost verbatim from the federal rule. The United States Supreme Court had proposed that *all* prior inconsistent statements used to impeach be allowed substantively. Fed. R. Evid. 801, 56 F.R.D. 293 (1972). Part of the reason for the congressional limitation was that in the case of sworn statements, as compared with prior oral statements, "there can be no dispute as to whether the prior statement was made." H.R. REP. No. 93-650, 93rd Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7087. The Hawaii drafters felt that this rationale applies equally to the prior written or recorded statements defined in paragraphs (1)(B) and (1)(C) of the Hawaii rule. These definitions, as the commentary to rule 802.1 points out, were taken from the so-called Jencks Act, 18 U.S.C. § 3500(e)(1)-(2) (1976); *see* Palermo v. United States, 360 U.S. 343, 349-52 (1959); Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964). Moreover, the (1)(B) and (1)(C) formulations resemble the definitions of "statement" contained in rules relating to discovery of trial preparation materials, HAWAII R. CIV. P. 26(b)(3)(A)-(B). Admission of this material against accused in criminal cases will not violate constitutional confrontation standards, *see* Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970).

[216] *See* text accompanying notes 176-79 *supra*.

[217] *See* HAWAII R. EVID. 801(1) commentary.

mits memoranda of "past recollection recorded"[218] if the recordation was substantially contemporaneous with the making of the statement and the witness "now has insufficient recollection to enable him to testify fully and accurately." This is the only 802.1 exception not requiring that the witness be "subject to cross-examination concerning the subject matter of his [prior] statement." The compensating factor in exception (4) is that the statement must be shown "to reflect . . . correctly" knowledge that the witness once had but has since forgotten. Ordinarily the witness himself will testify that, although present recollection is dim, he remembers making the statement and remembers that it was accurate when made. Substantive use of prior witness statements implements the policy of admitting trustworthy material because, having been made earlier in time, the statements present fewer memory and motivation problems than does trial testimony generally.

Rule 803 collects all those exceptions to the hearsay rule for which the "availability of declarant [is] immaterial." In other words, these exceptions do not depend upon any showing concerning the present status or whereabouts of the declarant. The declarant may be unavailable, available and subject to subpoena, or even present in the courtroom. The hearsay is nonetheless received, subject always to relevance and other article IV requirements. Rule 803(a) treats admissions, and rule 803(b) treats other exceptions in the availability-immaterial class. The reason for this breakdown is that the rationales for these two groups of exceptions differ markedly enough to justify, if not compel, differing approaches when courts apply the rules to individual fact situations.

Admissions are nothing more than prior statements of parties or their agents, servants, or predecessors now offered against them.[219] Confusion about this exception is probably attributable to the title word, "admissions." Lawyers and courts sometimes refer to these statements as "admissions against interest," thereby incorrectly suggesting a requirement that they were against interest when made. The Hawaii Supreme Court

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[218] The formulation is identical with that contained in federal rule 803(5).

[219] *See* Christensen v. State Farm Mut. Auto. Ins. Co., 52 Hawaii 80, 82-84, 470 P.2d 521, 523-24 (1970). In criminal cases, admissions of accused are typically denominated "confessions," but the rationale, specified below in text, is the same. The evidence rules do not attempt to codify restrictions on the use of custodial admissions by accused, *see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390-91 (1980) (no error to admit defendant's prior statement to police detective where defendant, who was not then a suspect, voluntarily responded to official request that he go to police station because *Miranda* warnings were not required to be given); State v. Santiago, 53 Hawaii 254, 261-67, 492 P.2d 657, 662-65 (1971) (state constitution precludes use of defendant's statements made before *Miranda* warnings either in prosecution's case-in-chief or for impeachment purposes). *Cf.* State v. Alberti, 61 Hawaii 502, 605 P.2d 937 (1980) (where withdrawal of guilty plea was pending in federal court, admissions made to support plea are admissible in subsequent state prosecution for related offense arising out of the same conduct but would not be admissible after federal court approved withdrawal). *See also* cases cited in note 164 *supra*.

recently addressed this problem and pointed out that "[t]he expression, 'admissions against interest,' is a misnomer."[220] An admission need not have been against declarant's interest when made, recognized the court; the only requirements of this exception are that the statement be relevant and that it now be offered against the party who made it or is considered responsible for its having been made. The rationale is found in the very nature of the adversary system. Regardless of the apparent trustworthiness or lack of trustworthiness of admissions,[221] it seems essentially fair to allow the use against a party of his previous statements relevant to the subject matter of the current litigation. For this reason the commentary to rule 803(a) approves "generous treatment of this avenue to admissibility."[222]

The classic formulation of an admission, "[a] statement that is offered against a party and is (A) his own statement . . . or (B) a statement of which he has manifested his adoption or belief in its truth," is contained in rule 803(a)(1). One class of adoptive admissions is somewhat problematical: When will mere silence be taken as the equivalent of adoption of a statement made by someone else? There cannot be any bright-line rule on this matter because, as the commentary points out, "[t]he decision in each case calls for an evaluation in terms of probable human behavior."[223] The question of adoption is a preliminary determination for the court under rule 104(a),[224] and the decision depends upon whether the nature of the statement, in the light of attending circumstances, was such that the person who remained silent would have been expected naturally to challenge it were it untrue or inaccurate.[225]

Rule 803(a)(2), entitled "Vicarious admissions," is concerned with statements made by agents, servants, or co-conspirators of parties.[226] The statement of an agent or servant not specifically authorized to speak for the party is receivable only if it concerns "a matter within the scope of his agency or employment, [and was] made during the existence of the

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[220] Kekua v. Kaiser Foundation Hosp., 61 Hawaii 208, 216 n.3, 601 P.2d 364, 370 n.3 (1979).

[221] The *Kekua* court recognized that the requirement of personal knowledge (rule 602), applicable to witnesses and hearsay declarants generally, is relaxed in the case of admissions. *Id.*

[222] HAWAII R. EVID. 803 commentary (quoting 28 U.S.C. app., at 576 note (1976) (Notes of Advisory Committee on Proposed Rules)).

[223] *Id., quoted in* HAWAII R. EVID. 803(a)(1) commentary.

[224] *See* text accompanying notes 24-29 *supra.*

[225] Silence by an accused in custody cannot be deemed the equivalent of adoption of accusations or questions because of the privilege against self-incrimination, *see* Doyle v. Ohio, 426 U.S. 610 (1976). *Cf.* Anderson v. Charles, 100 S. Ct. 2180 (1980) (silence insofar as it omits facts included in defendant's subsequent version is admissible for impeachment purposes as prior inconsistent statement); Jenkins v. Anderson, 100 S. Ct. 2124 (1980) (fifth amendment and due process not violated by impeachment use of prearrest silence).

[226] This rule closely resembles its federal counterpart, FED. R. EVID. 801(d)(2)(C)-(E).

relationship."[227] Paragraphs (a)(3), (4), and (5) treat admissions by decedents in wrongful death actions, by predecessors in interest, and by predecessors in litigation.[228]

The rule 803(b) exceptions are grounded in considerations of inherent trustworthiness. The general hearsay exclusion of rule 802 expresses a preference for live testimony given under oath at trial, which is a principal characteristic of the American justice system. This preference, however, is overlooked in the 803(b) exceptions because their reliability is considered roughly equivalent to that of live testimony. It is for this reason that the current availability of the declarant is not germane to admissibility in any of these exceptions. Different exceptions have distinct rationales or policies that courts should keep in mind when deciding preliminary admissibility questions. In most instances the rationale is specified in the commentary. The most litigated of the rule 803(b) exceptions are excited utterances,[229] statements of physical or mental condition,[230] statements made to physicians,[231] business records,[232] and public records.[233] Each of them has extensive common-law support; hence, discussion here will focus on variations from standard common-law doctrine.

The common law sustained admission of statements to physicians only when made in the context of medical treatment, and the policy was that declarants seeking or receiving treatment would not likely misstate relevant facts. Rule 803(b)(4), however, admits statements made during "medical diagnosis or treatment," thus specifically qualifying statements made to physicians employed only for purposes of the litigation. The old rationale does not justify the expansion, but the commentary points out that these statements will be recited by physicians in any event under rules 703 and 705;[234] thus, the only real impact of the change is to obviate the need for a limiting instruction which would be of dubious efficacy.

The former business records or "shop book" rule is expanded to include records of any "regularly conducted activity," but in other respects does not differ from the previous statute.[235] Because "business" was always defined broadly to include noncommercial occupations and callings, as well as nonprofit institutions, the variation is not a substantial one.

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[227] HAWAII R. EVID. 803(a)(2). *Accord*, FED. R. EVID. 801(d)(2)(D).

[228] These paragraphs, which have no federal counterparts, resemble California rules, *see* CAL. EVID. CODE §§ 1227, 1225, 1224 (West 1966).

[229] HAWAII R. EVID. 803(b)(2); *see* Anduha v. County of Maui, 30 Hawaii 44, 50-51 (1927). *See generally* State v. Antone, 62 Hawaii _, _ & n.10, 615 P.2d 101, 107-08 & n.10 (1980) (victim's statements made 1½ to 2 hours after rape arguably were excited utterances).

[230] HAWAII R. EVID. 803(b)(3).

[231] *Id.* 803(b)(4).

[232] *Id.* 803(b)(6)-(7).

[233] *Id.* 803(b)(8)-(10).

[234] *Id.* 803(b)(4) commentary. *See* text accompanying notes 194-99 *supra*.

[235] *Compare* HAWAII R. EVID. 803(b)(6), *with* HAWAII REV. STAT. § 622-5 (1976) (repealed 1980). *See* State v. Torres, 60 Hawaii 271, 276-77, 589 P.2d 83, 86-87 (1978); Warshaw v. Rockresorts, Inc., 57 Hawaii 645, 562 P.2d 428 (1977).

The public records exception, identical with its federal counterpart, is expanded to include "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness," or unless the evidence is to be used against a criminal defendant.[236] Dean McCormick argued for receipt of this material: "[T]he conclusions of a professional investigator making inquiries required by his professional and public duty contain assurances of reliability analogous to those relied upon as assuring accuracy of his statements of fact from firsthand knowledge."[237]

Learned treatises and texts are admitted to prove the truth of their contents "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination,"[238] provided the material is established as a reliable authority.[239] Previous practice admitted statements in reliable texts only for impeachment purposes,[240] but the limiting instruction was of questionable validity. Rule 702.1 permits impeachment by treatises that qualify substantively under this rule.[241] Limiting the substantive use of texts to occasions where experts are testifying and thus able to explain them is consistent with the federal rule on the subject.[242]

Rule 804(b) contains six hearsay exceptions[243] that are expressly dependent upon a showing that the declarant is "unavailable as a witness" as that phrase is comprehensively defined in rule 804(a). The theory is that the preference for live testimony should not yield to statements of this class, whose reliability, although substantially greater than that of hear-

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[236] HAWAII R. EVID. 803(b)(8). The exclusion in criminal cases results from "the almost certain collision with confrontation rights which would result from . . . use [of this material] against the accused in a criminal case," 28 U.S.C. app., at 584 note (1976) (Notes of Advisory Committee on Proposed Rules). The accused's confrontation rights are discussed in text accompanying notes 245-56 *infra*.

[237] MCCORMICK, *supra* note 47, at § 317, at 738. The commentary to this rule suggests that, in evaluating trustworthiness, the court consider "(1) the timeliness of the investigation . . . (2) the special skill or experience of the official . . . (3) whether a hearing was held and the level at which conducted . . . (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109 . . . (1943). Others no doubt could be added." 28 U.S.C. app., at 584 note (1976) (Notes of Advisory Committee on Proposed Rules) (citations omitted), *quoted in* S. REP. NO. 93-1277, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7064-65; HAWAII R. EVID. 803(b)(8)(C) commentary. The rule admits official investigative findings, *see* Hodge v. Seiler, 558 F.2d 284, 288-89 (5th Cir. 1977), but not statements of witnesses even when appended to an official report, John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 636 (3d Cir. 1977).

[238] HAWAII R. EVID. 803(b)(18).

[239] Reliability, according to rule 803(b)(18), can be established "by the testimony or admission of the witness or by other expert testimony or by judicial notice."

[240] *See* Fraga v. Hoffschlaeger Co., 26 Hawaii 557, 566-67 (1922), *aff'd*, 290 F. 146 (9th Cir. 1923).

[241] See note 200 *supra*.

[242] FED. R. EVID. 803(18). The treatises may not, however, be received as exhibits.

[243] *See* text accompanying notes 261-67 *infra*.

say generally, is thought to be inferior to that of the 803(b) exceptions. Unavailability of a declarant can be found in five circumstances: claim of privilege, refusal to testify despite court order to do so, lack of memory, death or illness, and absence from the trial or hearing where "the proponent of his statement has been unable to procure his attendance by process or other reasonable means."[244] This last ground requires amplification. To begin with, it fails to distinguish between civil and criminal cases, and such a distinction is necessitated by the confrontation clause of the Federal and State Constitutions.

In *State v. Kim*,[245] the Hawaii Supreme Court held that the civil unavailability standard, requiring merely that the declarant of former testimony be shown to be absent from the jurisdiction,[246] would not suffice in criminal cases because of the confrontation clause[247] as it has been construed by the Supreme Court.[248] The purpose of the clause is to preserve the right of accused to be confronted by their accusers and to be able to cross-examine the witnesses against them.

The declarant in *Kim* was out of the State, but the court held that "unavailability" in criminal cases requires additionally that the prosecutor demonstrate "a good faith effort to ascertain the actual location of the witness, and thereafter, if necessary, [make an] . . . attempt to compel the witness's [*sic*] attendance at trial through use of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings."[249] *Kim* involved former testimony,[250] but there is reason to suppose that the strict criminal unavailability requirement will apply equally to the other five exceptions in rule 804(b) because former testimony is more inherently reliable than any of them, and reliability is an

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[244] HAWAII R. EVID. 804(a)(5). Rule 804(a) also specifies that the declarant "is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."

[245] 55 Hawaii 346, 519 P.2d 1241 (1974).

[246] *See* Levy v. Kimball, 51 Hawaii 540, 542-43, 465 P.2d 580, 582 (1970) (declarant in New York).

[247] U.S. CONST. amend. VI; HAWAII CONST. art. I, § 14.

[248] 55 Hawaii at 349-50, 519 P.2d at 1244 (discussing Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968)). *Cf.* Ohio v. Roberts, 100 S. Ct. 2531, 2539, 2543-45 (1980) (constitutional requirement of unavailability met where prosecution issued five subpoenas to last known real address of declarant and talked with declarant's mother who testified at trial that she had made unsuccessful efforts to find her daughter).

[249] 55 Hawaii at 350, 519 P.2d at 1244. The Uniform Act referred to by the *Kim* court is HAWAII REV. STAT. ch. 836 (1976), *as amended by* Act 307, 1980 Hawaii Sess. Laws 962.

[250] The court reversed appellant's conviction for negligent homicide where the prosecutor proved defendant had driven her automobile in a grossly negligent manner by relying on pretrial hearing testimony of Dr. Wally to the effect that the injured defendant was drunk at the hospital where she was treated after the accident. Although the State knew the doctor's forwarding address in Missouri, apparently no attempt was made to assure his attendance at trial, even though Missouri had adopted the uniform law.

important factor in confrontation analysis.[351]

Although confrontation clause problems can arise in a variety of hearsay contexts,[352] the Hawaii rules, following the lead of the federal rules, avoid generally codification of civil and criminal differences arguably justified by this constitutional criterion. There are two reasons for this. The Supreme Court has been less than consistent in its confrontation clause decisions, several of which are exceedingly difficult to reconcile.[353] Constitutional requirements are thus difficult to ascertain, and remain in a developmental posture.[354] Moreover, development to date suggests strongly that confrontation issues need to be decided with reference to the entire case against the accused.[355] Secondly, the federal rules were approved, adopted, and transmitted to Congress in 1972 by the very Supreme Court that decides confrontation issues. Justice William O. Douglas dissented to the transmission of the rules because of his reluctance to place the Court's "imprimatur" on them,[356] but he was alone. The rules, as finally approved and promulgated, were in virtually all instances of amendment tightened, not liberalized, by Congress. Therefore, there is good reason to suppose that application of the rules in criminal cases will not offend the Constitution. Moreover, the Hawaii drafters were not insensitive to possible confrontation problems and drafted Hawaii's article VIII with an eye toward the federal rules, the Supreme Court's 1972 proposals, and applicable case law.

In civil cases, on the other hand, proponents will need to show only that rule 804 declarants are out of the State.[357] Suppose the declarant is on one island and the trial is on another. A rule of civil procedure,[358]

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[351] Ohio v. Roberts, 100 S. Ct. 2531 (1980); Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

[352] Dutton v. Evans, 400 U.S. 74 (1970) (statement against interest); Bruton v. United States, 391 U.S. 123 (1968) (codefendant's admission); Barber v. Page, 390 U.S. 719 (1968) (former testimony); Douglas v. Alabama, 380 U.S. 415 (1965) (prior statement of witness). Admitting substantively prior statements by witnesses that are available for cross-examination does not offend the clause, *see* Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970).

[353] *Compare* Ohio v. Roberts, 100 S. Ct. 2531 (1980) (former testimony), *and* Parker v. Randolph, 442 U.S. 62 (1979) (co-conspirator's admission), *with* Barber v. Page, 390 U.S. 719 (1968) (former testimony), *and* Bruton v. United States, 391 U.S. 123 (1968) (co-conspirator's admission).

[354] *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

[355] Dutton v. Evans, 400 U.S. 74, 87 (1970). *Cf.* State v. Napeahi, 57 Hawaii 365, 368-75, 556 P.2d 569, 572-76 (1976) (harmless error to disallow extrinsic evidence of prior inconsistent statement by prosecution witness where evidence of guilt was overwhelming). *See also* State v. El'Ayache, No. 6532 (Hawaii Sup. Ct. Oct. 24, 1980) (approving trial by stipulated testimony of all but one prosecution witness).

[356] 409 U.S. 1132, 1133 (1972) (Douglas, J., dissenting).

[357] Levy v. Kimball, 51 Hawaii 540, 542-43, 465 P.2d 580, 582 (1970); HAWAII R. EVID. 804(a) commentary.

[358] Hawaii R. Civ. P. 32(a)(3)(B) (1972).

superseded by rule 804,[359] previously admitted depositions in this circumstance. Accordingly, the commentary to rule 804(a)(5) elaborates:

> It is intended that the phrase "unable to procure his attendance by process or other reasonable means" . . . be construed in civil cases to allow a finding of unavailability where the declarant of an 804(b) statement resides on another island and the proponent demonstrates that procuring attendance of the declarant would work undue financial hardship, considering the personal circumstances of the proponent and the amount in controversy in the case.

Given the general applicability of the rules in all courts, such a flexible standard seems appropriate in Hawaii.

Assuming a proper showing of declarant's unavailability, a matter addressed to the court under rule 104(a),[360] the rule 804(b) exceptions admit former testimony including depositions,[361] dying declarations,[362] statements against interest,[363] statements of pedigree or family history,[364] and statements of recent perceptions.[365] The former-testimony provision is taken from the rule proposed by the Supreme Court in 1972.[366] It admits testimony or depositions given "at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered."[367] Former testimony and depositions are by definition given under oath and subject to cross-examination, factors that appear to justify admitting the statements so long as the previous party, if someone other than the current party, had a similar motive and interest in offering or confronting the declarant. The rest of the 804(b) exceptions

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[359] *See generally* Richardson, *supra* note 3, at 31 & n.261, 37-38 & n.326.

[360] See text accompanying notes 24-29 *supra*.

[361] HAWAII R. EVID. 804(b)(1).

[362] *Id.* 804(b)(2). The common law admitted dying declarations only in criminal homicide cases, *see* MCCORMICK, *supra* note 47, at § 283, and federal rule 803(b)(2) admits them in homicide prosecutions and civil cases generally; the Hawaii rule admits them in all cases. Whatever one thinks of the trustworthiness of the final utterances of dying persons, there appears no valid reason for distinguishing among different types of litigation for admissibility purposes. Under the rule a dying declaration must relate to "the cause or circumstances of what . . . [the declarant] believed to be his impending death." HAWAII R. EVID. 804(b)(2).

[363] HAWAII R. EVID. 804(b)(3). State v. Leong, 51 Hawaii 581, 587-88, 465 P.2d 560, 563-64 (1970), anticipated the present rule by approving use of statements against penal interest; *cf.* State v. Bennett, 62 Hawaii _, 610 P.2d 502 (1978) (motive to falsify disqualified statement under the exception). *See also* Chambers v. Mississippi, 410 U.S. 284 (1973) (statements against penal interest offered by an accused).

[364] HAWAII R. EVID. 804(b)(4); *see* Apo v. Dillingham Inv. Corp., 57 Hawaii 64, 66-68, 549 P.2d 740, 742-43 (1976).

[365] HAWAII R. EVID. 804(b)(5). The federal rules contain no "recent perception" exception, but the Supreme Court's 1972 submission contained one, Fed. R. Evid. 804(b)(2), 56 F.R.D. 321 (1972). In addition, rule 804(b)(5) restates the holding in Hew v. Aruda, 51 Hawaii 451, 462 P.2d 476 (1969).

[366] Fed. R. Evid. 804(b)(1), 56 F.R.D. 321 (1972).

[367] HAWAII R. EVID. 804(b)(1).

are unremarkable. Rule 804(b)(6) contains a catch-all provision admitting statements "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness" provided they meet a heightened relevance standard and are the subject of pretrial notice. A similar provision is found in rule 803(b)(24).

IX. Miscellaneous Provisions

Articles IX, X, and XI, entitled "Authentication and identification," "Contents of writings, recordings, and photographs," and "Miscellaneous rules," respectively, are treated together here. Article IX, applicable mostly to real evidence, establishes the general requirement of authentication or identification. Rule 901(a) provides that the requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." As applied to tangible objects in general, the identification foundation requires, as Dean McCormick pointed out, "testimony first that the object offered is *the* object which was involved in the incident, and further that the condition of the object is substantially unchanged."[268] As applied to writings in particular, the authentication requirement typically demands extrinsic proof of authorship.

Rule 901(b) provides examples of proper and satisfactory identification evidence. Testimony of a witness, upon personal knowledge, "that a matter is what it is claimed to be"[269] is the first example. Many of the illustrations relate specifically to document authentication: nonexpert opinions on handwriting,[270] expert comparisons with exemplars,[271] public records,[272] and ancient documents.[273] A method for authentication of tele-

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[268] McCormick, *supra* note 47, at § 212, at 527 (footnote omitted) (original emphasis). Regarding the foundational "chain of custody" requirements, *compare* State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 392 (1980) (check was properly admitted despite incomplete chain-of-custody showing because the object possesses unique characteristics and was identified by three witnesses), *and* State v. Olivera, 57 Hawaii 339, 344-45, 555 P.2d 1199, 1202-03 (1976) (chain-of-custody showing not required for inked fingerprint card where there was direct testimony of its unchanged condition and no evidence indicating tampering), *with* State v. Vance, 61 Hawaii 291, 303-04, 602 P.2d 933, 942 (1979) (where drugs or chemicals are involved, chain-of-custody must be proven only for period before substance was tested but not thereafter). *See also* State v. Antone, 62 Hawaii _, 615 P.2d 109 (1980) (no error in failure to object to admissibility of rape victim's clothes where it is reasonably certain that tampering did not occur).

[269] Hawaii R. Evid. 901(b)(1).

[270] *Id.* 901(b)(2).

[271] *Id.* 901(b)(3).

[272] *Id.* 901(b)(7).

[273] *Id.* 901(b)(8). *Cf.* Hulihee v. Heirs of Hueu, 57 Hawaii 312, 555 P.2d 495 (1976) (not error to exclude deeds where evidence failed to explain custody link and subsequent conduct of proponent repudiated genuineness of documents).

phone conversations is also included.[274] Rule 902, entitled "Self-authentication," sets forth a number of instances in which "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required." Several of these concern public documents and official publications, but the list also includes newspapers,[275] trade inscriptions,[276] and commercial paper.[277] Finally, rule 903 establishes that "[t]he testimony of a subscribing witness is not necessary to authenticate a writing."

Article X codifies and liberalizes the so-called best evidence rule.[278] Rule 1001 provides definitions, and rule 1002 states the essential proposition: "To prove the content of a writing, recording, or photograph, the original . . . is required, except as otherwise provided in these rules or by statute." Rule 1003, however, allows for general admissibility of "duplicates," which are defined so as to include carbon copies, photographic reproduction, and "other equivalent techniques which accurately reproduce the original."[279] Rule 1004 lists exceptions, rule 1005 governs public records, and rule 1006 admits summaries "of voluminous writings, recordings, or photographs which cannot conveniently be examined in court."

Article XI establishes the general applicability of the evidence rules in "all courts of the State of Hawaii except as otherwise provided by statute."[280] The exceptions include preliminary determinations of admissibility under rule 104(a),[281] grand jury proceedings, preliminary hearings in criminal cases, sentencing proceedings, and proceedings before the small claims courts. Rule 1102 is addressed to the matter of jury instructions: "The court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses."[282] Rule 1102 has no federal rules counterpart.[283]

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[274] HAWAII R. EVID. 901(b)(6).

[275] *Id.* 902(6).

[276] *Id.* 902(7).

[277] *Id.* 902(9).

[278] *See generally* MCCORMICK, *supra* note 47, at ch. 23 (1972 & Supp. 1978).

[279] HAWAII R. EVID. 1001(4).

[280] *Id.* 1101.

[281] See text accompanying notes 27-30 *supra*.

[282] Previous Hawaii law, HAWAII REV. STAT. §§ 635-15, -17 (1976) (repealed 1980), authorized judicial comment on the evidence in criminal cases but was silent about civil cases. The rationale for rule 1102 is that judicial comment risks casting the court in the role of an advocate, *cf.* State v. Pokini, 57 Hawaii 17, 23-26, 548 P.2d 1397, 1401-02 (1976) (no justification for trial court's remarks demeaning defense counsel), and that adversary comment on evidence should suffice to elucidate the issues. See text accompanying notes 133-35 *supra*.

[283] The Supreme Court's 1972 submission contained a rule, Fed. R. Evid. 105, 56 F.R.D. 199 (1972), that would have permitted the judge to sum up and comment upon the evidence and the credibility of witnesses. Recognizing that the rule simply restated existing federal law and practice, Congress struck the rule but intended not to change the practice. *See* 1 WEINSTEIN'S EVIDENCE, *supra* note 7, at 107-2 (1979).

X. Conclusion

The Hawaii Rules of Evidence, like any other new codification, can be expected to generate an initial spate of litigation as judges and practitioners gain familiarity with the rules and litigants test the meanings of individual provisions. Such is the price of codification and uniformity. With uniformity comes predictability, and predictability ultimately will tend to decrease the amount of litigation at the trial and appellate levels.

Uniformity, however, does not imply a wooden, uncritical application of rules to fact situations. Many of the rules, especially those pertaining to relevance and its counterweights, demand an informed exercise of judicial discretion. The rules should provide a solid framework for such decisions. The goal is truthseeking, and the rules were framed with this goal in mind.

PUBLIC EMPLOYEE ARBITRATION IN HAWAII

A STUDY IN EROSION

Benjamin C. Sigal*

Increased use of arbitration to resolve labor disputes parallels the post-World War II expansion of the labor movement itself.[1] The arbitral mechanism takes two basic forms: grievance arbitration, involving disputes requiring the interpretation or application of an existing collective bargaining agreement; and interest arbitration, involving disputes arising from negotiations for new contract terms. Grievance arbitration is now well established in the private sector[2] but is relatively new in the public sector.[3] Binding interest arbitration has not received the same level of acceptance as grievance arbitration,[4] but it is known in various forms to

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[1] Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245, 1246 (1963) (discussing the origin of grievance arbitration). *See generally* C. UPDEGRAFF & W. MCCOY, ARBITRATION OF LABOR DISPUTES (2d ed. 1961). The trend to develop out-of-court dispute resolution techniques has led to experimentation with arbitration in nonlabor law. *See generally* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 314 (1970); Note, *The Effectiveness of Arbitration for the Resolution of Consumer Disputes*, VI N.Y.U. REV. L. & SOC. CHANGE 175 (1977). One commentator doubts the successful transferability of the labor arbitration model to other fields because it is the peculiar nature of the collective bargaining process that makes arbitration a viable method of dispute resolution. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).

[2] For several years, an estimated 95% of all private sector labor contracts have included grievance arbitration provisions. *See, e.g.*, Cohen & Eaby, *The* Gardner-Denver *Decision and Labor Arbitration*, 27 LAB. L.J. No. 1, at 18 (1976); Comment, *Legality and Propriety of Agreements To Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129, 129-30 (1968).

[3] *See, e.g.*, Dempsey & Kahn, *Is Public Sector Grievance Arbitration Different from the Private Sector: A Union Perspective*, 7 J. L. & EDUC. 555 (1978) [hereinafter cited as Dempsey & Kahn]; Frazier, *Labor Arbitration in the Federal Service*, 45 GEO. WASH. L. REV. 712 (1977) [hereinafter cited as Frazier]; Comment, *Arbitration Awards in Federal Sector Public Employment: The Compelling Need Standard of Appellate Review*, 1977 B.Y.U. L. REV. 429, 430 & n.10; Comment, *supra* note 2, at 130.

[4] *Compare* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S.

no fewer than thirty-four states.[5]

In theory, the purpose of binding arbitration is to avoid litigation[6] while functioning as "the substitute for industrial strife."[7] It is therefore not surprising that Hawaii has sanctioned voluntary grievance and interest arbitration for as long as the state's public employees have enjoyed collective bargaining rights,[8] enforceable by a limited right to strike.[9]

574, 578 (1960) (grievance arbitration is "part and parcel of the collective bargaining process itself"), *with* NLRB v. Columbus Printing Pressmen & Assistants' No. 252, 543 F.2d 1161 (5th Cir. 1976) (interest arbitration not mandatory bargaining item). Even in jurisdictions that do not have enabling statutes, "[t]here has been increasing flexibility in the judicial posture on allowing grievance arbitration." Staudohar, *Negotiation and Grievance Arbitration of Teacher Tenure Issues*, 29 LAB. L.J. No. 7, at 413, 416 (1978). *See, e.g.*, Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975). *But see* International Union of Operating Eng'rs Local 321 v. Water Works Bd., 276 Ala. 462, 163 So. 2d 619 (1964).

[5] Note, *Binding Interest Arbitration in the Public Sector: Is It Constitutional?*, 18 WM. & MARY L. REV. 787 & n.5 (1977).

[6] It is generally considered that parties resort to arbitration to settle disputes more expeditiously and inexpensively than by a court action; and also that the objective is to have disputes considered by arbitrators, who are familiar with the problem, in a less formal and combative environment. Thus, it must be deemed that the primary purpose of arbitration is to avoid litigation.

Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Hawaii 332, 334, 460 P.2d 317, 318-19 (1969) (affirming confirmation of commercial arbitration award). The late Justice William O. Douglas found the nonlitigation function applicable only to commercial arbitration, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), but commentators and courts have rejected the distinction. *See* Pennsylvania Lab. Relations Bd. v. Commonwealth, 478 Pa. 582, 590, 387 A.2d 475, 479 (1978); Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U. L. REV. 411, 422 (1962) [hereinafter cited as Christensen]. Indeed, the most significant indication of a successful grievance procedure is prearbitration resolution of complaints. Several studies have considered the efficacy of various procedures, including contractual language urging early settlement, only to conclude that the attitudes of the parties rather than the procedures invoked control the level of success achieved. *See, e.g.*, Graham & Heshizer, *The Effect of Contract Language on Low-Level Settlement of Grievances*, 30 LAB. L.J. No. 7, at 427, 429, 432 (1979).

[7] 363 U.S. at 578 (discussing grievance arbitration). Binding interest arbitration is equally designed to facilitate labor peace. *See* Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CALIF. L. REV. 678 (1976) [hereinafter cited as Grodin]; McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972) [hereinafter cited as McAvoy].

[8] *See* Act 171, § 2, 1970 Hawaii Sess. Laws 307 (codified at HAWAII REV. STAT. §§ 89-10(a), -11 (1976 & Supp. 1979).

[9] Strikes are disallowed, however, where the resolution of disputes is by referral to grievance or interest arbitration. Hawaii Pub. Employment Relations Bd. v. Hawaii State Teachers Ass'n, 54 Hawaii 531, 511 P.2d 1080 (1973); HAWAII REV. STAT. § 89-12(a)(2) (1976). This tradeoff is designed to completely effectuate the policy of enhancing labor peace, *see* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 n.4 (1960), but the goal is not always achieved, *see* Hawaii Pub. Employment Relations Bd. v. Hawaii State Teachers Ass'n, 55 Hawaii 386, 520 P.2d 422 (1974).

Strike action in any event is legal only after HPERB declares that an impasse exists following good-faith bargaining, Board of Educ. v. Hawaii Pub. Employment Relations Bd., 56

More recently, Hawaii adopted a form of compulsory interest arbitration, known as final offer,[10] applicable only to firefighter contract negotiations.[11] Thus, the theoretical advantages of arbitration should find practical application in the Fiftieth State, a jurisdiction which generally deserves its reputation for having progressive labor laws.[12]

Hawaii 85, 528 P.2d 809 (1974), and other statutory remedies have been exhausted; even then, a cooling-off period of 60 days ensues, and a 10-day notice requirement of intent to strike must be met. HAWAII REV. STAT. § 89-12(b) (1976). The right to strike is most significantly limited by the injunction procedure available under subsection (e) for violation of orders issued by the board pursuant to subsection (c) which reads as follows:

> Where the strike occurring, or is about to occur, endangers the public health or safety, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger.

Id. § 89-12(c).

[10] Final-offer arbitration is a subcategory of binding interest arbitration, where both sides to a dispute trust its resolution to a fair and impartial individual or panel. Impartiality may be secured under the panel approach by allowing each side to choose one member and requiring the two of them to select a third or by allowing a third, disinterested party to select the final panel member based on recommendations from the American Arbitration Association, *see* Hoellering, *Recent Development at the American Arbitration Association*, 29 LAB. L.J. No. 8, at 477 (1978), or a governmental agency. This last method is often incorporated into legislation only to implement the arbitral process when the two persons picked by the disputants cannot agree on a third. Once the arbitrator or panel is chosen, parties present their positions and are bound by the award. Arbitration costs usually are borne equally by the parties. *See generally* Veglahn, *Arbitration Costs/Time: Labor and Management Views*, 30 LAB. L.J. No. 1, at 49 (1979).

Final-offer arbitration differs essentially from its predecessor forms by requiring the arbitrator or panel to choose either the employer or union proposal. In some cases the arbitrator may choose only between the comprehensive proposals presented by each side; other schemes give the arbitrator the same limited choice as to component parts of a contract. In either event, the award may not modify whichever position is picked. This winner-take-all approach has been expected to encourage collective bargaining by forcing the parties into reasonable positions which narrow their differences at the negotiating table. Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 833-34 (1970) [hereinafter cited as Wellington & Winter]. The gamble of having the other side's proposal adopted in its entirety on any or all issues is less attractive than further compromise, and impasse is theoretically overcome.

But it is also possible that cunning gamesmanship would encourage a party to remain intractable in order to force the arbitrator's choice and then to make its own last offer extremely reasonable on most issues in order to obtain a few gains that could never be won at the table. *See id.* at 834, Note, *Alternative Proposals for the Regulation of an Emergency Strike in the Health Care Industry*, 30 VAND. L. REV. 1033 (1977). Whole-package last offer is conducive to this result.

[11] Act 108, 1978 Hawaii Sess. Laws 185 (codified at HAWAII REV. STAT. § 89-11(d) (Supp. 1979)). Nineteen states have enacted compulsory arbitration laws, about half applicable solely to law enforcement personnel and firefighters. 102 MONTHLY LAB. REV. No. 9, at 35 (1979).

[12] *See* Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 129, 323 N.E.2d 714, 716 (1975). Hawaii is one of only eight states that authorizes public employee strikes to any extent. *See* ALASKA STAT. § 23.40.200 (1972); HAWAII REV. STAT. § 89-12

In practice, however, the success of arbitral procedures depends upon the willingness of parties to employ the device, the exclusiveness of the forum for dispute resolution, and the degree of finality accorded arbitration awards.[13] The purpose of this article is to consider the extent to which implementation of relevant Hawaii law accommodates these prerequisites to successful public-sector arbitration. Part I describes the statutory provisions governing the issues; Part II deals primarily with the status of grievance procedures, with particular emphasis on the role of the Hawaii Public Employment Relations Board (HPERB);[14] and Part III fo-

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(1976); MINN. STAT. ANN. § 179.64 (West Supp. 1980) (only if employer refused to submit impasse to arbitration or if legislature rejected a negotiated settlement or arbitration award); MONT. REV. CODES ANN. § 39-32-110 (1979) (only applicable to employees of health care facilities); OR. REV. STAT. § 243.726 (1977 & Supp. 1979); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1979-1980); VT. STAT. ANN. tit. 21, § 1730 (Supp. 1978); WIS. STAT. ANN. § 111.70(4)(*l*) (West Supp. 1979-1980).

In adopting its limited strike policy for public employees, *see* note 11 *supra*, the State legislature did not amend the preexisting statute which has been judicially interpreted to authorize the award of unemployment insurance benefits to lawful strikers in the private sector, so long as the work stoppage does not substantially impair the operations of the target employer. *See, e.g.*, Ahnne v. Department of Lab. & Indus. Relations, 53 Hawaii 185, 489 P.2d 1397 (1971); HAWAII REV. STAT. § 383-30(4) (1976). The United States Supreme Court recently upheld the New York law, New York Tel. Co. v. New York Lab. Dep't, 440 U.S. 519 (1979) (statute providing unemployment insurance payments to strikers after seven weeks not preempted by federal law), upon which the Ninth Circuit partially relied in sustaining Hawaii's law against a similar challenge, Hawaiian Tel. Co. v. Hawaii Dep't of Lab. & Indus. Relations, 614 F.2d 1197 (9th Cir. 1980), *rev'g* 405 F. Supp. 275 (D. Hawaii 1976). Hawaii is therefore distinguished as one of only five states that does not automatically disqualify strikers from insurance benefits. Note, *State Economic Aid to Strikers: Permissible or Preempted?*, 27 CATH. U.L. REV. 381 & n.2 (1978). The majority view among states is to preserve neutrality in labor disputes from the inception of a strike by denying benefits, *see generally* Korbee, *Labor Disputes and the Right to Unemployment Compensation in Ohio*, 46 U. CIN. L. REV. 823 (1977); 30 ARK. L. REV. 551 (1977), however, this view is consistent only insofar as the same majority does not grant its employees the right to strike; otherwise, the state as a struck employer would be favoring itself by denying benefits to its striking employees. A more conservative trend in local legislation, *see, e.g.*, Act 157, 1976 Hawaii Sess. Laws 290 (disqualifying workers who voluntarily quit "without good cause" from receiving benefits), corresponds with recently renewed attempts to eliminate striking workers' entitlement to unemployment benefits in the federal court, Small Business Ass'n v. Hawaii, Civ. No. 79-492 (D. Hawaii, filed Nov. 7, 1979) (claiming that Hawaii's law is unconstitutional because the basis upon which benefits are granted (no substantial impairment of operations) fails to meet the rational relationship test of the 14th amendment), and in the political arena, H.B. 2170-80, 10th Hawaii Leg., 2d Sess. (1980) (administration-sponsored bill).

[13] *See* Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52, 67-68 (1957) [hereinafter cited as Dunau]; Frazier, *supra* note 3, at 713; Wellington & Winter, *supra* note 10, at 835; Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A. L. REV. 936, 949 (1976).

[14] HPERB is a three-member board created to administer Hawaii's public employment collective bargaining laws. HAWAII REV. STAT. § 89-5 (1976 & Supp. 1979). HPERB's function is analogous to the National Labor Relations Board (NLRB), but the scope of the state

cuses on Hawaii's singular experience with its final-offer arbitration law in an attempt to measure the expectations for this compulsory mechanism against the realities.

I. Statutory Framework

Collective bargaining in the public sector in Hawaii has a constitutional foundation. In 1968, the state constitution was amended to give public employees the right to organize for the purpose of collective bargaining "as prescribed by law."[15] Legislation embodying that right was enacted in 1970.[16]

In addition to the usual provisions of such legislation requiring, *inter alia*, public employers to negotiate and enter into written agreements with elected exclusive employee representatives on matters of wages, hours, and other terms and conditions of employment, the Collective Bargaining Act limited the scope of bargaining with a management rights restriction that survives virtually unchanged.[17] From the outset, the Act

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agency's power is broader. For example, breach of contract is an unfair labor practice, *id.* § 89-13(a) (1976), over which HPERB has jurisdiction; the NLRB has no power to enforce collective bargaining contracts per se. NLRB v. Strong, 393 U.S. 357, 361 n.5 (1969); 29 U.S.C. §§ 158(a), 160(a) (1976); Christensen, *supra* note 6, at 433.

[15] Hawaii Const. art. XII, § 2 (1968, amended and renumbered art. XIII, § 2, 1978). The current provision is substantially the same as the 1968 version which was not intended to guarantee public employees the right to strike, [1968] Op. Hawaii Att'y Gen. No. 68-27, at 3.

[16] Act 171, 1970 Hawaii Sess. Laws 307 (codified at Hawaii Rev. Stat. ch. 89 (1976 & Supp. 1979)).

[17] Hawaii Rev. Stat. § 89-9(d) (1976) (emphasis added) provides in pertinent part as follows:

> (d) *Excluded* from the subjects of negotiations are matters of classification and reclassification, the Hawaii public employees health fund, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step and the length of service necessary for the incremental and longevity steps shall be negotiable. . . .
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> (7) . . . The employer and the exclusive representative *shall not agree* to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work . . . or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which

contained specific provisions regarding voluntary arbitration as a "means for preventing controversies between public agencies and public employees and for resolving these controversies when they occur."[18]

The Act enables a public employer to enter into a written agreement with the exclusive representative of an appropriate bargaining unit containing "a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement"[19] and providing that, *"[i]n the absence of such a procedure,"* either party may submit such a dispute to HPERB for a final and binding decision.[20] In fact, all thirteen contracts negotiated under the law contain grievance procedures that include arbitration as a last step.[21] Thus, there is little practical difference between the permissive language of Hawaii's law and the legal mandates of other jurisdictions that either require collective bargaining agreements to contain grievance procedures[22] or compel the resolution of grievances by

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the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

The terms of a collective bargaining agreement supersede employer rules and regulations *except* when they conflict with management rights, *id.* § 89-10(d). HPERB has ruled that the legislature completely preempted the *excluded* management rights from the scope of bargaining. James Takushi, Chief Negotiator, Office of Collective Bargaining, State of Hawaii, I H.P.E.R.B. 586 (1975), *enforced*, Civ. No. 47243 (1st Cir. Hawaii Aug. 26, 1979), *appeal docketed*, No. 7095 (Sup. Ct. Sept. 14, 1978). Some jurisdictions have reduced the impact of management rights reservations by delineating them as permissive subjects of bargaining. Vacarro, *Is Public Sector Grievance Arbitration Different from the Private Sector: A Management Perspective*, 7 J. L. & EDUC. 543, 548-49 (1978) [hereinafter cited as Vacarro] (criticizing the development). The New Jersey Supreme Court has held that advisory arbitration of non-negotiable matters of public policy is permissible. Board of Educ. v. Bernards Township Educ. Ass'n, 79 N.J. 311, 399 A.2d 620 (1979).

These reservations of management rights illustrate the pervasive dichotomy of labor law policy as applied to the private and public sectors. The duty to bargain is not similarly restricted in the private sector. 29 U.S.C. § 158(d) (1976). The dual standard regarding the right to strike is another example. Public employee strikes are outlawed in an overwhelming majority of the states, *see* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1978-79, at 172-73 (1978), while private-sector primary strikes are largely protected by statute, 29 U.S.C. §§ 163, 176-180 (1976). This distinction is based on a political analysis that weights the same factors differently and therefore produces a cost-benefit analysis favoring no-strike laws in the public sector. *See* Wellington & Winter, *More on Strikes by Public Employees*, 79 YALE L.J. 441, 443 (1970) (well-entrenched public employee unions attract too much power, extract unwise bargains from their politician employers, and cost taxpayers too much). *But see* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970) (supporting public employee right to strike).

[18] CONF. COMM. REP. No. 24, 5th Hawaii Leg., 2d Sess., *reprinted in* HOUSE JOURNAL 1262 (1970). See note 9 *supra*.

[19] HAWAII REV. STAT. § 89-11(a) (1976).

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

[21] Pursuant to the statute, Hawaii has thirteen collective bargaining units, *see* HAWAII REV. STAT. § 89-6 (Supp. 1979).

[22] 5 U.S.C. § 7121 (Supp. III 1979) (federal service). *See generally* Frazier, *supra* note 3.

arbitration.[23]

The Act also provides for voluntary interest arbitration. A public employer is empowered to enter into a written agreement setting forth a procedure culminating in a final and binding decision, to be invoked in the event of an impasse over the terms of an initial or renewed agreement.[24] In the absence of such an agreed upon procedure, if the parties reach an impasse in contract negotiations, they may submit their differences to a three-member arbitration panel, which is appointed by HPERB in the event the parties cannot agree on its composition.[25] If the dispute is not otherwise resolved within fifty days of the impasse, the panel must issue a final and binding award. Thereafter, the "parties shall enter into an agreement to take whatever action is necessary to carry out and effectuate the decision", and cost items contained therein are subject to appropriations by appropriate legislative bodies.[26] Although this enabling legislation has existed for nearly a decade, voluntary interest arbitration has been used only three times to reach contract terms.[27]

In 1978, the Hawaii legislature adopted an amendment to the public employee's collective bargaining law which provides for compulsory whole-package, final-offer arbitration after an impasse is reached in bargaining with the firefighters unit and mediation has failed.[28] As in voluntary arbitration, the parties are permitted to design their own type of arbitration procedure. If they fail to agree, however, HPERB must appoint a tripartite panel, consisting of a member chosen by the employers, a member chosen by the union, and a chairman selected by those two.[29]

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[23] *See, e.g.*, PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1978-1979). "Both parties being *authorized* by statute to adopt arbitration as a means of resolving disputes . . . it follows that the matters are *mandatorily* arbitrable." Newark Teachers Local 481 v. Board of Educ., 149 N.J. Super. 367, 373, 373 A.2d 1020, 1024 (Super. Ct. Ch. Div. 1977) (citation omitted) (emphasis added).

[24] HAWAII REV. STAT. § 89-11(b) (1976).

[25] *Id.* § 89-11(b)(3).

[26] *Id.*

[27] In two cases, the parties designed their own arbitration procedures and did not seek aid from HPERB. The first voluntary interest arbitration occurred between the State and the Hawaii State Teachers Association pursuant to an oral agreement to arbitrate which was reached during a strike. The second occasion involved the Hawaii Firefighters Association which culminated in an award pursuant to a written agreement to arbitrate. Interview with Henry K. Kanda, Labor Relations Specialist, Office of Collective Bargaining, State of Hawaii, in Honolulu (June 30, 1980). A year later, government employers and five collective bargaining units submitted their disputes to HPERB under the alternative mechanism for voluntary interest arbitration, which resulted in awards. Hawaii Gov't Employees' Ass'n v. State, I-02-17, I-03-18, I-04-19, I-08-20, I-13-21 (1976) (Brown, Abe, Kobayashi, Arbs.).

[28] Act 108, 1978 Hawaii Sess. Laws 185 (codified at HAWAII REV. STAT. § 89-11(d) (Supp. 1979)).

[29] It has been suggested that a panel chosen in this manner optimally promotes the dual goals of meaningful collective bargaining under the shadow of arbitration and confidence in the panel's award if settlement is not otherwise reached by the parties within the time prescribed for the panel's deliberations. Wellington & Winter, *supra* note 10, at 833.

Following appointment of the panel, each party must submit a written final offer, designed to be a complete agreement and containing every provision already agreed upon as well as those in dispute. A hearing is mandated at which the parties present information to support the reasonableness of their respective packages, between which the panel is obliged to choose. The need for an award may be aborted by voluntary settlement until the hearing terminates; however, the parties remain free to mutually alter the final and binding award.

In reaching a decision, the arbitration panel must "give weight" to ten factors,[30] but the statute is silent as to how much weight each guideline should receive. The formula used may receive illumination in the written opinion accompanying the panel's decision.

Each party to final-offer procedures pays its own costs for arbitration and half of the impartial chairman's fees. Arbitration cost items requiring appropriations for implementation must be submitted to the appropriate legislative bodies, but the award is "final and binding upon the parties."[31]

There is no express provision in the Act giving HPERB or the courts authority to review, affirm, or vacate arbitration decisions, whether issued pursuant to the statutory mechanisms for compulsory or voluntary arbitration or derived from collective bargaining agreements. The Act does make it a prohibited practice for public employers and unions to refuse to

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[30] HAWAII REV. STAT. § 89-11(d) (Supp. 1979) provides in pertinent part:

In reaching a decision, the arbitration panel shall give weight to the factors listed below and shall include in a written opinion an explanation of how the factors were taken into account in reaching the decision:

(1) The lawful authority of the employer.
(2) Stipulations of the parties.
(3) The interests and welfare of the public.
(4) The financial ability of the employer to meet these costs.
(5) The present and future general economic condition of the counties and the State.
(6) Comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other persons performing similar services, and of other State and county employees generally.
(7) The average consumer prices for goods for [*sic*] services, commonly known as the cost of living.
(8) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(9) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
(10) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, factfinding, arbitration, or otherwise between the parties, in the public service or in private employment.

[31] *Id.* The nature of this finality is the subject of Part III *infra*.

comply with any provisions of the Act[32] or to violate the terms of a collective bargaining agreement.[33]

In general, HPERB proceedings must comport with the Hawaii Administrative Procedure Act (HAPA),[34] which incorporates judicial review[35] and articulates the standard to be applied.[36] Circuit court reversal of an HPERB decision is permissible on the grounds, *inter alia*, that errors of law may have prejudiced substantial rights of the aggrieved party.[37] Appeals of right are afforded persons aggrieved by a decision or order of the board which allows the circuit court to vacate or modify the administrative action apparently based on the same HAPA standards.[38] Meanwhile, HPERB itself may seek circuit court enforcement of its prohibited practice orders.[39] Furthermore, filing a prohibited practice charge does not preclude a party from "the pursuit of relief in courts of competent jurisdiction."[40] Thus, where a prohibited practice also constitutes a breach of agreement to arbitrate or to implement the arbitral decision, external law is relevant.

A general arbitration statute, first enacted in 1859 and frequently amended thereafter, provides for circuit court enforcement of written agreements to arbitrate[41] and judicial confirmation of an award unless it

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[32] *Id.* § 89-13(a)(7), (b)(4) (1976).

[33] *Id.* § 89-13(a)(8), (b)(5). Collective bargaining contract terms supersede civil service and personnel regulations unless they conflict with the management rights provision. *Id.* § 89-10(d).

[34] *Id.* § 89-5(b)(9).

[35] *Id.* §§ 91-7, -8, -14, -15 (1976 & Supp. 1979).

[36] *Id.* § 91-14(g) (1976):

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[37] *Id.* § 91-14(g)(4). The applicability of this provision is discussed in text accompanying notes 227-32 *infra*. HPERB itself may appeal reversal of its decisions to the supreme court. Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 441-43, 591 P.2d 113, 116-18 (1979).

[38] HAWAII REV. STAT. §§ 91-14(a), 377-9(f) (1976). The Collective Bargaining Act incorporates the language of section 377-9 by reference in describing the manner and effect of submitting a controversy concerning prohibited practices to HPERB. *Id.* § 89-14.

[39] *Id.* § 377-9(e). See note 38 *supra*.

[40] *Id.* § 377-9(a). See note 38 *supra*.

[41] **Agreement to submit.** A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or

is held defective for one or more of the very limited grounds set forth in the statute.[42] An award therefore may be vacated only where it was fraudulently procured, where the arbitrator was partial or corrupt, where procedural unfairness has prejudiced the rights of parties, or where the arbitrator exceeded his powers.[43] The specific statutory language mirrors the United States Arbitration Act.[44] Since the nineteenth century, the Hawaii Supreme Court consistently has held that errors of fact or law reflected in the arbitrator's decision will not defeat the award.[45] The narrow grounds

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any part thereof, or an agreement in writing to submit an existing controversy to arbitration pursuant to section 658-2, shall be valid, enforceable, and irrevocable, save only upon such grounds as exist for the revocation of any contract.

Id. § 658-1.

[42] **Vacating award.** In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud, or undue means;
(2) Where there was evident partiality or corruption in the arbitrators, or any of them;
(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may in its discretion direct a rehearing by the arbitrators.

Id. § 658-9. The United States Arbitration Act, 9 U.S.C. § 10 (1970), contains virtually identical language.

Modifying or correcting award. In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;
(2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;
(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties.

HAWAII REV. STAT. § 658-10. A section of the United States Arbitration Act is identical except that miscalculations must be "material" to merit court modification. 9 U.S.C. § 11 (1970).

[43] *See, e.g.*, Brennan v. Stewarts' Pharmacies, Ltd., 59 Hawaii 207, 579 P.2d 673 (1978) (majority of arbitration panel exceeded its powers by construing provisions of lease agreement when empowered only to determine fair monthly rental; arbitrator evidently partial when he personally identifies with prejudices and needs of the disputant who appointed him).

[44] *See* note 42 *supra*.

[45] Thomas v. Lunalilo Estate, 5 Hawaii 39 (1883). *Accord*, Santa Clara-San Benito Chapter of Nat'l Electrical Contractors' Ass'n v. Local 332, IBEW, 40 Cal. App. 3d 431, 114 Cal.

for review constitute jurisdictional restraints on both the supreme and circuit courts.[46]

In many ways Hawaii's collective bargaining law resembles the National Labor Relations Act,[47] administered by the National Labor Relations Board (NLRB). Indeed, the Hawaii Supreme Court has found NLRB decisions "particularly instructive,"[48] and HPERB has announced it will follow an arbitration deferral policy similar to that of the NLRB.[49] The federal scheme, applicable only to the private sector, does contain significant differences: The duty to bargain is not restricted by a management rights reservation;[50] violation of a contract provision is not per se an unfair labor practice;[51] federal courts are expressly empowered to enforce collective bargaining agreements;[52] and arbitration is strictly voluntary, not imposed by the federal Act.[53] These differences dictate caution in discussing Hawaii's approach to public sector arbitration *vis-a-vis* NLRB

Rptr. 909 (1974) (after determination of arbitrability); School Comm. of West Springfield v. Korbut, 373 Mass. 788, 369 N.E.2d 1148 (1977); Ferndale Educ. Ass'n v. School Dist., 67 Mich. App. 645, 242 N.W.2d 481 (1976); Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, 78 Wis. 2d 94, 253 N.W.2d 536 (1977) (after determination of arbitrability as a matter of law). *See generally* Dempsey & Kahn, *supra* note 3, at 560.

The Supreme Court enunciated this narrow standard of review two decades ago in a trilogy of private-sector grievance arbitration cases, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), a policy which is inextricably tied to the recognition that having decided to submit issues to arbitration, the award must retain the maximum degree of finality possible. These principles have been integrated into review of federal service grievance arbitrations with few modifications, 5 U.S.C. § 7122(a)(2) (Supp. III 1979); *see generally* Frazier, *supra* note 3, although the notion that public-sector arbitrators should not be given the same free hand as those in the private sector has its advocates, Galgani, *Judicial Review of Arbitrability and Arbitration Awards in the Public Sector*, 18 SANTA CLARA L. REV. 937 (1978) [hereinafter cited as Galgani].

Institutional integrity of the arbitral process must give way to individual rights, at least where Congress has expressly protected rights that might be infringed by an arbitration decision, even one faithfully interpreting a private contract. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (trial de novo to enforce Title VII of the Civil Rights Act of 1964 notwithstanding prior adverse arbitration award). *See generally* Jacobs, *Confusion Remains Five Years After* Alexander v. Gardner-Denver, 30 LAB. L.J. No. 10, at 629 (1979).

[46] Kim v. Mel Cummins Bldg. Contractor, Inc., 57 Hawaii 186, 552 P.2d 1117 (1976); Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Hawaii 332, 460 P.2d 317 (1969); Richards v. Ontai, 20 Hawaii 198 (1910).

[47] 29 U.S.C. §§ 151-188 (1976).

[48] Hawaii State Teachers Ass'n v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 361, 365, 590 P2d 993, 996 (1979).

[49] Hawaii Gov't Employees' Ass'n, Local 152, HGEA, AFSCME, AFL-CIO, I H.P.E.R.B. 641, 646 (1977).

[50] *See* note 17 *supra*.

[51] *See* note 14 *supra*.

[52] 29 U.S.C. 185(a) (1976).

[53] *Id.* § 171(b).

policy.[54]

II. Jurisdictional Overlap: Problems of Forum and Finality

Jurisdictional conflict between the arbitrator and HPERB, the arbitrator and courts, or HPERB and the courts is inherent in Hawaii's collective bargaining law[55] and contradicts the goals of the arbitration mechanism. Multiple forums proliferate litigation, prolong dispute resolution, and promote administrative inefficiency. Different standards of review, which may depend on which governmental entity has jurisdiction and how it is assumed, invites forum shopping. A single forum for review is desirable,[56] but a single standard of review is essential.[57] Of course, any review of an award erodes the fundamental principle of finality—the very linchpin of the arbitral process.[58] For this reason, judicial review of private-sector arbitration decisions is constricted.[59] The courts having thus recognized the requirement of finality, debate among commentators has focused on the applicability of this limited judicial standard to the public sector.[60]

The Hawaii Supreme Court has not addressed the standard-of-review issue, but it has spoken twice on jurisdictional questions from which it may be inferred that HPERB and the circuit courts have concurrent jurisdiction in certain matters.[61] HPERB twice acknowledged its potentially

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[54] Similar caution is warranted in comparing Hawaii's approach with that of other states' regulation of public employee collective bargaining. *See* Central Point School Dist. No. 6 v. Employment Relations Bd., 27 Or. App. 285, _ n.5, 555 P.2d 1269, 1272 n.5 (1976).

[55] *Cf.* NLRB v. C & C Plywood Corp., 385 U.S. 421, 428 n.13 (1967) (one reason Congress did not empower NLRB to enforce contracts was concern for conflicting decisions). This is not pecular to Hawaii. *See, e.g.*, Brodie, *Public Sector Collective Bargaining in Oregon*, 51 Ore. L. Rev. 337, 344 (1975) [hereinafter cited as Brodie].

[56] *See* Smith v. State, 31 Or. App. 15, 569 P.2d 677 (1977); Pennsylvania Lab. Relations Bd. v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (1978).

[57] *See* Madison Metropolitan School Dist. v. Wisconsin Employment Relations Comm'n, 86 Wis. 2d 249, 272 N.W.2d 314 (Ct. App. 1978).

[58] Comment, *supra* note 13, at 949. The New Jersey Supreme Court has found judicial review in compulsory interest arbitration to be constitutionally required by the due process clause. Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978). *See generally* McAvoy, *supra* note 7, at 1204 & n.71. *But cf.* City of Providence v. Local 799, Int'l Ass'n of Firefighters, 111 R.I. 586, 305 A.2d 93 (1973) (compulsory interest arbitration award not appealable by statute or declaratory judgment but reviewable on discretionary writ of certiorari).

[59] *See* notes 45-46 *supra* and accompanying text. Despite the Supreme Court's unequivocal endorsement of narrow judicial review, the *Steelworkers* trilogy is not meticulously adhered to in every federal circuit. Comment, *supra* note 13.

[60] *Compare* Dempsey & Kahn, *supra* note 3, *with* Galgani, *supra* note 45, *and* Grodin, *supra* note 7, at 698-700, *and* Vacarro, *supra* note 17.

[61] Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 591 P.2d 113 (1979) (reversing circuit court ruling that the arbitration statute deprived HPERB of jurisdiction to issue a declaratory ruling on negotiability of collective bargaining agreement provision);

conflicting jurisdiction with the courts to review arbitration awards and has suggested contradictory answers in dicta.[62]

A. *HPERB Versus the Arbitrator*

HPERB has found itself without jurisdiction only where it is asked to construe external law.[63] Yet, even having declared itself powerless to resolve preliminary legal issues, the board has in the same decision determined that an employer's unilateral action was a prohibited practice and ordered it to bargain.[64] HPERB has held that it has jurisdiction to issue

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Hawaii Pub. Employment Relations Bd. v. Hawaii State Teachers Ass'n, 54 Hawaii 531, 511 P.2d 1080 (1973) (affirming circuit court jurisdiction to grant preliminary injunction of pending teacher strike prohibited by collective bargaining law; unfair labor practice charge that union is violating contract by striking over issues that must be submitted to arbitration is not exclusive remedy). *Cf.* Lamphere Schools v. Lamphere Fed'n of Teachers, 67 Mich. App. 331, 240 N.W.2d 792, *aff'd*, 400 Mich. 104, 252 N.W.2d 818 (1977) (no damage suit available for illegal strike; proper remedy involves unfair labor practice over which board has exclusive jurisdiction); Board of Educ. v. Detroit Fed'n of Teachers Local 231, 55 Mich. App. 499, 223 N.W.2d 23 (1974) (board has exclusive jurisdiction of unfair labor practice but court determined that strike is not prohibited practice and enjoined strike). *See also* Gealon v. Keala, 60 Hawaii 513, 591 P.2d 621 (1979) (HAPA review of employer's denial of grievance regarding employee's discharge requiring court to interpret collective bargaining agreement procedure for grievances; court did not consider that unfair labor practice charge for violation of contract might have been brought before HPERB).

[62] George R. Ariyoshi, Governor of the State of Hawaii, II H.P.E.R.B. 322 (1979) (suggesting HPERB jurisdiction is exclusive); Board of Educ., I H.P.E.R.B. 523, 526 (1974) (proper forum for review of arbitration award is circuit court pursuant to arbitration statute).

[63] University of Hawaii Professional Assembly, II H.P.E.R.B. 43, 46 (1978) (power to issue declaratory ruling restricted to interpretation of statutes HPERB administers); Bruce J. Ching, II H.P.E.R.B. 23, 31 (1978) (constitutional challenges to provision of collective bargaining agreement or collective bargaining law not within HPERB's jurisdiction). *Accord*, Central Point School Dist. No. 6 v. Employment Relations Bd., 27 Or. App. 285, 555 P.2d 1269 (1976) (by implication); Zukerman v. Board of Educ., 44 N.Y.2d 336, 405 N.Y.S.2d 652, 376 N.E.2d 1297 (1978) (court will not defer to labor board on pending unfair labor practice where the board is without jurisdiction to decide larger issues of constitutional and statutory violations). *But see* Hawaii State Teachers Ass'n, I H.P.E.R.B. 251, 264-65 (1972), *enforced in part*, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973) (construing the state constitution). Browne v. Milwaukee Bd. of School Directors, 69 Wis. 2d 169, 230 N.W.2d 704 (1975) (concurrent jurisdiction of labor commission and courts to decide constitutionality of Municipal Employment Relations Act allowing "fair share" agreements; trial court exercised proper primary jurisdiction although concurrent). *Cf.* Browne v. Milwaukee Bd. of School Directors, 83 Wis. 2d 316, 265 N.W.2d 559 (trial court decides if law is constitutional, then transfers case to labor commission), *rehearing denied*, 83 Wis. 2d 316, 267 N.W.2d 379 (1978) (proper for trial court to stay proceedings until commission made factual determinations of fair share dues to avoid possible prejudice to parties otherwise denied the administrative hearing).

[64] University of Hawaii Professional Assembly, I H.P.E.R.B. 753, 761-63 (1977), *enforced*, Civ. No. 52708 (1st Cir. Hawaii June 27, 1978) (HPERB without jurisdiction to decide which of two statutes governs mandatory retirement age, but since university acted pursuant to a statute that HPERB determined would not conflict with duty to bargain under collective

declaratory rulings based on hypothetical situations involving arbitration as well.[65]

The question of what jurisdiction, if any, the board has to entertain proceedings which overlap with grievance and arbitration provisions of collective bargaining agreements has arisen in the following contexts: (1) Where a union filed a prohibited practice complaint alleging violation of a collective bargaining agreement by a public employer without filing a grievance or submitting the dispute to arbitration;[66] (2) where an employer filed a petition for a declaratory ruling on arbitrability of grievances after a union requested arbitration—despite a contractual provision that the arbitrator shall have jurisdiction to decide disputes as to arbitrability;[67] and (3) where a public employer filed a petition for review or a petition for declaratory ruling to determine the validity of an arbitration award.[68] In each instance, whether before or after arbitration and whether the proceeding involved a prohibited practice or a declaratory ruling, HPERB established its jurisdiction.

1. Before Arbitration.—HPERB's first case on the issue arose on a prohibited practice complaint filed by a union charging the employer had violated its collective bargaining agreement.[69] The union had not submit-

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bargaining law, university committed prohibited practice and was ordered to bargain). *See also* Board of Educ. v. Bernards Township Educ. Ass'n, 79 N.J. 311, 399 A.2d 620 (1979) (PERC has primary jurisdiction regarding conflicting statutes).

[65] "[T]he applicability of HRS 89-9(d) [management rights reservation] to the . . . arbitration award is properly before HPERB as a defense against a *possible* prohibited practice charge which *might* be brought against the employer." George R. Ariyoshi, Governor of the State of Hawaii, II H.P.E.R.B. 322, 331 (1979) (emphasis added).

[66] Hawaii State Teachers Ass'n, I H.P.E.R.B. 251 (1972), *enforced in part on other grounds*, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973).

[67] Frank F. Fasi, Mayor, City & County of Honolulu, I H.P.E.R.B. 543 (1974), *rev'd sub nom.* Hawaii Gov't Employees' Ass'n v. Hawaii Pub. Employment Relations Bd., Civ. No. 44563 (1st Cir. Hawaii Oct. 30, 1975), *rev'd sub nom.* Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 591 P.2d 113 (1979).

[68] George R. Ariyoshi, Governor of the State of Hawaii, II H.P.E.R.B. 322 (1979); Board of Educ., I H.P.E.R.B. 523 (1974); Hawaii State Teachers Ass'n, H.P.E.R.B. Case No. CE-05-5 (May 16, 1973), *appeal dismissed*, Civ. No. 39567 (1st Cir. Hawaii Feb. 2, 1975). *See also* note 69 *infra*.

[69] Hawaii State Teachers Ass'n, I H.P.E.R.B. 251 (1972), *enforced in part*, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973). The teachers union alleged, *inter alia*, that the board of education violated the class-size provision of the collective bargaining agreement in attempting to meet the required student-teacher ratio by transferring temporary support positions to classroom teacher positions instead of hiring 250 new teachers. The board of education defended by asserting that the contract provisions were illegal intrusions on management rights under section 89-9(d) of the Act, *quoted in* note 17 *supra*. The contract provision in dispute resulted from an agreement based on voluntary interest arbitration. Therefore, HPERB's decision also may be characterized as review of the arbitration award. The employer's refusal to implement the award provoked the prohibited practice charge, thereby forcing HPERB to review the legality of the award as a defense. Alternatively, the employer might have sought to vacate the award under the Arbitration Act; however, court review might have been narrower under that statute than was agency review under the Col-

ted the dispute to the contractual grievance and arbitration procedure. Both parties argued that HPERB had jurisdiction,[70] and the board agreed.

The ruling was based on the grounds that the Act expressly makes violations of collective bargaining agreements prohibited practices[71] and that contractual grievance and arbitration provisions cannot interfere with the board's jurisdiction.[72] The board recognized in this case that the relevant federal statutory language, expressly conferring jurisdiction on the NLRB despite contractual arbitration clauses,[73] is different from Hawaii law, which is silent on the matter. Thus, the ruling rested on an independent analysis of Hawaii's Collective Bargaining Act.

HPERB's analysis, however, failed to consider section 89-11(a) of the Act which reads as follows:

> A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. *In the absence of such a procedure,* either party may submit the dispute to the board for a final and binding decision.[74]

Opponents of the board's current policy have stressed the italicized language as precluding HPERB intervention in the grievance arbitration process,[75] but as of this writing the board has not responded specifically to that contention.[76] The Hawaii Supreme Court similarly finessed the issue in affirming a second case involving jurisdiction, this one ultimately decided under HAPA rather than the Collective Bargaining Act.[77]

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lective Bargaining Act. *See* text accompanying notes 45-46 *supra*.

[70] I H.P.E.R.B. at 260 n.3.

[71] *Id.* at 261 (quoting HAWAII REV. STAT. §§ 89-5(b)(4), 89-13(a)(8), -13(b)(5) (Supp. 1973)).

[72] *Id.* at 262. *Accord,* NLRB v. Strong, 393 U.S. 357, 360-61 (1969); Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 444, 591 P.2d 113, 118 (1979).

[73] Section 10(a)(2) of the National Labor Relations Act provides: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement* . . . ." 29 U.S.C. § 160(1) (1976) (emphasis added). There is no comparable provision in Hawaii's collective bargaining law, HAWAII REV. STAT. ch. 89 (1976 & Supp. 1979).

[74] HAWAII REV. STAT. § 89-11(a) (1976).

[75] *See* note 93 *infra* and accompanying text.

[76] *See* text accompanying notes 85-90 *infra*. Nor has the board directly responded to the related contention that in the absence of any provision expressly giving it power to review, confirm, or vacate grievance arbitration awards, or to restrain completion of the arbitration process, section 89-11(a) precludes such action by HPERB. A recent supreme court decision, however, casts doubt on the success of this argument. Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 444, 591 P.2d 113, 118 (1979).

[77] Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 591 P.2d 113 (1979),

In 1973, the City & County of Honolulu promoted Cosme Rosete, Jr., instead of Arthur Aiu, to the position of incinerator plant furnace operator. The union filed a grievance on behalf of Mr. Aiu, claiming that the promotion violated the collective bargaining provision requiring that in circumstances where "other factors . . . [are] equal, seniority shall prevail."[78] The mayor of Honolulu filed a petition for a declaratory ruling with HPERB; three public employee unions intervened, along with the State and two other counties. The unions challenged HPERB's jurisdiction to issue a declaratory ruling.

Although the collective bargaining agreement provided for arbitration of grievances and conferred jurisdiction on the arbitrator to determine arbitrability, these facts do not appear in HPERB's decision because of the peculiar manner in which the petitioner had phrased the issue; namely, did the contractual provision in dispute violate the statutory management rights reservation. The reason for the question—clearly pointed out in the memoranda of union intervenors[79] —was that the petitioner refused to arbitrate the grievance on the ground that the contractual provisions dealing with seniority in promotions were illegal. The impact of the decision was obscured because HPERB limited itself to deciding that it had jurisdiction to issue a declaratory ruling on the legal question presented,[80] which cleared the ground for entertaining the arbitrability issue.[81]

The board first analyzed its jurisdiction under HAPA which gives an agency discretion to issue declaratory rulings "as to the applicability of any statutory provision."[82] Since the Collective Bargaining Act grants priority to contract provisions except when they violate management rights,[83] HPERB reasoned that HAPA and the Act authorized the board to decide in a declaratory ruling whether the disputed provision conflicted with the statutory reservation of the employer's powers.[84] This

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rev'g Hawaii Gov't Employees' Ass'n v. Hawaii Pub. Employment Relations Bd., Civ. No. 44563 (1st Cir. Hawaii Oct. 30, 1975), *rev'g* Frank F. Fasi, Mayor, City & County of Honolulu, I H.P.E.R.B. 534 (1974).

[78] I H.P.E.R.B. at 536.

[79] Memorandum of Intervenor, United Pub. Workers at 19; Supplemental Memorandum of Hawaii Gov't Employees' Ass'n, Intervenor at 1. *See* 60 Hawaii at 438-39, 591 P.2d at 115.

[80] I H.P.E.R.B. at 538.

[81] HPERB ultimately decided that the seniority provision did not contravene the statutory management rights reservation and issued a declaratory ruling to that effect. The ruling was consolidated with the jurisdictional issue on appeal, but the substantive issue was not reached. Frank F. Fasi, Mayor, City & County of Honolulu, I H.P.E.R.B. 548, *rev'd on other grounds sub nom.* Hawaii Gov't Employees' Ass'n v. Hawaii Pub. Employment Relations Bd., Civ. No. 44563 (1st Cir. Hawaii Oct. 30, 1975), *rev'd sub nom.* Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 591 P.2d 113 (1979).

[82] HAWAII REV. STAT. 91-8 (1976). The statutory language has not changed since HPERB construed it in the 1974 decision.

[83] *See* note 17 *supra*.

[84] I H.P.E.R.B. at 537.

logic appears infallible until one considers the second part of HPERB's decision.

The board rejected the unions' contention that section 89-11(a)[85] precluded HPERB jurisdiction in this case because it characterized the issue as a "purely legal question,"[86] not involving " 'the *interpretation* or *application* of a written agreement.' "[87] It is hard to imagine how an arbitrator could enforce a contractual provision through an award without first interpreting it.[88] Similarly, one must wonder how the board could determine whether the language of a collective bargaining agreement conflicted with inherent management rights without giving meaning to the alleged offending provision.[89] Indeed, HPERB later construed the disputed provision to require "merely . . . that seniority be utilized as a *criterion* [for promotion] only after it has been determined that the subject employees are relatively equal in qualification."[90] A less flexible reading of "seniority shall prevail" might have occurred to another interpreter. Although HPERB was careful to note that it considered the contract provision "on its face"[91] in disposing of the legal issue, that only suggests that a conflict could arise in its application. Even though the declaratory ruling did not apply the provision in the same way an arbitral award does, it nonetheless interpreted it. Hence, the relevance of section 89-11(a) lost its impact through a tortured construction of statutory language which was unavoidably inconsistent with HPERB's final disposition of the issue.

HPERB's rulings were appealed to the circuit court pursuant to HAPA.[92] The unions' contention that the board had no jurisdiction to consider the question was based, principally, on the following three grounds: (1) The board has jurisdiction of a dispute over the interpretation or application of an agreement only *in the absence* of contractual provisions setting forth a grievance procedure culminating in a final and binding decision;[93] (2) the contractual arbitration procedure provided that the arbitrator should first determine his jurisdiction to arbitration if

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[85] The provision is fully quoted in text accompanying note 74 *supra*.

[86] I H.P.E.R.B. at 538.

[87] *Id.* (quoting HAWAII REV. STAT. § 89-11(a) (Supp. 1973)) (original emphasis).

[88] *See, e.g.*, NLRB v. Strong, 393 U.S. 357, 360-61 (1969) ("Arbitrators and courts are still the principal sources of contract interpretation . . . ."); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 547, 581-83 (1960).

[89] *See* note 98 *infra*.

[90] Frank F. Fasi, Mayor, City & County of Honolulu, I H.P.E.R.B. 548, 552, *rev'd on other grounds sub nom.* Hawaii Gov't Employees' Ass'n v. Hawaii Pub. Employment Relations Bd., Civ. No. 44563 (1st Cir. Hawaii Oct. 30, 1975), *rev'd sub nom.* Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 591 P.2d 113 (1979).

[91] *Id.* at 553, 554.

[92] Hawaii Gov't Employees' Ass'n v. Hawaii Pub. Employment Relations Bd., Civ. No. 44563 (Oct. 30, 1975), *rev'd sub nom.* Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 591 P.2d 113 (1979).

[93] Memorandum in Support of Appeal of Hawaii Gov't Employees' Ass'n at 9-12 (quoting HAWAII REV. STAT. § 89-11(a) (Supp. 1973)).

either party raised the issue;[94] and (3) the Arbitration and Awards Act places jurisdiction over review of arbitration awards in the circuit courts.[95] The lower court reversed the board, holding that jurisdiction lay in the circuit court under the Arbitration and Awards Act, but stated no reasons.[96]

More than three years later, in *Fasi v. Hawaii Public Employment Relations Board*,[97] the Hawaii Supreme Court reversed the lower court in an opinion that mirrored the first part of HPERB's jurisdictional analysis.[98]

> We think it is not arguable that any collective bargaining agreement could deprive the Board of its statutory authority to take action with respect to prohibited practices, although the terms of existing agreements might well be relevant to the determination whether a prohibited practice existed. If the Board had jurisdiction to take action with respect to a prohibited practice, it had jurisdiction to declare what would constitute a prohibited practice.[99]

The issues raised by the unions were summarily dismissed by implication[100] and dicta which considered them irrelevant.

> The question of the effect of the pendency of C&C's [the City and County of Honolulu's] petition for declaratory ruling upon the ongoing grievance procedure is not before us. Some of the arguments addressed to us seem, however, to assume that the Board could not take jurisdiction of the petition because to do

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[94] Memorandum of Appellee United Pub. Workers, Local 646, at 6.

[95] Memorandum for Hawaii State Teachers Ass'n at 6.

[96] Civ. No. 44563. The supreme court imputed the following rationale to the circuit court decision:

> The circuit court concluded that the parties were bound by the collective bargaining agreement to submit the dispute to an arbitrator, who should first determine that he has jurisdiction and, if he should so determine, should proceed to decide the matter on its merits, following which an appeal would lie to the circuit court in which the court might vacate the award if it should find that the arbitrator exceeded his powers by accepting the case and disregarding the proper interpretation of HRS § 89-9(d) [management rights provision]. The decision and ruling of the Board was reversed on the ground that the Board lacked jurisdiction to issue a ruling on the matter which was pending arbitration.

Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 440, 591 P.2d 113, 116 (1979).

[97] 60 Hawaii 436, 591 P.2d 113 (1979).

[98] *Id.* at 442-45, 591 P.2d at 117-18. The court, however, found that the "*meaning and effect* of a provision of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a prohibited practice." *Id.* at 443, 591 P.2d at 117 (emphasis added).

[99] *Id.* at 444-45, 591 P.2d at 118.

[100] Assuming, as the circuit court found, that the parties had agreed to be bound by the arbitrator's decision on the question, the circuit court nevertheless erred in holding that the Board was without jurisdiction to provide its ruling on the same question in response to the petition . . . for a declaratory ruling.

Id. at 444, 591 P.2d at 118.

> so would interfere with the arbitration of the grievance. Conversely, it is argued by the Board that the question of the validity of the seniority clause was not subject to arbitration. We consider these arguments to be beside the point. We see nothing in the pendency of C&C's petition before the Board which relieved C&C from its obligation, if one existed, to proceed with the arbitration. The ruling of the Board might or might not have been significant to the outcome of the arbitration, just as the ruling of the arbitrator might or might not have been significant to the Board in determining its ruling. What questions were subject to arbitration is not, in our view, a factor in determining whether the question submitted to the Board by C&C's petition was within its jurisdiction under § 91-8 [the HAPA declaratory ruling provision].[101]

The court held that HAPA is designed to provide a means of securing from an agency, by way of a declaratory ruling, its interpretation of relevant statutes, rules, and orders, and the only parties necessary to a proceeding requesting a ruling are the petitioner and the agency.[102]

In a footnote, the court conceded that a party to a collective bargaining agreement may not maintain an action in *court* for a declaratory judgment with respect to an agreement to arbitrate, in the face of a stipulation that the question is to be submitted to an arbitrator for a decision.[103] The court's rationale was that such an action would adjudicate the rights of the parties under the agreement, in violation of its terms, whereas a declaratory ruling by HPERB would disclose only the interpretation which would guide the board in the performance of its administrative function.[104] This Delphic distinction is scarcely illuminating, particularly

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[101] *Id.* at 445, 591 P.2d at 119.

[102] The only parties necessary to a proceeding under § 91-8 are the petitioner and the agency. *The declaratory ruling so obtained has effect only as an order of the agency. With respect to parties not before the agency in the proceeding upon the petition, the ruling does not adjudicate rights and interests to any greater extent than is possible by an ex parte interpretative order of the agency.*

Id. at 444, 591 P.2d at 118 (emphasis added).

[103] *Id.* at 445 n.2, 591 P.2d at 118 n.2. *But cf.* Churchill v. S. A. D. # 49 Teachers Ass'n, 380 A.2d 186 (Me. 1977) (court has jurisdiction under Declaratory Judgment Act to determine purely legal question as to validity of agency shop provision of collective bargaining agreement); Zukerman v. Board of Educ., 44 N.Y.2d 336, 376 N.E.2d 1297, 405 N.Y.S.2d 652 (1978) (court *converts* proceeding to declaratory judgment action on remand to determine legality of layoffs under constitution and nonlabor laws); Yonkers School Crossing Guard Union v. City of Yonkers, 51 App. Div. 2d 594, 379 N.Y.S.2d 113, *aff'd*, 39 N.Y.2d 964, 354 N.E.2d 846, 387 N.Y.S.2d 105 (1976) (declaratory judgment regarding legality of "job security" clause of collective bargaining agreement); City Firefighters, Local 311 v. City of Madison, 48 Wis. 2d 262, 179 N.W.2d 800 (1970) (court has jurisdiction to decide whether employees are covered by collective bargaining act; declaratory judgment affirmed).

[104] 60 Hawaii at 445 n.2, 591 P.2d at 118 n.2 (citing Local 89, IBEW v. General Tel. Co. of Northwest, 431 F.2d 957 (9th Cir. 1970); United Ins. Co. of America v. Insurance Workers Int'l, 315 F. Supp. 1133 (E.D. Pa. 1970)). In *General Telephone*, the NLRB already had decided that certain workers were "supervisors" not "employees" under the federal Act. The Ninth Circuit reversed the lower court's declaratory ruling that the workers were intended to be "employees" under the contract and ordered the case dismissed because arbitration

in view of the court's acknowledgment that in order to interpret the statute, HPERB had to determine the "meaning and effect" of the contractual provision.[105] It was unnecessary, said the court, to consider whether the union's rights under the agreement were adjudicated once the union intervened. HPERB still would have jurisdiction, even though it is clear that a ruling by the board, in a proceeding where employer and union are parties, has the effect of an agency order.[106]

Some conclusions to be drawn from the *Fasi* decision are the following: (1) Since the board's declaratory ruling has no binding effect if the opposing party does not intervene, nonintervention is obviously the strategy to be followed in such circumstances;[107] (2) regardless of the board's ex parte ruling, the opposing party may seek a circuit court order to submit the dispute to arbitration under the Arbitration and Awards Act;[108] and (3) if

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was the agreed exclusive means of resolving the issue. In *United Insurance*, the district court dismissed a declaratory judgment action where petitioner claimed the grievances were not arbitrable because they involved management rights expressly reserved under the contract and an award for the union could not be sustained by a court under the contract language.

The problem with the court's reliance on these cases is that there was no potential conflict between an arbitrator's award and the NLRB ruling because the federal Act did not make the contract provisions in dispute illegal, and bargaining for them would not be an unfair labor practice. Private-sector cases involving an NLRB unit clarification may be more closely analogous to the *Fasi*-type case. The NLRB does not issue formal advisory opinions on matters other than jurisdiction under the commerce clause, *see, e.g.*, Mark Nolan, Presiding Judge, Dist. Ct. of St. Louis County, Sixth Judicial Dist. of Minn., 138 N.L.R.B. 576 (1962). But the effect of a unit-clarification determination has been described as "a declaratory judgment of changed circumstances leading to accretion," Retail Clerks Local 588 v. NLRB, 565 F.2d 769, 775 (D.C. Cir. 1977), and union demands for representation of an inappropriate unit is an unfair labor practice, Smith Steel Workers v. A.O. Smith Corp., 420 F.2d 1, 7 (7th Cir. 1969). Hence, the Seventh Circuit upheld the district court's refusal to compel arbitration of a unit-representation issue after the NLRB had acted. *Id.* A similar analysis applied to an action to compel arbitration or to enforce an arbitral award in a *Fasi*-type situation would mean that HPERB's declaratory ruling adjudicated arbitration rights under the contract. *But cf.* General Warehousemen & Helpers Local 767, 560 F.2d 700 (5th Cir. 1977), *appeal dismissed under rule 60 sub nom.* Union Light, Heat & Power Co. v. Rubin, 443 U.S. 913 (1979) (enforcing arbitrator's award absent clear conflict with NLRB unit certification). *See also* Retail Clerks Local 588 v. NLRB, 565 F.2d 769 (D.C. Cir. 1977) (denying enforcement of unfair labor practice where union merely asked employer to arbitrate, rather than seeking court order compelling arbitration or taking concerted action to resolve a colorable contract interpretation issue dealt with ten years before in unit-certification action by NLRB).

[105] *See* note 98 *supra*.

[106] HAWAII REV. STAT. § 91-8 (1976). In a different context, the Supreme Court has said "that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." National Licorice Co. v. NLRB, 309 U.S. 350, 365 (1940). *Cf.* Danielson v. International Organization of Masters, 521 F.2d 747, 754-55 (2d Cir. 1975) (affirming preliminary injunction forbidding arbitration based on reasonable cause to believe that enforcement of the "hot cargo" provision would be an unfair labor practice).

[107] *See* note 102 *supra*.

[108] *See* text accompanying note 101 *supra*. The court's reliance on *United Insurance, see*

the board's ruling precedes arbitration, the board's decision would not bind the arbitrator.[109] As matters now stand, HPERB is not ousted of jurisdiction over prohibited practice charges based on alleged contract violations by collective bargaining agreements requiring arbitration. This does not mean, however, that the board should or will exercise its jurisdiction.

2. *Prearbitration Deferral.*—Since 1972, when HPERB first sketched its deferral policy, decisions as to whether the board should hear a case or refer it to the contractual dispute mechanism have been unanimous. This contrasts with the NLRB's constant internal battle on the same subject.[110]

The state agency has deferred to arbitration pursuant to a stipulation of the parties after HPERB's jurisdiction had been invoked[111] and where the prohibited practice charge involved only a procedural arbitrability issue.[112] The board has declined to defer to arbitration in cases where it perceived that (1) the union's interests conflicted with those of the individual grievant,[113] (2) the public interest required speedy disposition of a matter which otherwise involved charges of employer discrimination,[114] and (3) the threshold issue required interpretation of the statutory management rights reservation in order to determine the negotiability of the contractual provision underlying the dispute.[115] Discussion will focus pri-

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note 104 *supra*, suggests that the question of arbitrability under the state arbitration act will not be decided on the basis of hypothetical arbitral awards which might conflict with HPERB rulings. *See* 415 F. Supp. at 1137.

[109] *See* text accompanying note 101 *supra*. *See generally* Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1212 (1968).

[110] *See, e.g.*, Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. (BNA) 1113 (Jan. 8, 1980) (postarbitration nondeferral); Roy Robinson, Inc. d/b/a/ Roy Robinson Chevrolet, 228 N.L.R.B. 828 (1977) (prearbitration deferral); General American Transp. Corp., 228 N.L.R.B. 808 (1977) (prearbitration nondeferral); Electronic Reproduction Serv. Co., 213 N.L.R.B. 758 (1974) (postarbitration deference); United States Postal Serv., 207 N.L.R.B. 398 (1973) (prearbitration deferral); Radioear Corp., 199 N.L.R.B. 1161 (1972) (prearbitration deferral); Southwestern Bell Tel. Co., 198 N.L.R.B. 569 (1972) (prearbitration deferral); Collyer Insulated Wire, A Gulf & Western Sys. Co., 192 N.L.R.B. 837 (1971) (prearbitration deferral); National Radio Co., Inc., 198 N.L.R.B. 527 (1972) (prearbitration deferral). *See generally* Dunau, *supra* note 13, at 61-63; Penello, *The NLRB's Misplaced Priorities*, 30 LAB. L.J. No. 1, at 3 (1979); Note, *supra* note 109; 1978 S. ILL. U.L.J. 98.

[111] *See* Hawaii State Teachers Ass'n, H.P.E.R.B. Case No. CE-05-5 (May 16, 1973), *appeal dismissed*, Civ. No. 39567 (1st Cir. Hawaii Feb. 12, 1975), *discussed in* Hawaii State Teachers Ass'n, I H.P.E.R.B. 442, 446 (1974), *enforced*, Civ. No. 42780 (1st Cir. Hawaii Feb. 27, 1976), *aff'd*, 60 Hawaii 361, 590 P.2d 993 (1979).

[112] State of Hawaii Organization of Police Officers (SHOPO), I H.P.E.R.B. 715 (1977).

[113] David Santos, I H.P.E.R.B. 669, 682-84, *rev'd on other grounds*, Civ. No. 51437 (1st Cir. Hawaii Nov. 29, 1977). *Accord*, Fleet Carrier Corp., 201 N.L.R.B. 227 (1973).

[114] Hawaii State Teachers Ass'n, I H.P.E.R.B. 442 (1974), *enforced*, Civ. No. 42780 (1st Cir. Hawaii Feb. 27, 1976), *aff'd*, 60 Hawaii 361, 590 P.2d 993 (1979).

[115] Hawaii Gov't Employees' Ass'n, Local 152, HGEA, AFSCME, AFL-CIO, I H.P.E.R.B. 641 (1977); Hawaii Gov't Employees' Ass'n, Local 152, HGEA/AFSCME, AFL-CIO, I H.P.E.R.B. 559 (1975); Hawaii State Teachers Ass'n, I H.P.E.R.B. 251 (1972), *enforced in*

marily on the last two types of nondeferral cases.

HPERB's first case on management rights[116] also presented the first opportunity for the board to outline its general deferral policy. The board held:

> We are of the opinion that under our statute this Board has jurisdiction over prohibited practice charges, including those involving alleged breaches of contracts, and that in the exercise of such jurisdiction *the Board has discretion to require the parties to utilize their contractual arbitration procedure.* It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, by deferral of matters concerning contractual interpretation and application to the arbitration process agreed to by the parties. The Board, in all cases where such deferrals are made, shall retain jurisdiction *for the limited purpose of determining whether the arbitrator's award is within the scope of his powers, the proceedings were expeditious, lawful and fair, and the award is consistent with Chapter 89* [the Collective Bargaining Act].[117]

Despite that statement of policy, the board did not defer the case,[118] nor did it state any criteria under which it would determine whether to do so.[119] The language used by HPERB was immediately recognized as an

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part, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973).

[116] Hawaii State Teachers Ass'n, I H.P.E.R.B. 251 (1972), *enforced in part*, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973). See note 69 *supra*.

[117] *Id.* at 260-61, as corrected at 252 (emphasis added).

[118] The board distinguished the Supreme Court's policy of deferral announced in the *Steelworkers* trilogy, *see* note 45 *supra*, on the ground that it represented the relationship of the arbitral process to courts, not to labor relations boards, *id.* at 264 n.7. This is a curious distinction, particularly since the NLRB relied upon the trilogy in formulating its deferral policy, Collyer Insulated Wire, A Gulf & Western Syss. Co., 192 N.L.R.B. 837, 840-41 & n.4 (1971), a policy which HPERB apparently embraced, *see* text accompanying notes 49 *supra* and 120 *infra*. Moreover, in a later decision, HPERB deferred to arbitration on the authority of "pertinent decisional law," which involved original court proceedings rather than appeals from labor board orders. State of Hawaii Organization of Police Officers (SHOPO), I H.P.E.R.B. 715, 720 (1977), *quoted in* note 156 *infra*.

HPERB did note the relevancy of the trilogy (decided under section 301 of the federal Act which empowers the courts to enforce collective bargaining agreements) to breach-of-contract charges filed with HPERB. Since the case before HPERB included just such a charge, and since the two trilogy cases on prearbitration deferral involved management rights defenses, HPERB logically sought to distinguish the Supreme Court cases. The potentially significant difference, of course, is that the management rights defense available under the state Act is statutory, while it is only a contractual defense under section 301.

[119] HPERB found "informative" the Wisconsin practice of deferral "unless arbitration would be fruitless or the parties jointly waive arbitration," *id.* at 264, as corrected at 252, and may have inferred waiver from the failure of the union to file a grievance and the posture of both parties in this case, urging the board to assert jurisdiction, *id.* at 260 n.3. This would comport with NLRB policy. *See, e.g.*, Duchess Furniture, Div. of Nat'l Serv. Indus., Inc., 220 N.L.R.B. 13 (1975) (error to defer where no party seeks deferral). The rationale for the federal board's policy as applied to refusal-to-bargain charges has been criticized as an undesirable intervention into the bargained-for forum. Note, *supra* note 109, at 1213-14.

adoption of the NLRB's *Collyer* doctrine,[120] but HPERB's next deferral case would depart from then prevailing federal policy.

Collyer[121] involved refusal-to-bargain charges based on the employer's unilateral changes, boosting the wages for skilled maintenance workers and extruder operators and reassigning one, instead of two, maintenance machinists to extruder machines.[122] The employer defended on the ground that the language of the contract, interpreted in light of past practices, sanctioned the independent actions. The NLRB agreed with the employer that deferral to arbitration under the contract was appropriate because an award construing the agreement might properly dispose of the unfair labor practice issue.[123] The Board would retain limited jurisdiction to ensure that an arbitral decision was reached which met the previously established *Spielberg*[124] standards of fairness and compatibil-

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It is equally likely that HPERB considered arbitration futile, since the proceeding required the board to determine if a collective bargaining agreement "calling for reduction of average class size ratio throughout the State educational system is a negotiable matter," I H.P.E.R.B. at 266, or an unenforceable intrusion upon management rights under the Act. *Cf.* Danielson v. International Organization of Masters, 521 F.2d 747, 754-55 (2d Cir. 1975) (where contract restricts arbitrator's jurisdiction to interpretation of the agreement and "hot cargo" contract clause is inconsistent with federal law, NLRB nondeferral is warranted since arbitration may be futile). California codifies agency deferral to arbitration where violation of a collective bargaining agreement also would be a prohibited practice, unless arbitration would be futile. CAL. GOV'T CODE § 3541.5(a)(2) (West Supp. Pamphlet 1967-1979). Federal courts also use the language of futility in declining to defer to arbitration in section 301 actions, *see, e.g.*, Local 115, United Ass'n of Journeymen v. Townsend & Bottum, Inc., 383 F. Supp. 1339, 1344 (W.D. Pa. 1974), *aff'd mem.*, 521 F.2d 1399 (3d Cir. 1975).

[120] Brodie, *supra* note 55, at 345 & n.59 (urging Oregon's board to adopt *Collyer* approach). Before the NLRB decided to defer to the bargained-for arbitration process where unfair labor practices raise substantial questions that are susceptible of resolution by interpretation of the collective bargaining agreement, one commentator suggested a conceptual framework upon which to base the arbitrator's primary jurisdiction in similar situations. Dunau, *supra* note 13. The author proposed three criteria for resolving jurisdictional tension: "Those criteria . . . are the policy encouraging collective bargaining and favoring the resolution of contract disputes by private arbitration, the statutory absorption and approval of the philosophy of bargaining as it works out in practice, and *the lack of jurisdiction by the NLRB over contract breaches.*" *Id.* at 80 (emphasis added). Because contract breaches are prohibited practices under both Hawaii and Oregon law, HAWAII REV. STAT. § 89-13(a)(8), (b)(5) (1976); OR. REV. STAT. § 243.672(a), (g) (1975), the central support for the arbitrator's jurisdiction under the above analysis is missing.

[121] Collyer Insulated Wire, A Gulf & Western Sys. Co., 192 N.L.R.B. 837 (1971).

[122] *Id.* at 837-39.

[123] [W]e believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroenous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties.

Id. at 841-42.

[124] Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955):

[T]he proceedings appear to have been fair and regular, all parties had agreed to be

ity with federal law.[125] The dissent found deferral unwarranted, especially since a grievance had not been filed, and considered the policy a denial of the parties' statutory rights and an abrogation of the Board's duty.[126]

In 1972, a majority of the NLRB applied *Collyer* principles to discrimination charges, even while acknowledging that arbitration of contractual provisions prohibiting discharge without just cause may not fully dispose of the prohibited practice issue by considering whether an otherwise justifiable discharge was motivated by discrimination.[127] Five years later, the Board reached a new level of discord in a 2-1-2 decision striking the balance in favor of protecting individual statutory rights and overruling its prior decisions to defer to arbitration in discrimination cases.[128]

HPERB had reached the same result in 1974, asserting its jurisdiction where charges of coercion and discrimination were involved.[129] Again, the deferral issue was not controversial;[130] the board's decision did not cite *Collyer* or its progeny and treated the equivalent section 8(a)(1)[131] considerations in a single conclusory sentence, stating that the prohibited practice allegations "are not referrable to arbitration."[132]

The dispute involved an amnesty provision in a settlement that followed an illegal teacher strike. The union contended that the general nondiscrimination language of the agreement precluded the board of education from computing seniority credit based on a prestrike formula which resulted in a loss of one month's credit for the illegal strikers. Since employment and salary status hinged on seniority, HPERB declined to defer to arbitration primarily to avoid the chaos that would occur if the dispute were not resolved before the next school year.[133] In other words, the board will not defer to the bargained-for method of dispute resolution

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bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award.

[125] 192 N.L.R.B. at 842-43.

[126] *Id.* at 846 (Fanning, Member, dissenting); *id.* at 850 (Jenkins, Member, dissenting).

[127] National Radio Co., Inc., 198 N.L.R.B. 527 (1972).

[128] General American Transp. Corp., 228 N.L.R.B. 808 (1977), *discussed in* 1978 S. ILL. U.L.J. 98.

[129] Hawaii State Teachers Ass'n, I H.P.E.R.B. 442 (1974), *enforced*, Civ. No. 42780 (1st Cir. Hawaii Feb. 27, 1976), *aff'd*, 60 Hawaii 361, 590 P.2d 993 (1979). The board of education asked HPERB to defer to arbitration, even though the union had not filed a grievance, because one of the charges involved violation of the collective bargaining agreement, *id.* at 446, but the union also had filed charges of coercion and discrimination under section 89-13(a)(1) and (3) of Hawaii Revised Statutes, *id.* at 444, that are equivalent to 8(a)(1) and (3) violations under the federal law. *Compare* 29 U.S.C. § 158(a)(1), (3) (1976), *with* HAWAII REV. STAT. § 89-13(a)(1), (3) (1976).

[130] The dissent dealt only with the merits of the case, I H.P.E.R.B. at 455 (Clark, Member, dissenting).

[131] *See* note 129 *supra*.

[132] I H.P.E.R.B. at 447.

[133] *Id.* at 446-47.

where it perceives the public interest requires speedy resolution by HPERB.[134] In reaching its conclusion, the board relied exclusively on two United States Supreme Court decisions[135] which dealt with NLRB jurisdiction, not deferral.[136] Presumably, the speedy-resolution rationale for nondeferral will remain limited to the peculiar circumstances of the 1974 case.[137]

In contrast, HPERB's decisions involving management rights establish a solid pattern of nondeferral.[138] The board's tenacious exercise of jurisdiction in this area is best illustrated by *Hawaii Government Employees' Association, Local 152, HGEA/AFSCME, AFL-CIO,*[139] decided only a few months after the declaratory rulings that culminated in the *Fasi* ap-

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[134] HPERB issued its decision, dismissing the charges against the board of education, on July 9, 1974; the circuit court upheld the order two years later; and the controversy was finally resolved when the supreme court affirmed the lower court on April 26, 1979. *See* note 129 *supra.*

[135] I H.P.E.R.B. at 446 (discussing NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967)).

[136] NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 30 n.7 (1967) (NLRB has jurisdiction over unfair labor practice although section 301 action is available for breach of contract resulting from same conduct); NLRB v. C & C Plywood Corp., 383 U.S. 421, 428-29 (1967) (contractual defense does not divest NLRB of jurisdiction over unfair labor practice, even where interpretation of no-strike contract clause is required to determine 8(a)(1) claim for reinstatement). HPERB's reliance on these cases appears misplaced, particularly since in briefly discussing the NLRB's nondeferral, the Court in *Plywood* found it highly significant that the collective bargaining agreement there did not require arbitration as a final grievance procedure. *Id.* at 426.

[137] Indeed, HPERB noted that it had dismissed charges in an earlier case in which the petitioner's primary complaint was the delay surrounding the grievance procedure, I H.P.E.R.B. at 446 (citing Edward A. Arrigoni, I H.P.E.R.B. 435 (1974)). Moreover, the speedy-resolution argument for nondeferral generally makes little sense, since the board has ordered contract compliance with arbitral procedures to ensure prompt disposition of disputes, State of Hawaii Organization of Police Officers (SHOPO), I H.P.E.R.B. 715, 720 (1977) (order to submit dispute to arbitration and report on extent of compliance with order within 45 days). *Cf.* Columbia Typographical Union No. 101, Int'l Typographical Union of North America, AFL-CIO, 219 N.L.R.B. 88 (1975), *enforced,* 540 F.2d 841 (6th Cir. 1976) (NLRB reinstated complaint where party did not comply with reasonable promptness).

[138] *See* cases cited in note 115 *supra.* In Hawaii Gov't Employees' Ass'n, Local 152, HGEA, AFSCME, AFL-CIO, I H.P.E.R.B. 641, 646 (1977), the board declined to defer to arbitration in part because the "dispute involves the statutory question of whether the installation, use, and removal of the two-way radios [in liquor inspectors' cars] constitutes a term and condition of employment subject to negotiation" under the statutory duty to bargain. Again, the employer interposed a management rights defense to claim that the subject was non-negotiable. *Id.* at 647. The actual charge involved management's failure to sign a memorandum of agreement on the issue after it had been discussed. Hence, an alternative holding for nondeferral was the fact that the subject was not yet covered by the contract and therefore was not arbitrable. *Id. Accord,* Teamsters Union Local No. 85, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 206 N.L.R.B. 500 (1973) (no deferral where union allegedly violated section 8(b)(3) by refusing to sign supplemental oral agreement because issue did not turn on resolution of contract interpretation).

[139] I H.P.E.R.B. 559 (1975).

peal.[140] Following board action in *Fasi*, it was reasonable to expect HPERB would not defer to arbitration when an employer sought agency disposition of a "purely legal question" by raising a section 89-9(d) defense to a prohibited practice charge.[141] But linking nondeferral only to the defense-based request for a ruling would give the employer an unfair advantage in choosing its forum. *HGEA* made it clear that labor could effect the same result as management by claiming that the union's statutory right to bargain over terms and conditions of employment was being violated.[142]

The *Fasi*-type rationale was applied in *HGEA* where its extension exposes the logic as a denial of basic *Collyer* principles. This is particularly ironic since *HGEA* was the first deferral decision to cite *Collyer*.[143] The specific issue in *HGEA* was whether the employer was required to negotiate a change in the work schedule of a building custodian supervisor. The union did not object to the actual hours established for Supervisor Kam but insisted on more than consultation rights in the matter.[144] The employer requested deferral to arbitration based on its several contractual defenses, including a broad management rights reservation.[145] But the board viewed the union's statutory claim of the duty to bargain, circumscribed by the employer's statutory defense of non-negotiability, as controlling.[146]

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[140] *See* text accompanying notes 78-109 *supra*.

[141] *See* text accompanying notes 85-90 *supra*.

[142] I H.P.E.R.B. at 564-67. Having decided in *Fasi* that a challenge to a contractual seniority provision based on the management rights clause, HAWAII REV. STAT. § 89-9(d) (1976), presented a purely legal question, it was a small step in logic for the board to conclude that questions regarding the duty to bargain under *id.* § 89-9(a) are purely legal, since the scope of bargaining is restricted by the management rights clause. *But see* Dunau, *supra* note 13, at 77, 79-80 (duty to bargain is neither wholly statutory nor wholly contractual; regulation by NLRB, courts, or arbitrator results in overlapping functions).

[143] I H.P.E.R.B. at 565 (citation omitted) (original emphasis):

> [T]he NLRB applied . . . its deferral policy in *Collyer*, a case in which the employer's defense for its unilateral actions was that it was acting within what he believed to be his *contractual* rights . . . .
>
> Though the employer defends its unilateral act in changing the work schedule, to a large extent on contractual rights, . . . the threshold issue involves statutory rights.

[144] *Id.* at 562. The board reached a narrow holding, confined to the specific facts of this case, that management has "an inherent right" to change a supervisor's work schedule where the change is required to coordinate the supervisor's schedule with the work hours of the employees he oversees. *Id.* at 569.

[145] *Id.* at 562, 565, 567.

[146] In determining whether deferral would be appropriate in the instant case, the Board finds significant the following:

> (1) The union's primary contention is that it was deprived of its statutory right to negotiate on wages, hours and other terms and conditions of employment under Section 89-9(a), HRS.
>
> (2) The employer asserts management rights preserved under Section 89-9(d), HRS, as a defense that it was under no obligation to bargain, but merely to consult, on the change in hours.

In reaching this conclusion, HPERB appears to have inverted the NLRB analysis in *Collyer:*

> The Board is cognizant of the employer's various contractual defenses, but deems that such defenses would be relevant only after the issue of statutory rights is resolved and if it is resolved in the union's favor. This is particularly true of the employer's defense of contractual waiver by the union . . . . In the absence of a resolution favorable to the union on the threshold issue, the waiver defense is nugatory since the union could not waive a right (to bargain on the subject change in work schedule) it did not have.[147]

HPERB later explained that "an interpretation of the . . . contract is not necessary to resolve the issue of statutory rights."[148] But the *Collyer* premise is that deferral is appropriate where an arbitral decision is likely to resolve both the statutory and contractual issues.[149] Where, as here, the contract included a management rights clause, an award resolving the tension between that clause and the maintenance-of-benefits provision might well have disposed of the "legal" issue in a manner compatible with the Act.[150] HPERB, however, ignored the most closely analogous NLRB decisions applying *Collyer*[151] and again relied instead upon a Supreme Court decision involving jurisdiction.[152]

HPERB also drew an analogy between contract provisions that violate the National Labor Relations Act and those which interfere with the management rights reservation in Hawaii law.[153] While there are NLRB

> It is apparent that the dispute centers on the threshold question: What are the statutory rights and obligations of the employer and the exclusive representative under the Act?

Id. at 564.

[147] *Id.*

[148] *Id.* at 567.

[149] *See* note 123 *supra.*

[150] For a pre-*Collyer* discussion of the rationale favoring deferral in no-waiver private sector cases see Note, *supra* note 109, at 1216.

[151] United States Postal Service, 207 N.L.R.B. 398 (1973) (deferral where employer asserts *inter alia* that Postal Reorganization Act of 1970 empowered employer to make unilateral changes eliminating postal carrier routes); Radioear Corp., 199 N.L.R.B. 1161 (1972) (deferral since contract language and implementation are at the heart of the dispute where 8(a)(5) refusal-to bargain charged and employer defends on basis of "zipper clause" in contract which is claimed to constitute "clear and unequivocal" waiver of employer's statutory obligation to refrain from unilateral action); Southwestern Bell Tel. Co., 198 N.L.R.B. 569 (1972) (deferral where union alleged 8(a)(5) and (1) violations resulting from employer's unilateral changes in working conditions and seniority lists).

[152] I H.P.E.R.B. at 565 (quoting NLRB v. C & C Plywood, 385 U.S. 421 (1969)). See note 136 *supra.*

[153] I H.P.E.R.B. at 566 (referring to closed shop and hiring hall restrictions). The approach of other states to similar issues in the public sector has been mixed. *Compare* Pennsylvania Lab. Relations Bd. v. Butler Educ. Ass'n, 30 Pa. Commw. Ct. 549, 375 A.2d 1341 (1977) (arbitration of union grievance seeking dismissal of teacher for nonpayment of dues appropriate even though court had decided in prior case that arbitral award requiring dis-

cases holding that deferral is inappropriate when the validity of a contract provision is the essential issue,[154] the board in *HGEA* was not confronted with a contractual provision that even arguably would be illegal on its face. Arbitration under those circumstances, at least, would better effectuate the policies underlying deference to the contractual mechanism, even if on later review HPERB found the award inconsistent with the mandates of the Act.[155] Instead, the board has transformed management rights issues into a talisman for ensuring that HPERB will preempt the contractual means for dispute resolution.

In summary, HPERB has applied the *Collyer* principles only where narrow questions of arbitrability were involved. For example, where a union filed a complaint of contract violation against an employer who refused to arbitrate on the ground that the grievance was not arbitrable because it was not timely filed at an intermediate level, HPERB ordered the parties to submit the grievance to an arbitrator to permit him to determine his jurisdiction.[156]

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charge is invalid), *with* Churchill v. S. A. D. # 49 Teachers Ass'n, 380 A.2d 186 (Me. 1977) (court not required to defer to arbitration in declaratory judgment action contesting legality of agency shop provision of collective bargaining agreement); Smigel v. Southgate Community School Dist., 388 Mich. 531, 202 N.W.2d 305 (1972) (reversing lower court refusal to issue injunction where matter not pending before state labor board and construing collective bargaining law to prohibit agency shop provision).

[154] *See, e.g.*, International Organization of Masters, Mates & Pilots, AFL-CIO, 220 N.L.R.B. 164 (1975) (nondeferral of arbitration to enforce contract provision alleged to violate section 8(e) hot cargo prohibition in part because third parties not involved in arbitration are affected); Columbus Printing Pressmen & Assistants' Union No. 252, Subordinate to IP & GCU, 219 N.L.R.B. 268 (1975), *enforced*, 543 F.2d 1161 (5th Cir. 1976) (issue does not concern meaning of existing contractual provision but whether interest arbitration provision is mandatory subject of bargaining, and if it was not, if bargaining to impasse on the subject violates section 8(b)(3); no deferral); International Union of Operating Eng'rs, Local No. 701, AFL-CIO, 216 N.L.R.B. 233 (1975) (deferral inappropriate where contract provision on its face violates section 8(e) "hot cargo" prohibition; union had filed grievance to enforce contract provision, but arbitrator refused to decide legality because of pending 8(e) charge which board decided), *quoted with approval in* Danielson v. International Organization of Masters, 521 F.2d 747, 755 (2d Cir. 1975); Fenix & Scisson, Inc., 207 N.L.R.B. 752 (1973) (question of validity of contract under section 8(f) construction prehire provision is for Board, not arbitrator).

[155] *See* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 16 (1974) (approving NLRB deferral policy). *But cf.* Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977) (supplementing *Spielberg* criteria for postarbitration review of alleged section 7 rights violations).

[156] State of Hawaii Organization of Police Officers (SHOPO), I H.P.E.R.B. 715 (1977).

> Under this contractual provision, and pertinent decisional law, the Employer in this case may not unilaterally determine the arbitrability of the subject grievances which is what, in fact, he attempted to do by unilaterally determining that the matter could not go to arbitration. *The decision on arbitrability is for the arbitrator to make.* When the issue of the arbitrability of the grievances is submitted to an arbitrator, then the Employer may raise his assertions that noncompliance with the time limits renders the grievances nonarbitrable.
>
> The Employer's failure to utilize the total grievance procedure as outlined in the con-

HPERB's approach to deferral therefore suggests a dichotomy between procedural and substantive arbitrability, which might be termed the difference between questions of arbitrability and negotiability.[157] The distinction is not readily apparent from *Collyer* or its progeny,[158] but must find its source in the diversity between the federal and state statutes being construed.[159]

In Pennsylvania, however, the courts have not found such distinctions relevant to the labor board's deferral policy. Arbitration of grievances is mandatory,[160] and the labor board must order arbitration so long as the complaint is considered a grievance.[161] This is so despite a statutory management rights provision regarding the scope of bargaining[162] and case law holding that the board has jurisdiction in the first instance to define the scope of bargaining.[163] In *Association of Pennsylvania State College & University Faculties v. Commonwealth*,[164] for example, the union filed a grievance for failure to arbitrate a dispute according to the collective bargaining agreement. The employer defended on the ground that the underlying dispute, failure of the employer to submit a budget to the legislative body to fund the contract, was not arbitrable because an award requiring budget submission would contravene the management rights

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tract is a prohibited practice . . . .

Id. at 720 (emphasis added). *Accord*, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Suffern Distribs., Inc. v. Local 153, Office & Professional Employees Int'l, 39 App. Div. 2d 713, 331 N.Y.S.2d 876 (1972); School Comm. v. Pawtucket Teachers Alliance, _ R.I. _, 390 A.2d 386 (1978).

[157] *Cf.* Newark Teachers Local 481 v. Board of Educ., 149 N.J. Super. 367, 373 A.2d 1020 (Super. Ct. Ch. Div. 1977) (court decides arbitrability; PERC decides negotiability).

[158] Radioear Corp., 214 N.L.R.B. 362 (1974) (suggesting arbitrator has jurisdiction to decide legality of employer's unilateral action as well as its effect under the collective bargaining agreement). *See* Stephenson v. NLRB, 550 F.2d 535, 538 & n.4 (9th Cir. 1977) (NLRB deference to arbitration award proper only where arbitrator's decision specifically dealt with the statutory issue). Arbitrators' errors may be remedied on later review. *See, e.g.*, Milwaukee Police Ass'n v. City of Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979) (vacating award regarding transfer request and seniority provisions of contract where collective bargaining agreement contained management rights language of the law and arbitrator relied on case law since overruled in reaching his decision; award was not derived from the essence of the contract).

[159] The recent change in NLRB posture on section 7 rights, *see* text accompanying notes 127-28, may provide an analogy to HPERB's treatment of management rights, expressly protected by state statute. Thus, HPERB's approach may reflect the state agency's equal concern for individual rights, *see* text accompanying notes 129-32, and reserved government powers, both perceived as central to the state statutory scheme. *See* note 175 *infra*.

[160] PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1978-1979). *See* note 23 *supra* and accompanying text.

[161] *E.g.*, Pennsylvania Lab. Relations Bd. v. Butler Educ. Ass'n, 30 Pa. Commw. Ct. 549, 375 A.2d 1341 (1977).

[162] PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1978-1979).

[163] Pennsylvania Lab. Relations Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975).

[164] 30 Pa. Commw. Ct. 403, 373 A.2d 1175 (1977).

clause. The board agreed, and determined that the employer had not violated its obligations to bargain or to discuss the grievance. The commonwealth court reversed the board, holding that it was error to determine before arbitration that a possible remedy which an arbitrator might fashion could infringe upon the Governor's decisionmaking authority.

Pennsylvania has applied the same standard for deferral to the labor board that courts use in prearbitration situations.[165] The focus is on the remedy ordered by the arbitrator. Because the remedy gives meaning to the disputed contract provision as interpreted by the arbitrator, one might argue that only the remedy is relevant to HPERB's determination whether a contract provision offends the management rights clause.[166]

3. *After Arbitration.*—From its first jurisdiction decision, HPERB appeared to be adopting the *Collyer-Spielberg* approach of the NLRB.[167] This contemplates deferral to arbitration under *Collyer*, coupled with deference to the arbitral award so long as it meets the three-pronged *Spielberg* test.[168] One commentator has suggested that there is little difference between retaining jurisdiction to review an award and deciding the issues in the first instance.[169] The NLRB seemed to recognize this in the early 1970's by expanding its *Spielberg* policy, giving deference to

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[165] School Comm. of Southbridge v. Brown, _ Mass. _, 377 N.E.2d 935 (1978); School Comm. of Danvers v. Tyman, 372 Mass. 106, 360 N.E.2d 877 (1977); School Comm. of Burlington v. Burlington Educators Ass'n, _ Mass. App. Ct. _, 385 N.E.2d 1014 (1979); Kaleva-Norman-Dickson School Dist. No. 6 v. Kaleva-Norman-Dickson School Teachers' Ass'n, 393 Mich. 583, 227 N.W.2d 500 (1975), *appeal dismissed sub nom.* Crestwood Educ. Ass'n v. Board of Educ., 427 U.S. 901 (1976). *Contra*, Van Gorder v. Matanuska-Susitna Borough School Dist., 513 P.2d 1094 (Alaska 1973). Deferral is well established by federal courts which decline to rule on speculative results. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); United Steelworkers of America v. American Int'l Aluminum Corp., 334 F.2d 147 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965). See note 229 *infra*.

[166] *Cf.* Pennsylvania Lab. Relations Bd. v. Butler Educ. Ass'n, 30 Pa. Commw. Ct. 549, 375 A.2d 1341 (1977) (arbitration was proper in dispute arising out of contract provision expressly conditioning employment on payment of union dues, even though the court had decided in another case that an award which discharges teacher for nonpayment is illegal). *But see* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974) (no remand to determine arbitrability of grievance alleging violation of contract standards for involuntary transfer of teacher where ultimate decision involves assessment of teacher's qualifications and court had decided in another case that such assessment cannot be delegated to an arbitrator).

[167] Hawaii State Teachers Ass'n, I H.P.E.R.B. 251 (1972), *enforced in part*, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973), *discussed in* text accompanying notes 117-25 *supra*. This case also demonstrates postarbitration review through prohibited practice charges. *See* note 69 *supra*.

[168] *See* note 124 *supra*.

[169] There seems to be no difference in principle between *Spielberg*, where the offices of the NLRB were invoked after an arbitral award had been rendered, and the situation in which arbitration is available but is bypassed in favor of proceedings before the NLRB. The consideration of "voluntary settlement" is as much defeated by ignoring the contractual forum as by attempting to relitigate its award.

Dunau, *supra* note 13, at 59-60.

arbitral awards even when the specific unfair labor practice issue was not clearly decided by the arbitrator.[170] In 1980, the Board retreated from this expansion,[171] a retrenchment which may have been influenced by decisions of the Ninth Circuit[172] and District of Columbia Circuit.[173]

The controversial aspect of NLRB postarbitration deference has been avoided by HPERB largely because the state deferral policy has been so restrictive.[174] HPERB's penchant for deciding statutory issues at the outset has made nearly obsolete the third *Spielberg* criterion for retained jurisdiction to review an award's conformity with the law and its underlying policies.[175]

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[170] Electronic Reproduction Serv. Co., 213 N.L.R.B. 758 (1974).

[171] The Board can no longer adhere to a doctrine which forces employees in arbitration proceedings to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter. Accordingly, we hereby expressly overrule Electronic Reproduction [*sic*] and return to the standard for deferral which existed prior to that decision. In specific terms, we will no longer honor the results of an arbitration proceeding under Spielberg [*sic*] unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator.

Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. (BNA) 1113, 1114 (Jan. 8, 1980) (footnote omitted).

[172] Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977), *discussed in* 11 LOY. L.A.L. REV. 199 (1977).

[173] Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

[174] *See* text accompanying notes 111-12 *supra*.

[175] *See* text accompanying notes 138-59 *supra*. The board did retain jurisdiction in one case where the parties stipulated to arbitration during HPERB proceedings. Hawaii State Teachers Ass'n, H.P.E.R.B. Case No. CE-05-5 (May 16, 1973), *appeal dismissed*, Civ. No. 39567 (1st Cir. Hawaii Feb. 12, 1975). After the award was issued, the employer moved that the board review it on the ground that the arbitrator had exceeded his authority. Over the union's objections, the board again ruled that it has authority to review an arbitrator's award where deferrals are made, based on equivalent *Spielberg* standards. Order Granting Review of Arbitration Decision at 6-16 (May 16, 1973). The board noted, however, that the arbitrator expressly limited his decision to an interpretation of the contract provisions in dispute and did not attempt to determine the legality of the provisions. *Id.* at 12-16. "Given . . . [the arbitrator's] avoidance of addressing himself to the legality of the subject contract provisions, it falls to the Board which was created 'to administer the provisions of' [chapter 89, HRS] to rule on the legality of the subject contract provisions." *Id.* at 16 (footnote omitted). The board later explained that "it does not encourage arbitration . . . where the arbitrator in rendering his award totally disregards the law which sets the boundaries of public sector collective bargaining." *Id.*

The board vacated the award which purported to order the board of education to provide duty-free preparation periods during the student's school day on the authority of Department of Educ., I H.P.E.R.B. 311 (1973) (declaratory ruling that *scheduling* of preparation periods is management prerogative), and likewise vacated the award requiring the employer to hire additional teachers, not other kinds of workers, to accomplish the duty-free preparation period objective on the authority of Hawaii State Teachers Ass'n, I H.P.E.R.B. 251 (1972), *enforced in part*, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973), *discussed in* note 69 *supra*.

> It is necessary to conclude that what the Legislature forbade the parties to agree to under Section 89-9(d), HRS, it did not intend to permit them to agree to by going through the arbitration procedure. Here the distinction between public and private sec-

HPERB's most interesting postarbitration decisions have involved declaratory rulings which consider the potential conflict between the administrative agency and circuit courts to review an award.[176] It is primarily the dicta rather than the holdings of these decisions which are significant because they offer contradictory responses.

In *Hawaii State Teachers Association*,[177] an employer petitioned for a declaratory ruling that a portion of the award was contrary to the Act and should be vacated. The petition was filed seventeen months after the rendition of the award.[178] The board dismissed the petition for two reasons: first, holding that it would be contrary to the "spirit, intent and basic purpose" of the Act to vacate the arbitration award;[179] and second, recognizing that the proper forum for the modification or vacation of the award was the circuit court under the Arbitration Act.[180] The board made little effort to explain why the latter reason should not apply in every case where a party effectively seeks to vacate or modify an award by invoking agency review.[181]

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tors must be kept in mind and it must be remembered that Section 89-9(d), HRS, seeks to place and preserve managerial responsibility for running government agencies in the hands of officials elected by and accountable to the public.

Order Granting Review of Arbitration Decision at 17.

[176] *See* note 62 *supra*.

[177] I H.P.E.R.B. 523 (1974).

[178] The case involved a settlement reached through voluntary interest arbitration. The agreement between the parties required arbitration of future disagreements over modifications of the award based on an impasse notice which the employer was contending before HPERB conflicted with the impasse notice requirements of the Act and therefore contravened statutory policy.

[179] If this Board were to overturn the Kagel award . . . it would be acting in a manner completely contrary to the spirit, intent and basic purpose of . . . [the Collective Bargaining Act] and the mission of this Board which are [*sic*] to promote harmonious and cooperative relations between government and its employees, and encourage parties to any labor dispute to voluntarily settle their differences.

I H.P.E.R.B. at 526.

[180] Although we rest our refusal to grant the requested declaratory order herein on the grounds stated above [*see* note 172 *supra*], we also take cognizance of the HSTA's argument that the proper forum to which the BOE [board of education] should have taken its request for what is, in effect, a vacation or modification of the Kagel award is the Circuit Court under Chapter 658, HRS [the Arbitration and Awards Act]. The BOE is aware that the Circuit Court has in the past taken jurisdiction over a case involving an arbitration award rendered under [the Collective Bargaining Act] . . . . *Certainly, if the BOE felt it had grounds for a modification or vacation of the Kagel award, it should have moved the Circuit Court under Section 658-11, HRS, for relief.*

Id. (citation omitted) (emphasis added).

[181] The board found this case "clearly distinguishable" from its earlier decision involving prohibited practice charges and management rights defenses thereto, based on the same interest arbitration award. *Id.* at 526 (distinguishing Hawaii State Teachers Ass'n, I H.P.E.R.B. 251 (1972), *enforced in part*, Civ. No. 38086 (1st Cir. Hawaii Mar. 30, 1973), *discussed in* notes 69-74, 116-19 *supra* and accompanying text). The distinction was so clear to the board that it was left unexplained. One may conjecture that the board found the management rights issue in the earlier case more important than the impasse notice policies

A procedural device brought about the same result in the next effort to have the board vacate an arbitration award. The employer in *George R. Ariyoshi, Governor of the State of Hawaii*[182] petitioned for a declaratory ruling that an award violated the management rights section of the Act. Unlike the prearbitration situation in *Fasi*, the union here did not intervene; the employer was the only party in the case, and the hearing was ex parte. The employer contended that (1) the board has *exclusive* jurisdiction over all prohibited practice violations;[183] and (2) the employer's failure to implement the award and authorize the necessary expenditure *might* constitute a violation of the arbitration provision of the collective bargaining agreement and therefore be a prohibited practice.[184] HPERB refused to act on the petition ex parte because of insufficient evidence.[185] The board held that it had jurisdiction to issue a declaratory ruling under the supreme court's decision in *Fasi*.[186] Without mentioning *Teachers Association*, HPERB raised a question whether its jurisdiction would supersede circuit court jurisdiction in the pending proceeding to vacate the same award under the Arbitration Act.[187] The board, however, also de-

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claimed to be violated in this case. Although the earlier case arose on prearbitration prohibited practice charges rather than a declaratory ruling petition, this would not appear to be significant in light of the board's policy to issue prearbitration declaratory rulings where management rights are involved.

[182] II H.P.E.R.B. 322 (1979). The arbitrator had decided that summer duties assigned to school administrative services assistants were compensable under the contract. The director of personnel services, however, advised the board of education that such duties were included in the employees' classification. Hence, education officials claimed that the arbitrator's award encompassed non-negotiable items since the statute expressly excludes "matters of classification and reclassification" from subjects of negotiation, HAWAII REV. STAT. § 89-9(d) (1976). See note 17 *supra*.

[183] II H.P.E.R.B. at 328.

[184] *Id.* The possibility that the board would ever take action in this case was more attenuated than in *Fasi* where a grievance had been filed and the employer refused to arbitrate, *see* text accompanying note 79 *supra*. Here HPERB noted that four employees had asked for pay under the arbitration award, and "[t]hese four . . . arguably could file a prohibited practice against the Employer." *Id.* at n.9.

[185] *Id.* at 331-32.

[186] *Id.* at 329-31 (quoting Fasi v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 436, 442-43, 591 P.2d 113, 117-18 (1979)).

[187] While this Board is of the opinion that it has jurisdiction over the subject declaratory ruling petition, nothing which has come to its attention during the course of these proceedings is instructive as to whether such jurisdiction in any way precludes a court from acting pursuant to Chapter 658 [the Arbitration and Awards Act]. If the exercise of jurisdiction by this Board would be in conflict with the Court's exercise of jurisdiction, then perhaps this Board's jurisdiction would be exclusive because of the provisions of Section 89-19 . . . [of the Collective Bargaining Act]:

> **Chapter takes precedence, when.**
>
> This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission.

clined to decide that issue in an ex parte proceeding.

HPERB's internal contradictions regarding review of arbitration awards are difficult to reconcile: First, board review is proper under retained jurisdiction;[188] next, review is the domain of circuit courts;[189] and finally, review may be an exclusive function of HPERB.[190] In the first instance, HPERB addressed its jurisdiction *vis-a-vis* the arbitrator. Only the subsequent pronouncements concerned potentially conflicting court jurisdiction, and their difference apparently derives from the supreme court's intervening *Fasi* decision. Hence, discussion of the relationship between HPERB and the courts should explore the implications of *Fasi*.

B. HPERB Versus Court Jurisdiction

The courts have become involved in the arbitration problem in two ways: first, by taking original jurisdiction on motions to vacate or confirm arbitration awards and to compel or restrain arbitrations under chapter 658 of the Hawaii Revised Statutes;[191] and second, by appeals pursuant to HAPA[192] from either the board's declaratory rulings, also issued under HAPA, or decisions and orders regarding prohibited practices, issued under chapter 89.[193] In general, potential conflict arises between HPERB's jurisdiction over prohibited practices and the original jurisdiction of circuit courts under the Arbitration and Awards Act, although the existence of multiple forums has been demonstrated in other contexts.[194] The main questions then are whether there will be one appeal route or two in public-sector arbitration and whether the standard of review will be uniform.

1. Exclusive or Concurrent Jurisdiction.—The Hawaii Arbitration

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An *ex parte* proceeding is, however, an inappropriate medium in which to explore this question of potentially conflicting jurisdiction and the Board declines to rule on whether the jurisdiction it has to review the arbitration award in this declaratory ruling case is concurrent or exclusive.

II H.P.E.R.B. at 331.

[188] *See* text accompanying note 117 *supra* and note 175 *supra*.

[189] *See* note 180 *supra*.

[190] *See* note 187 *supra*.

[191] HAWAII REV. STAT. ch. 658 (1976). See notes 41-42 *supra* and accompanying text.

[192] *See* notes 34-37 *supra* and accompanying text.

[193] *See* notes 38-39 *supra* and accompanying text.

[194] *Compare* Gealon v. Keala, 60 Hawaii 513, 591 P.2d 621 (1979) (individual police officer appeals decision of superiors under HAPA dismissing grievance because untimely filed; court decides if grievance were timely under contract), *with* Bruce J. Ching, II H.P.E.R.B. 23 (1978) (individual police officer files prohibited practice with HPERB alleging that employer's interpretation of contract, not allowing individual to proceed to arbitration in grievance procedure, violates policy of Collective Bargaining Act), *and* State of Hawaii Organization of Police Officers (SHOPO), I H.P.E.R.B. 715 (1977) (union files prohibited practice charge with HPERB where employer refuses to arbitrate on ground earlier grievance procedure was untimely filed).

and Awards Act provides that written contracts containing provisions for arbitrating controversies arising out of the contract are enforceable, and parties to such contracts may be compelled to arbitrate.[195] Arbitration awards will be confirmed except under the circumstances set forth in the statute.[196] The Act contains no exception for any type of arbitration agreement; accordingly, public collective bargaining agreements providing for arbitration are covered.[197]

HPERB has suggested, however, that its jurisdiction to issue a declaratory ruling on the legality of a contract provision may oust the circuit courts of original jurisdiction under the Arbitration Act.[198] HPERB apparently drew support for this argument from the recent supreme court decision in *Fasi*, where HPERB's jurisdiction to declare what constitutes prohibited practices is derived from its jurisdiction to prevent them.[199] Therefore, the logical extension of HPERB's argument is that circuit courts are preempted whenever an action under the Arbitration Act arguably presents a prohibited practice. Moreover, since violation of a collective bargaining agreement (to arbitrate or to consider an award final) is a prohibited practice, this reasoning always would preclude original circuit court jurisdiction. But *Fasi* supports neither HPERB's argument nor its extension.

The parties in *Fasi* had not invoked circuit court jurisdiction under the Arbitration Act; the court held only that HPERB was not deprived of

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[195] Gregg Kendall & Assoc. v. Kauhi, 53 Hawaii 88, 488 P.2d 136 (1971) (private sector case requiring lower court to stay action and order arbitration even though arbitration was not exclusive remedy in contract). See note 229 *infra*.

[196] *See* notes 42-44 *supra* and accompanying text.

[197] Since the final-offer interest arbitration for firefighters is imposed by statute and required to be final and binding, it may not admit of review. *Cf. In re* City of Washington, 436 Pa. 168, 259 A.2d 437 (1969) (interest arbitration statute precludes appeal but court will allow review under special rules of appellate procedure); City of Providence v. Local 799, Int'l Ass'n of Firefighters, 111 R.I. 586, 305 A.2d 93 (1973) (arbitration is final and binding on both parties and therefore immune from appeal by declaratory judgment or statutory appeal but reviewable on discretionary common-law writ of certiorari). *But see* Maquoketa Valley Community School Dist. v. Maquoketa Valley Educ. Ass'n, 279 N.W.2d 510 (Iowa 1979) (agency review standards applicable); Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 286 A.2d 1290 (1978) (agency review applicable; review should be broader because arbitration is compulsory); Caso v. Coffey, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976) (arbitration statute applicable). Some states have codified the means and standard of review for compulsory interest arbitration. *See, e.g.*, City of Alpena v. Alpena Fire Fighters Ass'n, 56 Mich. App. 568, 224 N.W.2d 672 (1974) (statutory appeal to circuit court on narrow grounds of fraud or collusion, but due process requires procedural review to ensure statutory criteria was basis of award); Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wash. 2d 156, 542 P.2d 1252 (1975) (construing arbitration statute establishing arbitrary and capricious standard); Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County, 64 Wis. 2d 651, 221 N.W.2d 673 (1974) (arbitration statute incorporates review under statute generally applicable to all arbitrations).

[198] *See* note 187 *supra* and accompanying text.

[199] *See* text accompanying note 99 *supra*.

jurisdiction by the existence of the arbitration statute.[200] In other words, the circuit court's original jurisdiction is not exclusive.

Fasi did make it clear that HPERB has power to issue declaratory rulings on the legality of contract provisions under the Collective Bargaining Act even where the contract provides for the arbitrator to make such decisions.[201] But the rationale for barring declaratory judgments on similar matters is not transferable to the Arbitration Act. A declaratory judgment seeks to adjudicate the rights of the parties under the agreement, in violation of its terms, said the court. An action under the Arbitration Act seeks compliance with agreements to arbitrate and enforcement of arbitral decisions implementing contract terms. Hence, the *Fasi* analysis cannot be the basis for preclusion under the arbitration statute.

HPERB primarily based its preclusion suggestion on section 89-19 of the statute, which gives the Collective Bargaining Act precedence over conflicting legislation.[202] The same theory has ousted Oregon courts of jurisdiction under the arbitration statute. In *Smith v. State*,[203] the court of appeals held that the legislature intended only one forum, and the arbitration statute therefore was superseded by the collective bargaining law; the employment relations board has exclusive jurisdiction to order arbitration because violation of a contract, including an agreement to arbitrate or to accept an award as final and binding, is a prohibited practice.[204]

Since Hawaii's arbitration legislation existed long before collective bargaining, it is similarly vulnerable *if* it conflicts with the bargaining law. At the outset, it should be recalled that Hawaii's law provides as follows: "Any controversy concerning unfair labor practices may be submitted to the [public] employment relations board in the manner and with the effect provided in . . . chapter [89], but nothing herein shall prevent the pursuit of relief in courts of competent jurisdiction."[205] There is no valid basis for the HPERB suggestion that circuit courts may be foreclosed from the exercise of their jurisdiction under the Arbitration Act.

The Wisconsin Supreme Court has construed similar statutory language allowing "pursuit of legal or equitable relief"[206] to permit a declaratory judgment regarding whether particular employees were covered by

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[200] *See* notes 96-102 *supra* and accompanying text.

[201] *See* text accompanying notes 103-04 *supra*.

[202] *See* note 187 *supra*.

[203] 31 Or. App. 15, 569 P.2d 677 (1977).

[204] The board also has exclusive jurisdiction over the scope of bargaining, of course. *See* Springfield Educ. Ass'n v. Springfield School Dist. No. 19, 25 Or. App. 407, 549 P.2d 1141, *cert. denied by Ore. Sup. Ct.* (1976) (proper procedure is court remand to board to determine whether proposed subject was permissive or mandatory bargaining item following reversal of original board determination); Sutherlin Educ. Ass'n v. Sutherlin School Dist. No. 130, 25 Or. App. 85, 548 P.2d 204 (1976).

[205] HAWAII REV. STAT. § 377-9(a) (1976). See note 38 *supra*.

[206] WIS. STAT. ANN. § 111.07(1) (West 1974).

the collective bargaining act.[207] Subsequent decisional law leaves no doubt that Wisconsin has two appeal routes for public-sector arbitration: one, through the labor relations commission; the other, through the courts.[208] The bargaining law in Wisconsin, like Oregon and Hawaii, has a conflict-of-provisions section,[209] and violations of collective bargaining agreements, including agreements to accept an arbitral award, are unfair labor practices.[210]

The conflicting Wisconsin and Oregon models are not the only available options. Pennsylvania resolved the situation by appellate court rules establishing exclusive court jurisdiction to affirm or vacate arbitration awards,[211] a system deemed compatible with the board's exclusive power to enforce unfair labor practices,[212] among which is failure to abide by an arbitrator's decision.[213] The Pennsylvania Supreme Court reasoned that efficient administration of justice dictated one appeal route which would simplify the board's function by confining its inquiry to the following questions: (1) Had there been an arbitration award? (2) Did the parties exhaust appeal procedures through the courts? (3) Did the parties comply with the award?[214] At the same time, Pennsylvania courts do not have jurisdiction either to order compliance with an award (since noncompliance is a prohibited practice)[215] or to enjoin an arbitration that arguably

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[207] City Firefighters Local 311 v. City of Madison, 48 Wis. 2d 262, 179 N.W.2d 800 (1970).

[208] By statute, arbitrations that involve the commission are reviewable under the Wisconsin Arbitration Act. WIS. STAT. ANN. § 111.10 (West 1974). The collective bargaining agreement in Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, 78 Wis. 2d 94, 253 N.W.2d 536 (1977), provided for the commission to choose the arbitrators, but the commission did not participate. Hence, the statute was not significant to the decision which allowed for judicial review in any event, either under the arbitration law or under the common law. *Cf.* Browne v. Milwaukee Bd. of School Directors, 83 Wis. 2d 316, 267 N.W.2d 379 (1978) (proper for court to stay proceeding while board determines fair-share-dues factual issues to avoid possible prejudice to parties otherwise denied the administrative hearing). *See also* Wisconsin Employment Relations Comm'n v. Teamsters Local 563, 75 Wis. 2d 602, 250 N.W.2d 696 (1977); Madison Metropolitan School Dist. v. Wisconsin Employment Relations Comm'n, 86 Wis. 2d 249, 272 N.W.2d 314 (App. Ct. 1978).

[209] WIS. STAT. ANN. § 111.17 (West 1974).

[210] *Id.* § 111.06(1)(f), (2)(c).

[211] PA. R. APP. P. 703; PA. R. CIV. P. 2101.

[212] PA. STAT. ANN. tit. 43, § 1101.1301 (Purdon Supp. 1978-1979).

[213] *Id.* § 1101.903.

[214] Pennsylvania Lab. Relations Bd. v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (1978). A grievance involving a demotion resulted in an arbitral award requiring reinstatement, which the employer did not appeal through the courts but refused to implement. The union filed an unfair labor practice charge to which the employer defended on the ground that the arbitrator exceeded his authority by using sources outside the agreement. The board refused to hear the defenses and ordered enforcement of the award. On appeal of the award, the lower court held that the labor board was compelled to consider the validity of the award, but the supreme court reversed. *See also* Scranton School Dist. v. Scranton Fed'n of Teachers Local 1147, 43 Pa. Commw. Ct. 102, 402 A.2d 1091 (1979).

[215] Geriot v. Council of Borough of Darby, 38 Pa. Commw. Ct. 337, 394 A.2d 1298 (1978).

involves an unfair labor practice.[216] But the board must order arbitration if the grievance alleges failure to arbitrate, notwithstanding the assertion of a statutory management rights defense.[217] Other jurisdictions have resolved the problem by statute, often following the federal private-sector model excluding contract violations from unfair labor practices and then explicitly authorizing court enforcement of arbitration agreements and awards through state arbitration statutes.[218]

Although the question of conflicting jurisdictions has been raised by

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[216] Hollinger v. Department of Pub. Welfare, 469 Pa. 358, 365 A.2d 1245 (1976); Koch v. Bellefonte Area School Dist., 36 Pa. Commw. Ct. 438, 388 A.2d 1114 (1978); School Dist. of Penn Hills v. Penn Hills Educ. Ass'n, 34 Pa. Commw. Ct. 507, 383 A.2d 1301 (1978). *But cf.* Parents Union v. Board of Educ., 480 Pa. 194, 389 A.2d 577 (1978) (taxpayer suit contesting constitutionality of collective bargaining agreement provisions not require board determination before court ruling on legality; proper for taxpayers and students to file complaint in court to enjoin compliance with the contract).

[217] Pennsylvania Lab. Relations Bd. v. Butler Educ. Ass'n, 30 Pa. Commw. Ct. 549, 375 A.2d 1341 (1977); Association of Pa. State College & Univ. Faculties v. Commonwealth, 30 Pa. Commw. Ct. 403, 373 A.2d 1175 (1977).

[218] *See, e.g.*, CAL. GOV'T CODE ANN. § 3541.5(b) (West Supp. Pamphlet 1967-1979) (violation of contract not prohibited practice); *id.* § 3548.7 (review of arbitration award), *discussed in* Galgani *supra*, note 45; MASS. GEN. LAWS ANN. ch. 150E, § 8 (West Supp. 1980-1981) (grievance arbitration of public employment contract provisions enforceable through arbitration statute); *id.* § 10 (refusal to participate in arbitration procedures is unfair labor practice); *id.* ch. 150C, § 2(b)(2) (West 1971) (superior court enforces arbitration agreements absent clear showing that requested award would impinge directly on nondelegable duty of school committee); WIS. STAT. ANN. § 111.10 (West 1974), *discussed in* note 208 *supra*.

New York does not empower the labor board to enforce collective bargaining agreements. N.Y. CIV. SERV. LAWS § 205-5(d) (McKinney Supp. 1979-1980). A clear pattern does not emerge from the decisions, but there is no question that judicial review of an award is allowed under N.Y. CIV. PRAC. LAWS §§ 7501, 7503, 7511 (McKinney 1980). *Compare* Binghamton Civil Serv. Forum v. City of Binghamton, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978) (if no challenge is made before arbitration, party may not complain of arbitrability after award is issued; court affirms award reducing employer's penalty from discharge to six-months' suspension without pay for receiving a bribe), *with* Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976) (decision to grant tenure to probationary teachers may not be submitted to arbitrator). *See also* Board of Educ. v. Auburn Teachers Ass'n, 49 App. Div. 2d 35, 371 N.Y.S.2d 201 (1975) (order to arbitrate does not oust labor board of jurisdiction; postarbitration review may be sought either at the board or in the courts where claim potentially involved representational issue). *But cf.* De Mila v. McGuire, 101 Misc. 281, 420 N.Y.S.2d 960 (Sup. Ct. 1979) (court without jurisdiction to enjoin unilateral action when parties already filed unfair labor practice regarding the same activity).

In the private sector, the Tenth Circuit recently reached an alternative holding that the NLRB initially must determine the legality of a contract provision under section 8 of the Labor-Management Relations Act where the claimed illegality constituted an affirmative defense in an action seeking confirmation of an arbitral award. IBEW Local 12 v. Professional Hole Drilling, Inc., 574 F.2d 497, 500 (10th Cir. 1978). *Accord*, International Bhd. of Boilermakers v. Combustion Eng'r, Inc., 337 F. Supp. 1349, 1352 (D. Conn. 1971) (granting motion to stay postarbitration enforcement proceedings pending NLRB decision involving same subject matter).

HPERB and left unresolved in Hawaii,[219] the lower courts are developing an approach much like the required procedure in New Jersey. Under that state's collective bargaining statute, refusing to process grievances presented by majority representatives is an unfair labor practice.[220] The public employment relations commission has exclusive jurisdiction over prohibited practices and exclusive power to decide the scope of negotiations.[221] The New Jersey Supreme Court has found it necessary to invoke the jurisdiction of both the commission and the superior courts in order to resolve disputes involving management rights. The court decides only narrow issues of arbitrability; that is, whether an agreement to arbitrate exists and whether the arbitration provision applies to the grievance. Where the court determines that the essential issue in dispute involves negotiability, meaning the propriety of the contractual provision requiring interpretation by an arbitrator, the court must stay the proceedings until the commission has exercised its jurisdiction by deciding the threshold issue.[222]

In the earlier public-sector cases which came before the circuit courts of the first circuit of Hawaii, motions for vacation, modification, or confirmation of awards under the Arbitration Act were summarily disposed of, much as private arbitrations had been treated for more than a century.[223] More recently, however, the first circuit has proved somewhat sympathetic to the argument that HPERB has primary jurisdiction to review the obligation of parties to arbitrate, as well as the validity of arbitration awards. Where a union sought to compel an employer to arbitrate, the court stayed its decision pending action by the board on a petition for declaratory ruling on the issue, initiated during the court proceeding;[224] and where a union sought to confirm an arbitration award, the court originally stayed its decision pending determination by the board on a petition for declaratory ruling as to the jurisdiction of the arbitrator, also initiated during the court proceeding.[225] The court confirmed the awards

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[219] *See* note 187 *supra*.

[220] N.J. REV. STAT. § 34:13A-5.4(a)(5) (Supp. 1979-1980).

[221] Board of Educ. v. Plainfield Educ. Ass'n, 144 N.J. Super. 521, 366 A.2d 703 (Super. Ct. App. Div.).

[222] Board of Educ. v. Bernards Township Educ. Ass'n, 79 N.J. 311, 399 A.2d 620 (1979); Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978); Newark Teachers Local 481 v. Board of Educ., 149 N.J. Super. 367, 373 A.2d 1020 (Super. Ct. Ch. Div. 1977).

[223] City & County of Honolulu v. Hawaii Gov't Employees' Ass'n, S.P. No. 4442 (1st Cir. Hawaii Oct. 24, 1977), *appeal docketed*, No. 6852 (Sup. Ct. Oct. 24, 1977) (dismissed without giving reasons); Hawaii State Teachers Ass'n v. Board of Educ., S.P. No. 3505 (1st Cir. Hawaii May 29, 1974) (confirmation of award where HPERB stipulated to arbitral procedure).

[224] University of Hawaii Professional Assembly v. University of Hawaii, Civ. No. 50744 (1st Cir. Hawaii Apr. 17, 1979), *appeal docketed*, Nos. 7497, 7445 (Sup. Ct. June 19, 1979, Aug. 7, 1979).

[225] Hawaii Gov't Employees' Ass'n v. Department of Educ., S.P. No. 4951 (1st Cir. Hawaii

in both cases after the board dismissed the petitions for declaratory rulings. It is not clear what the court would have done had the board ruled that the arbitrator had no jurisdiction.

One may say tentatively that the first circuit of Hawaii is acknowledging its jurisdiction under the Arbitration Act while accommodating agency expertise in applying the Collective Bargaining Act. For a court to stay an action pending a decision of HPERB at the prearbitration stage undercuts the general rule that courts customarily resolve doubts about arbitrability in favor of arbitration.[226] The consequent delay and uncertainties severely erode the salutary principles underlying grievance procedures. Aside from the debilitating effect this has on employee relations, the requirement for multiple forums does not advance administrative efficiency. More importantly, the potential for separate standards of review exists where two forums are available to deal with arbitration matters.

2. *Conflicting Standards of Review.*—Judicial review under Hawaii's Arbitration Act is confined to very narrow limits.[227] The supreme court has held that the grounds for review under the Act constitute jurisdictional restraints equally applicable to appellate review of circuit court decisions on the subject.[228]

The arbitration statute provides that a party aggrieved by the failure, neglect, or refusal of another to perform under an agreement in writing to arbitrate may apply to the court for an order requiring arbitration in the manner provided for in the agreement. There are no reported decisions on the question of whether illegality of the agreement to arbitrate by reason of the provisions of section 89-9(d), the management rights reservation, would preclude issuance of such an order. Even if one surmises that

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Jan. 21, 1980), *appeal docketed,* No. 7793 (Sup. Ct. Mar. 19, 1980). The board declined to rule whether the jurisdiction it claims to review arbitration awards is concurrent or exclusive because the matter was before it ex parte. George R. Ariyoshi, Governor of the State of Hawaii, II H.P.E.R.B. 322 (1979), *discussed in* text accompanying notes 182-87 *supra.*

[226] *See* notes 108, 165 *supra.*

> When the arbiter's award has been rendered and perhaps the Labor Board decision announced, appealed, enforced, or vacated, the trial Court can see on the basis of facts actually developed in each of the proceedings—whether, and to what extent, there is any real conflict between private arbitration and public labor law enforcement.

United Steelworkers of America v. American Int'l Aluminum Corp., 334 F.2d 147, 152 (5th Cir. 1964), *cert. denied,* 379 U.S. 991 (1965). The well-established rule that an arbitrator may consider past practice in interpreting the language of a collective bargaining contract, *see* Gealon v. Keala, 60 Hawaii 513, 521, 591 P.2d 621, 626 (1979) (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79, 581-82 (1960)), is a clear reason courts should enforce arbitration. Indeed, an order compelling arbitration is not appealable in Massachusetts and Wisconsin. School Comm. of Agawam v. Agawam Educ. Ass'n, 371 Mass. 845, 359 N.E.2d 956 (1977); Teamsters Local 695 v. Waukesha County, 57 Wis. 2d 62, 203 N.W.2d 707 (1973). See note 229 *infra.*

[227] *See* notes 41-46 *supra* and accompanying text.

[228] Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Hawaii 332, 336, 460 P.2d 317, 320 (1969). See note 46 *supra* and accompanying text.

the answer would be in the affirmative,[229] HPERB's current approach in determining arbitrability is broader.[230]

The arbitration act standards are likewise in conflict with the standards applicable to review of decisions of HPERB by the courts. Under HAPA, a court may reverse an agency action based on errors of law, distinct from statutory or constitutional violations,[231] and a liberal "clearly erroneous" standard applies to the evidentiary basis for the agency order.[232] Among the bases for review under the arbitration statute is whether the arbitrators exceeded their powers.[233] An award was vacated, for example, where the court found the arbitrators decided a question that was not entrusted to them.[234] Although the Hawaii Supreme Court has not ruled on the issue, it is likely that courts have jurisdiction to deny a remedy ordered by an arbitrator which violates section 89-9(d) of the Collective Bargaining Act. Arbitrators therefore would have exceeded their powers if an award required a public employer to do that which the management rights provision prohibits.[235]

On the other hand, mistakes by arbitrators in the application of the law and in their findings of fact, or insufficiency of the evidence, are not grounds for vacating or modifying awards under the Arbitration Act.[236]

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[229] Agreements to arbitrate are enforceable to the same extent as other contracts, HAWAII REV. STAT. § 658-1 (1976), *quoted in* note 41 *supra*. Illegal contracts generally are not enforceable, although the Hawaii Supreme Court makes a distinction between contracts that violate statutes designed to protect the public against incompetence and fraud and those which generate revenue, and the court has enforced contracts which violate the latter type of statute. Wilson v. Kealakekua Ranch, Ltd., 57 Hawaii 124, 551 P.2d 525 (1976) (rejecting defense of illegality where plaintiff was not a duly licensed architect at the time he rendered services). Thus, it is possible for a court to refuse to order enforcement of an arbitration provision where the issue to be arbitrated clearly violates section 89-9(d). *Cf.* Danielson v. International Organization of Masters, 521 F.2d 747 (2d Cir. 1975) (affirming preliminary injunction forbidding arbitration based on reasonable cause to believe that enforcement of the "hot cargo" provision would be an unfair labor practice). *But see* note 226 *supra*.

[230] *See* discussion of prearbitration deferral in Part IIA *supra*.

[231] *See* note 36 *supra*.

[232] Judicial review under the clearly erroneous standard allows "the reviewing court greater leeway to reverse a lower court's findings than the substantial evidence test applicable to review of jury verdicts . . . and the administrative fact-finding under the *federal* Administrative Procedures Act." DeFries v. Association of Owners, 57 Hawaii 296, 303, 555 P.2d 855, 859 (1976) (footnote omitted) (original emphasis). The court is nevertheless mindful of the policies underlying the statutory language applied by an administrative agency, *id.* at 303-09, 555 P.2d at 860-63, and the policy that arbitration awards generally should not be disturbed may undercut a court's inclination to annul a panel's findings.

[233] HAWAII REV. STAT. § 658-9(4) (1976), *quoted in* note 42 *supra*.

[234] Brennan v. Stewarts' Pharmacies, Ltd., 59 Hawaii 207, 579 P.2d 673 (1978).

[235] *See* note 175 *supra* and text accompanying notes 241-45 *infra*. *See also* Comment, *supra* note 13, at 957-58 & n.123 (discussing United States Arbitration Act which is similar to Hawaii's arbitration act, *see* note 42 *supra*).

[236] "The parties have voluntarily agreed to arbitrate, and they thereby assumed all the hazards of the arbitration process, including the risk that the arbitrators may make mistakes in the application of law and in their findings of fact." Mars Constructors, Inc. v.

This standard also prevails in the common law, exemplified by the *Steelworkers* trilogy,[237] and some jurisdictions have found the common-law standard no different from review under their respective arbitration statutes.[238] In Massachusetts, where the arbitration statute requires an award to be vacated if "the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law,"[239] the Supreme Judicial Court applied the errors-of-fact-or-law standard to the arbitrator's understanding of the question to be arbitrated.[240] The Massachusetts court then reviewed the scope-of-bargaining issue in deciding that the arbitrator's remedy of reinstatement did not impermissibly intrude on nondelegable duties of the school committee.[241]

More significant for our purposes are the decisions in Wisconsin where the state arbitration statute is virtually identical to sections 658-9 and -10 of Hawaii Revised Statutes.[242] The Wisconsin Supreme Court has held that there is no difference between the statutory and common-law standard.[243] In the same case, the court concluded that questions of law and fact decided by the arbitrator will not be upset, but the award will be vacated if it is illegal or violates strong public policy.[244] *Wisconsin Employment Relations Commission v. Teamsters Local 563*[245] demonstrates both the application of this principle and the necessity for establishing a single standard of review. There, the commission sought court enforcement of its order mandating the employer's compliance with an award

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Tropical Enterprises, Ltd., 51 Hawaii 332, 335-36, 460 P.2d 317, 319 (1969) (commercial arbitration).

[237] *See* note 45 *supra*. Lower federal courts have not always adhered to the dictates of the Supreme Court although lip service is paid to the trilogy principles. Comment, *supra* note 13.

[238] *E.g.*, Community College v. Community College of Beaver County, Soc'y of the Faculty, 473 Pa. 576, 375 A.2d 1267 (1977) (trilogy standard is not narrower than review under arbitration statute which allows award to be vacated when "against the law").

[239] MASS. GEN. LAWS ANN. ch. 150C, § 11(a)(3) (West 1971). The Massachusetts law is modelled after the Uniform Arbitration Act which expressly allows awards to be vacated on public policy grounds.

[240] School Comm. v. Korbut, 373 Mass. 788, 369 N.E.2d 1148 (1977). *See also* City of Boston v. Boston Police Superior Officers Fed'n, _ Mass. App. Ct. _, 402 N.E.2d 1098 (1980).

[241] *Accord*, Board of Trustees v. Cook County College Local 1600, 74 Ill. 2d 412, 386 N.E.2d 47 (1979) (arbitrators' powers are limited by nondelegation doctrine or where remedy contravenes public policy); Binghamton Civil Serv. Forum v. City of Binghamton, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978) (review of public policy issue).

[242] *Compare* HAWAII REV. STAT. §§ 658-9, -10 (1976), *with* WIS. STAT. ANN. §§ 298.10, .11 (West 1974).

[243] Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, 78 Wis. 2d 94, 116, 253 N.W.2d 536, 547 (1977). *See also* Milwaukee Police Ass'n v. City of Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979).

[244] 78 Wis. 2d at 117-18, 253 N.W.2d at 547.

[245] 75 Wis. 2d 602, 250 N.W.2d 696 (1977).

requiring reinstatement of an employee who had been discharged for noncompliance with a municipal residency law. By statute, the commission was required to utilize arbitration act standards in reviewing the award. The lower court used the same arbitration standards and reversed the agency order on the ground that the arbitrator exceeded his powers because the award contravened the residency law. On appeal, the agency argued that the court did not have jurisdiction under the arbitration statute and must confine its inquiry to the standard for enforcement of an agency order regarding a prohibited practice. The supreme court rejected this argument. The court instead looked to the nature of the agency order, found it to be a review of an arbitration award, and determined that court review therefore should employ the arbitration review standards. The supreme court then affirmed the ruling that the arbitrator had exceeded his power by rendering an award contrary to law and strong public policy.

The potential for different standards of review is endemic to Hawaii's statutory scheme. Assuming that the concurrent jurisdictions of HPERB and the circuit courts continue to prevail, incentives for forum shopping should be curtailed and the value of the arbitral mechanism preserved by establishing the Arbitration Act as the single standard of review.

III. Compulsory Interest Arbitration: Last Rites for Final Offers?

While implementation of the Collective Bargaining Act has eroded both the exclusiveness of arbitration for resolving grievances and the finality accorded an award, Hawaii's experience with compulsory final-offer interest arbitration demonstrates the importance of finality if the arbitral mechanism is to serve its goal as a substitute for strike action.[246] The following sections will discuss both practical and legal considerations surrounding the degree of finality accorded compulsory interest arbitration for Hawaii firefighters.[247]

A. Background

"[T]he right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system."[248] Although it is clear in the private sector that a union may

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[246] *See* notes 7 *supra*, 323 *infra* and accompanying text.

[247] For a description of the procedure required by the statute, see text accompanying notes 28-31 *supra*. For a general description of the final-offer concept, see note 10 *supra*.

[248] Labor Bd. v. Erie Resistor Corp., 373 U.S. 221, 234 (1963) (footnote omitted).

waive an individual's right to strike by contractual agreement,[249] it is equally the case that government can and often does deny public employees the same bargaining power.[250]

Although most jurisdictions outlaw public employee strikes, the legal prophylaxis is so inadequate that New York's illegal police and firefighter strikes doubled in 1975[251] —a trend that continues unabated on a nationwide scale.[252] These economic pressures are dictating new perspectives and increasing efforts to find and implement alternative dispute resolution techniques.[253] The State of Hawaii is not immune to these pressures.[254]

No serious attempt has been made in Hawaii to eliminate public employees' limited right to strike against labor's will;[255] nor has the law prevented labor from attempting to exert its will illegally.[256] In 1977, the Ha-

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[249] *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279-84 (1956).

[250] Public employee strikes are outlawed in an overwhelming majority of the states. *See* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1978-79, at 172-73 (1978); note 12 *supra*.

[251] Note, *supra* note 5, at 787.

[252] The Bureau of Labor Statistics recently noted that increased public employee militancy is manifested in strikes claiming a larger number of workers and greater loss of workdays, even though the incidence of strikes has stabilized since 1969. 102 MONTHLY LAB. REV. No. 9, at 35 (1979).

[253] This is so both in the public and private sector. *See, e.g.*, Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 469-75 (1971) (nonstoppage strike and graduated strike proposed for public sector); Note, *supra* note 10 (concluding that final-offer arbitration or partial-strike proposals are the only viable alternatives to present federal legislation). The notion that partial strikes, including refusals to work overtime and work slowdowns, should be protected by the National Labor Relations Act has caused a sharp debate among commentators. *Compare* Lopatka, *The Unprotected Status of Partial Strikes After* Lodge 76: *A Reply to Professor Getman*, 29 STAN. L. REV. 1181 (1977) (partial strikes are not and should not be protected), *with* Getman, *The Protected Status of Partial Strikes After* Lodge 76: *A Comment*, 29 STAN. L. REV. 205 (1977) (federal preemption of state regulation of partial strike by injunction signals shift to protection of partial strike activity which is desirable result).

[254] Aggregate work-stoppage figures compiled by the federal government show that the number of stoppages and workers involved increased by 50% over the preceding year for which statistics are available. In 1975 there were 13 work stoppages involving 2,000 laborers who were idled for 32 days. The following year, 20 stoppages were recorded involving 3,000 workers and 35 days. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT 432, Table No. 703 (99th ed. 1978).

[255] Democrat Kathleen G. Stanley (Oahu), who is chairperson of the house public employment and government operations committee, received immediate, widespread, and inevitable publicity upon introducing a bill to eliminate the right to strike. The bill was referred to her committee where it died an ignominious and equally inevitable death. *See* H.B. 2160-80, 10th Hawaii Leg., 2d Sess. (1980).

[256] *See, e.g.*, Hawaii State Teachers Ass'n v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 361, 363, 590 P.2d 993, 995 (1979) (illegal teacher strike). Injunctive relief was required in a recent United Public Workers [UPW] strike when the Hawaii State Employment Relations Board sought to return essential workers to their jobs. *See, e.g.*, Hawaii Pub. Employment Relations Bd. v. United Pub. Workers Local 646 (5th Cir. Ct. Hawaii Mar. 20, 1980). UPW filed a notice of appeal from the case on March 31, 1980, concerning the

waii Firefighters Association (HFFA) supported passage of final-offer arbitration as a substitute for its right to strike. The Governor vetoed the original legislation for the following reasons: First, he feared carpetbagging mainland arbitrators would make expensive awards; and, second, the bill failed to address the legal problems that would occur if arbitrators chose a final package including non-negotiable items.[357] A year later, the legislature positively responded to the Governor's concerns,[358] although the amended legislation would not significantly repair the first problem.[359] On July 1, 1978, compulsory final-offer arbitration for firefighters became effective.[360]

In deciding whether union or management contract terms will prevail, arbitrators are guided by statutory standards.[361] But the range of deviation from such standards is controlled by the parties' final offers, and the potential for anomalous results is enhanced where the whole-package ap-

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$30,000 judgment which was preceded by preliminary injunction. It took several trips to courthouses on several islands to procure the injunctions, some of which were never served by local authorities, again proving the popular wisdom that injunctions are not effective against strikes. *See generally* Douglas, *Injunctive Relief in Public Sector Work Stoppages: Alternative Approaches*, 30 LAB. L.J. No. 7, at 406 (1979); Shipman, *The Scope of the National Emergency Labor Injunction Law*, 9 SETON HALL L. REV. 709, 738-43 (1978) (discussing and rejecting proposals to bind individual union members by injunctions issued under the Labor-Management Relations Act).

[357] [I]n almost every instance, an out-of-state arbitrator will be chosen. That is the way the bill has been designed. I question whether such a result would be desirable, since out-of-state arbitrators might be ill-equipped to apply portions of the criteria established by the bill, having obtained their expertise under different circumstances and conditions than those prevailing in Hawaii. I also question the propriety of using an arbitrator, who makes a decision, packs his bag and goes home to wherever he came from and need not have to live in the community which is affected by the decision.

. . . I also note that the final-offer package could pose legal problems, if such package should contain non-negotiable items, since the bill does not in any way address the issue. Governor's Message No. 512, SENATE JOURNAL 784 (1977) (statement of objections to S.B. 237, 9th Hawaii Leg., 1st Sess. (1977) (vetoed June 9, 1977)).

[358] S. STAND. COMM. REP. No. 632-78, 9th Hawaii Leg., 2d Sess., *reprinted in* SENATE JOURNAL 1032 (1978).

[359] *See* note 279 *infra*. The first time the statute was used, the parties could not agree upon the impartial arbitrator. The first list of five candidates included three from Hawaii, all of whom were struck. The remaining person was unavailable and a second list was required from which the parties eliminated all but UCLA Labor Law Professor Edgar Jones, Jr. Interview with Henry K. Kanda, Labor Relations Specialist, Office of Collective Bargaining, State of Hawaii, in Honolulu (Apr. 25, 1980).

[360] Act 108, 1978 Hawaii Sess. Laws 185 (codified at HAWAII REV. STAT. § 89-11(d) (Supp. 1979)). For historical background on the development of interest arbitration in general and a comparison with approaches used in Australia and Canada, see Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 197 (1976). For a sophisticated economic analysis of final-offer arbitration based on experience with public safety employees in several states, see J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER, & B. DENNIS, FINAL-OFFER ARBITRATION (1975) [hereinafter cited as FINAL-OFFER].

[361] HAWAII REV. STAT. § 89-11(d) (Supp. 1979), *quoted in* note 30 *supra*.

proach is used. The arbitrator's most reasonable choice may be the least outrageous offer.[262]

The likelihood that the relatively more reasonable award would prove politically untenable aggravates the practical and legal problems attendant to public-sector interest arbitration. "Binding arbitration, . . . if it means anything, means that it binds the legislative body as well as the executive and the employee representative . . . ."[263] Yet, even in jurisdictions where the legislative branch is bound to implement the award, the mechanism has been denounced because "final-offer arbitration does not effectively encourage negotiated settlements, deter potential strikes, or insure rational arbitral decisions."[264] Why, then, did Hawaii embrace final-offer arbitration, and what has been the cost of this latest technique to outlaw and eliminate strikes? Why would a labor union court potential disaster?

There are at least two plausible explanations for HFFA's support of final-offer arbitration. First, the union knew that it was not giving up much, if anything, by forfeiting the right to strike under existing legislation. In 1977 HPERB ruled that almost all aspects of firefighters' services are essential, and to withdraw them, as was threatened by the union, would endanger the health and safety of the community.[265] HPERB ordered the union to abandon its massive strike plans and to continue performing normal and customary duties, under the statutory exception to the right to strike. Therefore, any effective strike would be illegal, and (aside from provoking court action and potential fines and costing members lost wages) an illegal work stoppage likely would erode public sup-

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[262] *See* Bornstein, *Interest Arbitration in Public Employment: An Arbitrator Views the Process*, 29 LAB. L.J. No. 2, at 77, 81 (1978) [hereinafter cited as Bornstein].

[263] Wellington & Winter, *supra* note 10, at 835.

[264] Note, *Final Offer Arbitration and the Labor-Management Posse: Heading Off Municipal Disputes at the Impasse*, 59 B.U. L. REV. 105, 106 (1979).

[265] George Ariyoshi, Governor of the State of Hawaii, I H.P.E.R.B. 721 (1977). See note 9 *supra*. In a later decision involving only HFFA members employed by the County of Hawaii, the board did not reach the issue of essential services because it held that the firefighters' withdrawal of paramedic services for which they were trained at county expense did not constitute a strike within the meaning of the collective bargaining statute, HAWAII REV. STAT. § 89-2(17) (1976). Herbert T. Matayoshi, Mayor of the County of Hawaii, H.P.E.R.B. Decision No. 121 (Jan. 8, 1980). The rationale in *Matayoshi* was that employees need not perform voluntary duties, and since the employer agreed that the paramedic duties were voluntary, it was irrelevant that firefighters regularly had performed such work since 1972. The board omitted to note that its earlier decision had included first-aid treatment in fire and rescue emergencies along with administering intravenous fluids as essential services that the strike notice intended to withhold from the public, in contravention of the emergency exception to legal strikes, *see* note 9 *supra*. The two decisions appear at least inconsistent, if not contradictory, although the error may have been a tactical one by the county which might have argued in 1980 that the union was precluded by the 1977 decision from asserting that the services were voluntary. One assumes that the board no longer would consider paramedic-firefighters volunteers since their services are now compensated.

port for the union's bargaining position.[266] To trade something the union did not have (a meaningful right to strike) was eminently good politics. But what did HFFA expect to gain from the trade?

The second logical explanation for the union's support of final-offer arbitration is that it would result in relatively higher wage gains than would otherwise be won in the normal course of collective bargaining. Studies have shown that the union would have been completely justified in entertaining such an assumption.[267] Moreover, if the arbitration legislation became controversial and were repealed within a few years of adoption, the union would have derived maximum benefits from the law since the same studies show that the relative gains under arbitration tend to level off after the first few years.[268]

Assuming that the union perceived final-offer arbitration as a deal it could not refuse, even before it was compulsory legislation, one might also note that relinquishing the right to strike was philosophically compatible with the history of HFFA and its parent union, both of which had no-strike clauses in their constitutions until 1966.[269] Despite the pacific nature of the union's early charters, HFFA vigorously asserted its rights under the collective bargaining law. The union received membership authorization to strike in each year of contract negotiations;[270] conducted a statewide sick-out in 1974;[271] promised to strike despite an HPERB declaration in 1977 that such action would violate the law;[272] rejected government offers in 1974 and 1977 that other unions accepted and then negotiated better deals for its members,[273] who in 1977 refused to ratify a

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[266] *See, e.g.*, Honolulu Star-Bulletin, Oct. 21, 1974, at A-20, col. 1 (editorial noting that most of the 13 collective bargaining units had settled for pay raises of 7% or less while HFFA is holding out for more, creating a whipsaw effect); *id.* July 24, 1974, at A-18, col. 1 (urging HPERB to find threatened strike illegal). In 1974, HFFA staged two sick-outs, the first having statewide impact and receiving a great deal of media coverage, including the cease and desist order issued by HPERB, *see, e.g., id.*, Aug. 2, 1974, at A-6, cols. 1-8; Honolulu Advertiser, July 25, 1974, at A-4, col. 1, and the Honolulu fire chief's estimate that each day cost county taxpayers between $63,000 and $75,000 in overtime pay to those firefighters who did not strike, *id.*, July 23, 1974, at A-14, col. 1.

[267] FINAL-OFFER, *supra* note 260; Note, *supra* note 264, at 112-13 & nn. 53-59.

[268] FINAL-OFFER, *supra* note 260, at 159.

[269] Honolulu Advertiser, Mar. 15, 1971, at A-1, col. 1; *see id.*, Dec. 17, 1966, at A-20, col. 2.

[270] Honolulu Star-Bulletin, June 2, 1979, at A-1, col. 5 (strike authorization vote; 11 to 1,234); *id.*, July 9, 1977, at 2, col. 1 (strike authorization vote; 97.5%); Honolulu Advertiser, Sept. 13, 1974, at A-3, col. 2 (strike authorization vote; 853 ballots cast, 41 to 807, 5 blank); *id.*, Dec. 22, 1972, at A-9, col. 1 (strike authorization vote; 71% turnout, 97% authorization).

[271] *See* note 266 *supra*.

[272] Honolulu Advertiser, Aug. 27, 1977, at A-1, cols. 2-4.

[273] In 1977, HFFA refused to accept an average 4.5% pay hike which the legislature approved for most other employees. *Id.*, June 18, 1977, at A-1, col. 1. After rejecting the percentage pay hike with a minimum $50 per month guarantee, agreement was reached on the eve of a strike, settling for a minimum $62 per month guarantee. Honolulu Star-Bulletin, Sept. 2, 1977, at A-2, col. 1. In 1974, most state and county workers received 7% or less in pay raises, *id.* Oct. 21, 1974, at A-20, col. 1, but HFFA won an 8-½% across-the-board raise

tentative agreement.[274] The 1977 contract caused the County of Hawaii so much concern over cost factors that it took a month for the county council to ratify the agreement.[275] Although HFFA is one of the smallest collective bargaining units in the state, it is among the most successful. Thus, the bargaining history alone may have provided sufficient incentive for public employers to support final-offer arbitration as a viable alternative to the existing statutory scheme.

Hawaii's final-offer mechanism differs in several respects from the voluntary interest arbitration that was available through the original collective bargaining statute.[276] The differences reflect both the politics that forged the new legislation and the distinct purposes for which the statutory provisions were designed.[277]

The high stakes involved in final-offer arbitration may explain why a state agency, HPERB, does not initially select a panel, although final appointment power rests with the agency. HPERB has the power to select arbitrators under certain circumstances in voluntary arbitration,[278] but a more neutral source, the American Arbitration Association, is interjected into the final-offer process.[279]

The difference in formality and burdens placed upon arbitrators and parties regarding presentation of information also relates to the scope of issues being decided in the two processes and to the compulsory aspect of final-offer arbitration. Procedural and substantive standards take on added importance in the context of forced arbitration. The statutory guidelines for choosing a package include specifics to ameliorate the Governor's original objections to the legislation,[280] but they are also significant to satisfy legal criteria. Indeed, the arbitrator's mandate to consider at least ten specific factors in reaching an award may insulate the legislation from constitutional challenge, a subject discussed more fully in the next section.

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for its 1,100 members that year, *id.*, Oct. 29, 1974, at A-1, cols. 1-8.

[274] Honolulu Advertiser, Aug. 4, 1977, at A-1, col. 2 (pact rejected by fewer than 100 votes).

[275] *Id.*, Oct. 21, 1977, at A-4, col. 1.

[276] *See* text accompanying notes 24-31 *supra*.

[277] *See generally* Bornstein, *supra* note 262.

[278] *See* text accompanying note 25 *supra*.

[279] The statute is designed to allow the parties to choose one arbitrator each who in turn choose the chairman. If, however, the two panel members cannot agree on a third, a list of five candidates approved by the American Arbitration Association is provided, from which the two arbitrators choose a third by striking two names each from the list. This method did not produce a Hawaii resident as chairman, *see* note 259 *supra*, and the Governor has proposed legislation that would, *see* note 344 *infra*.

[280] S. STAND. COMM. REP. No. 632-78, 9th Hawaii Leg., 2d Sess., *reprinted in* SENATE JOURNAL 1032 (1978).

B. Constitutional Challenges

The constitutionality of compulsory interest arbitration statutes has been litigated in several states with mixed results.[281] Pennsylvania changed its constitution expressly to authorize interest arbitration involving police and firefighters[282] after the state law was held unconstitutional.[283] The Florida Constitution Revision Commission proposed an amendment to the state charter in 1978 that would have outlawed interest arbitration, even though Florida had no existing statute authorizing the mechanism, and no attempt to enact one was forseen.[284]

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[281] *Compare* Bagley v. City of Manhattan Beach, 18 Cal. 3d 22, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976) (where state statute expressly conferred power to set salaries in city council, compulsory arbitration for firefighters adopted by initiative is unconstitutional delegation, but if adopted by city council would be constitutional); City of Aurora v. Aurora Firefighters' Protective Ass'n, 193 Colo. 437, 566 P.2d 1356 (1977) (unconstitutional delegation of legislative authority); Greeley Police Union v. City Council of Greeley, 191 Colo. 419, 553 P.2d 790 (1976) (unconstitutional delegation; arbitrators lack accountability); Town of Berlin v. Santaguida, No. 201307 (Conn. Super. Ct. June 26, 1978), *appeal docketed*, No. 9184 (Sup. Ct. July 14, 1978), *discussed in* Note, *Compulsory Binding Arbitration for Municipal Employees in Connecticut: Constitutional?*, 11 CONN. L. REV. 583 (1979) (unconstitutional delegation of legislative power to unaccountable arbitrators with unconstitutionally inadequate standards established for arbitral decisionmaking); City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973) (standards inadequate); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975) (prospective ruling; unconstitutional lack of accountability in temporary arbitrators), *discussed in* Note, *City of Dearborn Labor Disputes: Out of Confusion—More Confusion*, 1976 DET. C.L. REV. 164; City of Sioux Falls v. Sioux Falls Firefighters Local 814, 89 S.D. 455, 234 N.W.2d 35 (1975) (unconstitutional delegation of legislative power of city under specific constitutional provision known as "ripper" clause); Salt Lake City v. International Ass'n of Firefighters, Locals 1645, 593, 1654, 563 P.2d 786 (Utah 1977) (lack of accountability; inadequate standards), *discussed in* Comment, Salt Lake City v. International Association of Firefighters: *A Responsive Analysis and Proposal for Public Sector Bargaining in Utah*, 1977 UTAH L. REV. 457, *with* Town of Arlington v. Board of Conciliation, 370 Mass. 769, 352 N.E.2d 914 (1976); City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, _ Minn. _, 276 N.W.2d 42 (1979); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969), *discussed in* Liguori, *Labor Arbitration and Rhode Island Law*, XIII SUFFOLK U.L. REV. 473 (1979); City of Spokane v. Spokane Police Guild, 87 Wash. 2d 457, 553 P.2d 1316 (1976); State v. City of Laramie, 437 P.2d 295 (Wyo. 1968). *Cf.* NLRB v. Sheet Metal Workers Local 38, 575 F.2d 394 (2d Cir. 1978) (affirming unfair labor practice order based on union invocation of interest arbitration clause to resolve impasse in contract renegotiation on issue of including interest-arbitration clause in new contract and continuation of industry funding of business promotion), *criticized in* 10 RUT.-CAM. L.J. 755 (1979). *See generally* Note, *supra* note 5; *see also* Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County, 64 Wis. 2d 651, 221 N.W.2d 673 (1974) (invalidating portion of arbitration award involving amendment to final-offer package).

[282] PA. CONST. art. 3, § 20 (1874, amended and renumbered § 31, 1967). *See* Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969).

[283] Erie Firefighters Local 293 v. Gardner, 406 Pa. 395, 178 A.2d 691 (1962).

[284] Kennedy, *Prohibiting Binding Arbitration: The Proposed Change in Article I, Sec-*

A constitutional challenge to Hawaii's law might be initiated by any party to an award, which is generally how the cases have arisen elsewhere.[285] It is also possible for a taxpayer to maintain an action to question the propriety of the process that leads to an appropriation.[286] Therefore, it may be useful to consider the rationale for the disparate results in other jurisdictions, along with relevant Hawaii laws, in order to predict the outcome of any future challenges.

Successful constitutional challenges in other jurisdictions hinge upon some variation of the same theme: unconstitutional delegation of legislative power to arbitrators who are not politically accountable to the public.[287] At the outset, it should be noted that the vitality of the nondelegation doctrine is not similarly demonstrated either in federal constitutional law[288] or in early Hawaii court decisions.[289] The prevailing federal view is

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tion 6, 6 FLA. ST. U.L. REV. 1003 (1978).

[285] *See* cases cited in note 281 *supra*. In the New York case, the government sought prearbitration judicial review. In Michigan, the City of Dearborn refused to name arbitrators to the panels considering awards for firefighters and police negotiations. The California case arose when city officials refused to include on the ballot an initiative requiring compulsory arbitration. In the Connecticut case, the lower court granted standing to a private individual as well as the municipalities, Note, *Compulsory Binding Arbitration for Municipal Employees in Connecticut: Constitutional?*, 11 CONN. L. REV. 583, 588 (1979).

[286] *See* Schwab v. Ariyoshi, 58 Hawaii 25, 26, 564 P.2d 135, 137 (1977) (taxpayer suit challenging constitutionality of legislation appropriating pay raises for officials of executive, legislative, and judicial branches, included in appropriation for government workers' salary increases); Federal Elec. Corp. v. Fasi, 56 Hawaii 57, 64-65, 527 P.2d 1284, 1290 (1974) (action to set aside contract award may be brought by plaintiff in capacity of taxpayer even if no standing is conferred as unsuccessful bidder).

[287] Challenges to compulsory arbitration of labor disputes based on the United States Constitution have been uniformly rejected by state supreme courts. *See* Note, *supra* note 5, at 817-19. One lower court in Connecticut, however, ruled that the liberty interest of a private individual to voice his opinion in municipal government was violated by binding arbitration in contravention of the 14th amendment. Note, *supra* note 285, at 597-99.

In a wholly different context, Hawaii's compulsory arbitration of valuation of lands prior to eminent domain proceedings pursuant to the Land Reform Act has been declared unconstitutional by the federal district court. This case is inapposite because it dealt with the taking provision of the fifth amendment and because it is well established that mandatory arbitration is not a part of normal condemnation proceedings. *See* Midkiff v. Tom, 471 F. Supp. 871 (D. Hawaii 1979).

[288] *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

> The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes . . . . This doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary . . . .

National Cable Television Ass'n v. United States, 415 U.S. 336, 352-53 (1974) (Marshall, J., dissenting) (footnote omitted).

[289] *See, e.g.*, Campbell v. Stainback, 38 Hawaii 310, 321-28 (1949) (appropriations for "entertainment" including liquor to be spent by statehood commission without voucher control for purposes of lobbying for statehood not unconstitutional delegation of legislative power and not overbroad standard); Territory v. Fung, 34 Hawaii 52, 57-58 (1936) (agency certification of common carrier based on "necessity and convenience" is sufficient standard upon

that "there is no forbidden delegation of legislative power 'if Congress shall lay down by legislative act an intelligible principle' to which the official or agency must conform."[290]

Challenges to state compulsory arbitration statutes have relied, in part, on language similar to the Hawaii and Federal Constitutions, that legislative power resides in the legislature,[291] coupled with state constitutional provisions similar to article I, section 1 of Hawaii's constitution, that political power is "inherent in the people".[292] Neither of these constitutional provisions impede Hawaii's final-offer statute. With respect to the first, the state supreme court has noted that "legislative power has been defined as the power to enact laws and to declare what the law shall be."[293] It therefore seems likely that the court would reach a result similar to rulings in those jurisdictions where legislative delegation of the power to fix public employees' salaries is compatible with constitutional principles.[294] Arbitrators are merely implementing the law established by the Hawaii legislature.

The principle of accountability that underlies challenges based on the political power of the people loses some of its force in light of recent amendments to Hawaii's constitution. The legislature is mandated to set a general-fund expenditure ceiling pegged to revenue estimates established by a council on revenues.[295] The power of the executive to make judicial appointments is limited to a list of names provided the executive by a judicial selection commission.[296] The latter provision was inspired by the same policy that promotes use of arbitrators; that is, to insulate the process from political pressure and to enhance impartial decisionmaking.[297]

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which to exercise authority). *Accord, In re* Kauai Elec. Div. of Citizens Util. Co., 60 Hawaii 166, 590 P.2d 524 (1978).

[290] Amalgamated Meat Cutters & Butcher Workmen v. Connaly, 337 F. Supp. 737, 746 (D.D.C. 1971) (footnote omitted) (quoting Hampton v. United States, 276 U.S. 394, 409 (1928)). The court upheld the Economic Stabilization Act of 1970, *see* 12 U.S.C.A. § 1904 note (Supp. 1980), against a constitutional challenge that it gave the President and wage board overbroad power to control wage increases throughout the nation. The court found the standards of the Act sufficient by analyzing the statutory language within the context of its legislative history and the economic conditions that led to the emergency measure. 377 F. Supp. at 747-54.

[291] U.S. CONST. art. I, § 1; HAWAII CONST. art. III, § 1. *See, e.g.*, Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 259-62, 231 N.W.2d 226, 235 (1975).

[292] HAWAII CONST. art. I, § 1; UTAH CONST. art I, § 2; MICH. CONST. art. 1, § 1. *See* 394 Mich. at 256, 231 N.W.2d at 235; Salt Lake City v. International Ass'n of Firefighters, Locals 1645, 593, 1954, 563 P.2d 786, 790 (Utah 1977).

[293] Bissen v. Fujii, 51 Hawaii 636, 638, 466 P.2d 429, 431 (1970).

[294] *See, e.g.*, Town of Arlington v. Board of Conciliation, 370 Mass. 769, 775-77, 352 N.E.2d 914, 919-20 (1976).

[295] HAWAII CONST. art. VII, §§ 7, 9.

[296] *Id.* art. VI, §§ 3-4.

[297] STAND. COMM. REP. No. 52, 3d Hawaii Const. Conv. 7-8, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19_).

But the validity of the arbitration statute need not stand or fall on the basis of such attenuated constitutional provisions, for Hawaii's legislation appears to have been drafted with care to avoid the pitfalls discovered in other states. The selection process is one example. The law provides that the parties may select arbitrators, but their appointment is by HPERB, thus blunting the argument that government decisionmaking is being performed by private persons who lack accountability.[298]

Similarly, the most serious constitutional challenge—insufficient standards by which arbitrators are guided to reach a conclusion as to which final package is more reasonable—has been addressed in detail. The specific factors to be considered[299] substantially mirror the standards established by law in Massachusetts, New York, and Rhode Island,[300] where compulsory arbitration has been upheld.[301] The traditional safeguards of a hearing to adduce evidence and a written statement of the arbitrators' findings, including the bases therefor, clearly guard against claims that the limited choice intended by the legislation could be an arbitrary or capricious one.

The state constitution and interpretive case law quickly dispose of another line of attack that has been little successful elsewhere. Municipalities have argued that comparable arbitration statutes violate their home-rule powers.[302] The Hawaii Supreme Court already has decided that conflicting city and county charters are superseded by state laws involving civil service and compensation.[303]

Perhaps the most difficult issue involves judicial enforcement of arbitration awards in the face of legislative refusal to make appropriations implementing the final and binding decision of the arbitrators. The problem, of course, could not arise in those states where the enabling statute

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[298] *Compare* HAWAII REV. STAT. § 89-11(d) (Supp. 1979), *with* CONN. GEN. STAT. § 7-473c(a) (Supp. 1980) *and* MICH. STAT. ANN. § 17.455(3) (Supp. 1979). The Michigan and Utah courts found delegation to arbitrators unconstitutional. *See* cases cited in note 292 *supra*. The Minnesota Supreme Court found that "accountability to the public is like delegation of power; both are a matter of degrees." City of Richfield v. Local 1215, Int'l Ass'n of Firefighters, _ Minn. _, _, 276 N.W.2d 42, 47 (1979). The court found sufficient accountability based on the statutory requirement that arbitrators be qualified, a requirement found in the Hawaii law; the restraints imposed by the standards the arbitrators must follow in reaching a decision, also a feature of the Hawaii law; the fact that the public employment relations board may disqualify an arbitrator by a majority vote; and the philosophy behind the statute that emphasizes the need to eliminate political pressures from the decisionmaking. *Id.* at _, 276 N.W.2d at 47-48.

[299] *See* note 30 *supra*.

[300] *See* MASS. GEN. LAWS ANN. ch. 150E, § 4 (West 1980-1981); N.Y. CIV. SERV. LAW § 209-4(c)(v) (McKinney Supp. 1979-1980); R.I. GEN. LAWS § 28-9.1-10 (1979).

[301] Town of Arlington v. Board of Conciliation, 370 Mass. 769, 352 N.E.2d 914 (1976); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969).

[302] *See* Note, *supra* note 5, at 814.

[303] Hawaii Gov't Employees' Ass'n v. County of Maui, 59 Hawaii 65, 576 P.2d 1029 (1978).

expressly makes the award of cost items advisory, rather than binding.[304] But it has been the subject of litigation in jurisdictions where the statutory scheme either precludes legislative consideration of the award or mandates legislative implementation.[305]

The first Pennsylvania case to discuss the matter arose as a mandamus action instituted by the union to force two boroughs to enact legislation implementing the arbitral award.[306] The supreme court rejected an argument that due process is violated because the boroughs could be held in contempt for failure to effect the award due to insufficient funds, a problem that could be remedied only by increasing taxes.[307] The court responded that the record failed to show the government's inability to pay. More importantly, the court suggested that it might require an increase in the tax rate or mandate budget cuts in other areas in order to implement an arbitrator's award, if the record were to show an inability to meet the financial demands.

Two years later, the commonwealth court directed the legislative branch of the City of Philadelphia to appropriate sufficient funds to cover its collective bargaining obligations, incurred in one case pursuant to an arbitration award and in another pursuant to a negotiated agreement.[308] In discussing the judicial power to enforce the arbitration award, the court invoked the state constitutional provision enabling compulsory arbitration legislation governing police and firefighters,[309] which reads as follows:

> [T]he General Assembly may enact laws which provide that the [compulsory arbitration awards] . . . shall be binding upon all parties and shall constitute a mandate to the head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the em-

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[304] *See, e.g.*, City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 390 (Me. 1973) (noting that the arbitrators' decision on salaries, pensions, or insurance is advisory only, while determinations on other matters are binding upon the parties); School Comm. v. Westerly Teachers Ass'n, 111 R.I. 96, 98, 299 A.2d 441, 442 (1973) (arbitrators' decision on teachers' wages advisory because expenditure of money involved); Salt Lake City v. International Ass'n of Firefighters, Locals 1645, 593, 1654, 563 P.2d 786, 789 (Utah 1977) ("determination of the panel is *final* and *binding* on *all matters* in dispute except in salary and wage matters") (original emphasis).

[305] *See, e.g.*, MINN. STAT. ANN. §§ 179.63(4), .72(7) (West Supp. 1980); N.Y. CIV. SERV. LAW § 209-4(d)(vi) (McKinney Supp. 1979-1980); PA. STAT. ANN. tit. 43, § 217.7 (Purdon Supp. 1979-1980).

[306] Harney v. Russo, 435 Pa. 183, 225 A.2d 560 (1969).

[307] *Id.* at 192-93, 255 A.2d at 564-65. It should be noted that other jurisdictions uniformly have rejected constitutional challenges to compulsory binding arbitration based on the claim that it interferes with the sovereign taxing power. *See* Note, *supra* note 5, at 813-14. Hawaii's constitutional provisions regarding the inalienability of taxing powers, HAWAII CONST. art. VII, § 1, and the prohibition against expenditures not authorized by appropriations, *id.* § 5, would appear equally unavailing of a successful constitutional attack.

[308] Tate v. Antosh, 3 Pa. Commw. Ct. 144, 281 A.2d 192 (1971).

[309] *Id.* at _, 281 A.2d at 197-98.

> ployer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivision or of the Commonwealth, with respect to matters which require legislative action, to take the action necessary to carry out . . . [the award].[310]

The court relied on earlier dictum of the supreme court[311] in determining that the city was required to accommodate the costs of the arbitration award. The court further concluded, based on the philosophy underlying the collective bargaining process, that the city also must appropriate moneys to pay disability benefits contained in a negotiated contract, even though the original appropriation had been depleted.[312]

In New York, the first reported case to address the issue of enforcement was dismissed because the Erie County Supreme Court determined that judicial review was appropriate only upon petition by the public employment relations board to seek enforcement of the arbitration award.[313] The New York Court of Appeals later ruled that judicial review would follow the statutory procedure traditionally related to consensual arbitration, not agency review, for the simple reason that the agency is not a party to compulsory arbitration and should not be placed in the position of defending an award which it might not have made.[314] The high court rejected government requests to annul wage increases for police and firefighters based on final-offer awards. The standard of review required nothing more than a rational or plausible basis and good-faith consideration of the statutory criteria, which include economic conditions.[315] Moreover, the court rejected a proposed burden-of-proof standard reflecting "a kind of presumption that the county's best offer during bargaining prior to arbitration represented its good faith statement of the most it could afford."[316] The arbitration awards were confirmed.

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[310] PA. CONST. art. 2, § 31. See text accompanying notes 282-83 *supra*. Absent express constitutional authority to require legislative implementation of an arbitral award, a court order requiring the State legislature to appropriate funds may violate the separation of powers theory underlying Hawaii's constitution. *See* Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. HAWAII L. REV. 1, 39-40 (1979), and Hawaii courts may frown upon mandamus actions regarding county legislative bodies, *see* Hawaii Gov't Employees' Ass'n v. County of Maui, 59 Hawaii 65, 576 P.2d 1029 (1978); HAWAII CONST. art. VIII.

[311] 3 Pa. Commw. Ct. at _, 281 A.2d at 199 (quoting 435 Pa. at 193, 255 A.2d at 545).

[312] *Id.* at _, 281 A.2d at 200-01. The court noted that there would be no question of enforceability if it were dealing with a private-sector arbitration award.

[313] Buffalo Police Benevolent Ass'n Local 282 v. City of Buffalo, 81 Misc. 2d 172, 364 N.Y.S.2d 362 (Sup. Ct. 1975).

[314] Caso v. Coffey, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976). For examples of different approaches taken in other jurisdictions, see cases cited in note 197 *supra*.

[315] 41 N.Y.2d at 158, 359 N.E.2d at 686-87, 391 N.Y.S.2d at 91-92. If final-offer awards are reviewable at all, the standard of review would depend on whether the court employed the common law or the Arbitration Act, agency review, or some other method, *see* note 197 *supra*. Of course, the same problem of multiple forums for review may arise, *see* text accompanying notes 227-45 *supra*.

[316] 41 N.Y.2d at 159, 359 N.E.2d at 387, 391 N.Y.S.2d at 92.

In 1977, the New York Court of Appeals reversed an appellate division decision to vacate an arbitration award to the Buffalo Police Benevolent Association (PBA) because the lower court determined that the city was unable to fund the increase.[317] Again, the rational basis standard was applied, the court emphasizing that the statute required the arbitrators only to consider the ability of the city to pay the salary increase as part of their overall deliberations. The arbitration panel "had a right to balance the ability of the city to pay against the interest of the public and the PBA members."[318] Since the panel had done just that, its award was reinstated.

The 1977 New York case contains particularly relevant dicta since Hawaii's arbitration panel must consider "financial ability of the employer to meet . . . costs."[319]

> [M]ost significant, it must be recognized that the statute, the wisdom of which it is for others to decide, vests broad authority in the arbitration panel to determine municipal fiscal priorities within existing revenues. Thus, even if the statute were to mandate consideration of municipal ability to pay (rather than as at present only to identify ability to pay as one of the factors to be taken into consideration "so far as it deems them applicable"), the panel would still be confronted with responsibility and vested with authority to determine priorities among all relevant factors in a balancing process. The panel might determine that a particular increase in compensation should take precedence over other calls on existing or even diminishing municipal revenues.[320]

The logic of the New York court contemplates the prospect of inflationary arbitral awards under a final-offer statute like that of Hawaii. It further suggests that, under an agency standard of judicial review, a panel's good-faith decision would conform with both the spirit and letter of the law, despite its dubious merits in terms of the government's fiscal integrity.[321]

No doubt the soundness of this logic, coupled with the constitutionality of statutes that eliminate budgetary approvals, has led to political opposition of compulsory arbitration in other jurisdictions.[322] Hawaii's law only

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[317] City of Buffalo v. Rinaldo, 41 N.Y.2d 764, 364 N.E.2d 817, 396 N.Y.S.2d 152 (1977).

[318] *Id.* at 767, 364 N.E.2d at 819, 396 N.Y.S.2d at 154.

[319] HAWAII REV. STAT. § 89-11(d)(4) (Supp. 1979).

[320] 41 N.Y.2d at 768, 364 N.E.2d at 819, 396 N.Y.S.2d at 154.

[321] The judicial branch would thus be helpless to prevent what politicians assiduously seek to avoid—fiscal problems of such proportions that either a tax increase or unpopular budget cuts are required. Although an award involving only the firefighters collective bargaining unit could not alone provoke the impolitic choice, other units which still retain strike powers would be influenced by the award and not likely to settle for less.

[322] *See* Note, *supra* note 264, at 122-28 (initiative petition requiring municipal voter approval of arbitration award provoked creation of compromise joint labor-management committee); *id.* at 123 & n.134 (extension of Massachusetts final-offer arbitration legislation required veto override); 102 MONTHLY LAB. REV. 35, 40-41 & n.15 (1979). *But cf.* City of

recently was put to a practical test, and the results imply that the trade-off for legislative autonomy is labor unrest.

C. *Implementation and Evaluation*

"[M]ore than any other alternative mechanism, final-offer arbitration induces negotiated agreements because the very process generates certain risks when negotiations fail (e.g. losing everything in a decision which is final and binding upon both parties)."[323] Such was the vision of the Ninth Legislature which passed Hawaii's final-offer law. It proved myopic.

The firefighters' first agreement was indeed a negotiated contract. It was, however, concluded in eleventh-hour bargaining with the Governor acting as the chief negotiator for the government.[324] The risk of failed negotiations was the old, familiar, and this time very serious threat of a statewide strike.

The history of Hawaii's first attempt to implement final-offer arbitration is succinctly summarized in an HPERB decision.[325] After impasse was reached and mediation failed, an arbitration panel was appointed to choose the most reasonable final package.[326] A majority chose HFFA's final offer which contained a cost-of-living provision in addition to a wage hike.[327] The award issued on April 11, 1979, expressly to afford time for legislative action[328] which never came.

Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, _ Minn. _, _, 276 N.W.2d 42, 48 (1979) (statutory scheme which binds public employers (defined, *inter alia*, as political subdivision with final budgetary power) to arbitration award is constitutional; alternative voter referendum would thwart good-faith collective bargaining).

[323] S. STAND. COMM. REP. No. 632-78, 9th Hawaii Leg., 2d Sess., *reprinted in* SENATE JOURNAL 1032 (1978). See note 10 *supra*.

[324] Negotiations did not resume for several months after the legislature failed to act on the arbitration award, the union refusing to go to the table. The Governor eventually intervened as chief negotiator. Honolulu Star-Bulletin, June 26, 1979, at A-2, col. 1.

[325] Hawaii Fire Fighters Ass'n, Local 1463, IAFF, AFL-CIO, II H.P.E.R.B. 286 (1979).

[326] *Id.* at 288; *see* note 259 *supra*.

[327] *Id.* at 289. The employers had rejected a cost-of-living clause (COLA) throughout negotiations. The final-offer award, based on HFFA's package, included a 7% increase for the first year of a two-year contract and a COLA to be paid in the second year in addition to the 7% wage hike for that year only if the Consumer Price Index exceeded 7% from December 1978 to December 1979, and then the salary increase would be increased by the same number of percentage points up to a maximum of 12%.

The controversy over the inflationary effect of COLA provisions is far from resolved, Stevens, *Inflation Issues and Cost-of-Living Adjustment (COLA) Clauses: Research Perspectives*, 30 LAB. L.J. No. 8, at 467 (1979), and only a small fraction of collective bargaining contracts covering about ten million workers in both public and private sectors contain escalator clauses involving various formulas. Tanner, *Inflation Issues and Industrial Relations Escalator Clauses Under a Voluntary Pay Program*, 30 LAB. L.J. No. 8, at 458, 459 (1979).

[328] II H.P.E.R.B. at 289. Legislative vehicles were available so that the legislature might have inserted the necessary appropriation amount into the bills that were poised for final passage. *Id.* at 294.

On the day following the issuance of the arbitration award, the attorney general issued an opinion, in response to questions asked several weeks earlier, as to the effect of the refusal of one or more public employers to accept the arbitration award.[329] The opinion declared that section 89-10(b) of Hawaii Revised Statutes[330] would apply. That section, which was in the Act when it was first enacted in 1970, provides that within ten days after an *agreement* reached in collective bargaining has been ratified by the employees concerned,[331] all cost items contained therein shall be submitted to the appropriate legislative body; if any cost item is rejected by any legislative body, all cost items submitted shall be returned to the parties for further bargaining. In other words, according to the attorney general, public employers are free to reject "final and binding" arbitration awards issued pursuant to the compulsory arbitration legislation enacted in 1978.

All of the public employers rejected the award. Two days before scheduled adjournment of the 1979 legislative session, the Governor sent a message to the legislature setting forth the cost items of the award.[332] In a subsequent message, the Governor stated that the amount involved appeared to be higher than the State and counties could afford and that he was concerned about the impact the award would have on negotiations with other bargaining units.[333] He concluded with the statement that he could "not support approval of the cost items by the Legislature."[334] On the same day, the Hawaii State Association of Counties informed the Governor it unanimously rejected the award.[335]

Neither the State legislature nor the county councils took action on the firefighters' arbitration award. HFFA elected to seek enforcement of the award by filing prohibited practice charges against the Governor and the mayors, charging failure to bargain in good faith and failure to comply with provisions of chapter 89.[336]

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[329] *Id.* at 293-94. The opinion determined, *inter alia*, that the award need not be signed by the parties to have legal effect.

[330] HAWAII REV. STAT. § 89-10(b) (1976), *quoted in* note 346 *infra*.

[331] This contrasts with the final-offer arbitration provision requiring that agreements based on arbitrations "shall not be subject to ratification by the employees concerned." *Id.* § 89-11(d) (Supp. 1979).

[332] Governor's Message No. 95 (Apr. 16, 1979) (on file in State archives). The legislature acknowledged receipt of the message on the 58th day of the session that was scheduled to adjourn on the 60th day. HOUSE JOURNAL 908, 10th Hawaii Leg., 1st Sess. (1979). But the State senate was not told of the Governor's message until too late to deck legislation for passage without extending the session. Honolulu Advertiser, May 18, 1979, at A-4, cols. 6-8.

[333] Governor's Message No. 96 (Apr. 17, 1979) (on file in State archives); receipt acknowledged by the house on April 18, 1979, HOUSE JOURNAL 908, 10th Hawaii Leg., 1st Sess. (1979); II H.P.E.R.B. at 290-91 (reproducing Governor's letter dated Apr. 18 [*sic*], 1979).

[334] Governor's Message No. 96 (Apr. 17, 1979).

[335] The letter was attached to the Governor's message containing his statement. *Id.*; II H.P.E.R.B. at 291-93.

[336] *See* HAWAII REV. STAT. § 89-13(a)(5)-(7) (1976).

In concluding that no prohibited practice was committed, a majority of HPERB held as follows: (1) HFFA failed to establish that the public employers did not bargain in good faith;[337] (2) failure to sign the arbitration award was not a prohibited practice either because the union never insisted on signature or because none is required since, by law, the award is binding;[338] (3) HFFA failed to establish that the employers had not submitted the cost items contained in the award to their respective legislatures; (4) the Governor's letter to the State legislature did not influence the latter's action in failing to act on his cost-item submission;[339] and (5) the board has no jurisdiction over the legislature which is not an employer under the collective bargaining law.[340] All members of the board were of the opinion that the various legislative bodies legally could refuse to fund the arbitration award.[341] In so construing the statute, HPERB eliminated constitutional issues that arise when final-offer arbitration awards bind legislatures and require appropriations, but the assertion of legislative independence undermines the effectiveness of the statute by robbing the award of finality.

HPERB Chairman Mack Hamada declared that this was "one of the most frustrating cases ever to come before this Board" because of the "anemic" HFFA presentation.[342] Writing for the majority, the chairman was constrained to pass judgment on the events that led to the HPERB decision: "The rejection of the cost items in this case has been a disaster for collective bargaining . . . . Arbitration has been converted from a meaningful strike substitute into a reckless gamble for unions."[343] He

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[337] II H.P.E.R.B. at 295. In particular, HPERB found that there was no legitimate claim of bad-faith bargaining because neither side sought further negotiations during consideration of the final offers by the arbitrators. The board also ruled that the timing of the attorney general opinion, issued one day after the State lost its final offer, was not evidence of bad faith.

[338] *Id.* at 296. See note 329 *supra.*

[339] *Id.* at 297-98. The dissent disagreed on this point, *id.* at 302-03 (Clark, Member, dissenting), and published reports attributed the legislature's inaction largely to the Governor's message, Honolulu Advertiser, May 18, 1979, at A-4, cols. 4-5. A majority might have found bad faith if the Governor had acted with knowledge that the legislature intended to fund the cost items at the time he sent his letter. The decision hinged on the inadequacy of the record on this point.

[340] *Id.* at 299.

[341] In its legislative wisdom, the State Legislature reserved unto the respective legislative bodies the right to fund or not to fund arbitration awards . . . . This it had a right, perhaps even an obligation to do. But in reserving that right, it created false expectations in . . . [the HFFA collective bargaining unit]. It would have been better not to call the mechanism created by Subsection 89-11(d) "final and binding arbitration," it should have been called what it really is, advisory arbitration.

Id. at 299. The dissent did not object on this point.

[342] *Id.*

[343] Id. at 12. By characterizing legislative inaction as rejection, the chairman recognized the true nature of the failure of the various legislatures to act; namely, that it was part of a deliberate and well-orchestrated plan of the executive and legislative branches of the State

called for legislative reform[344] and concluded the opinion with this despairing observation: "Notwithstanding the *breach of the spirit and policy of the collective bargaining law* implicit in the legislative refusal to act upon the Unit 11 cost items, there has been no breach of the letter of the law by any party to this case."[345]

HPERB's decision that the legislative refusals to act on the cost items involved in the arbitration award were not a violation of the "letter of the law" is questionable. The function of the legislature when dealing with the cost items of a *negotiated agreement* is described in different terms from those dealing with the cost items of an arbitration award. In the former instance, the statutory language expressly contemplates legislative approval or rejection;[346] in the latter, no reference to the possibility of rejection exists.[347] Although the legislative history provides some basis for inferring that the State legislature reserved to itself, or to the legislative bodies of the other public employers, the right to reject or to refuse to

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and counties to reject that arbitration award. The characterization also accords with an earlier attorney general opinion interpreting section 89-10(b) which concluded that legislative rejection of a *negotiated contract* "may be indicated by the failure to appropriate the necessary funds." [1972] OP. HAWAII ATT'Y GEN. No. 72-10, at 4.

[344] II H.P.E.R.B. at 299-300. In fact, the administration did have a bill introduced, S.B. 2987-80, 10th Hawaii Leg., 2d Sess. (1980), that would have made the following changes in current legislation: (1) HPEEB, rather than the American Arbitration Association, would furnish the list of names from which the chairman of any panel would be selected, and that list would name only Hawaii residents, qualified by experience in interest or grievance arbitration, as opposed to the present law which does not limit the list to Hawaii residents and is silent on the type of experience required; (2) whole-package final offer would be abandoned, allowing arbitrators to select between the noncost-item proposals of either management or labor on an issue-by-issue basis and requiring all cost items to be taken as a separate, miniature package; (3) the standard guiding arbitrators' analyses of cost items would be narrowed to a comparison of current firefighters' wages with those of other state and county employees in Hawaii, no longer mandating a comparison of wages with other workers who perform similar tasks; and (4) the language of section 89-10(b), returning rejected cost items to the parties for negotiation, would be included in the final-offer statutory scheme.

The State senate amended the administration bill and sent it to the house where the measure died. S.B. No. 2987, S.D. 1, 10th Hawaii Leg., 2d Sess. (1980). The senate version would have (1) retained whole-package last offer, (2) returned the entire contract proposal to the parties for further negotiation upon legislative rejection, and (3) required reappointment of the arbitration panel to repeat the final-offer process if impasse occurred within 15 days of the reentered negotiations.

[345] II H.P.E.R.B. at 300 (emphasis added).

[346] All cost items shall be subject to appropriations by the appropriate legislative bodies . . . . The State legislature or the legislative bodies of the counties acting in concert, as the case may be, may *approve or reject* the cost items submitted to them, as a whole. If the State legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

HAWAII REV. STAT. § 89-19(b) (1976) (emphasis added).

[347] "All items requiring any monies for implementation shall be subject to appropriations by the appropriate legislative bodies." *Id.* § 89-11(b)(3) (voluntary interest arbitration); *id.* § 89-11(d) (Supp. 1979) (final-offer arbitration).

fund the cost items contained in final-offer awards,[348] the absurd and unjust result compels the opposite conclusion.[349]

Assuming that the statute does not compel legislative funding of final-offer awards, an obvious corollary is that legislative transgression of the "spirit and policy" of the law revives a legitimate right to strike.[350] If subsection 89-10(b) applies to abortive final-offer awards, thereby requiring parties to reenter negotiations over cost items following legislative rejection, then it is logical to assert that other statutory provisions apply equally once the final-offer remedy has been exhausted. This means legislative rejection reinstates the limited right to strike. Because that right practically forecloses a legal full-scale work stoppage by firefighters,[351] the union is forced to take extra-legal action, as was ultimately threatened by HFFA.

The lack of parallelism in requiring arbitration and then prohibiting the union from submitting an award to its membership for ratification while allowing the legislature to reject the award[352] did not escape notice by the public. Hence, the economic weapon which the legislation sought to obviate instead became a particularly viable mechanism for forcing settlement and was cloaked with the legitimacy of public support.[353]

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[348] The decision of the arbitrator shall be *final and binding upon the parties;* provided that at any time and by mutual agreement, they may modify or amend the decision. Agreements reached pursuant to the decision of an arbitrator as provided in this bill shall not be subject to ratification by the employees concerned [*sic*] moreover, employees covered by this method of impasse resolution voluntarily relinquish their right to strike by virtue of such coverage. *As with all other collective bargaining agreements, this bill provides for final approval of any cost items by the appropriate legislative bodies.*

S. STAND. COMM. REP. No. 632-78, 9th Hawaii Leg., 2d Sess., *reprinted in* SENATE JOURNAL 1032, 1032-33 (1978) (emphasis added). The house committee report was to the same effect. H. STAND. COMM. REP. No. 248-78, 9th Hawaii Leg., 2d Sess., *reprinted in* HOUSE JOURNAL 1494, 1494-95 (1978).

[349] "[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act." Pacific Ins. Co. v. Oregon Automobile Ins. Co., 53 Hawaii 208, 211, 490 P.2d 899, 901 (1971). *Cf. In re* Sanborn, 57 Hawaii 585, 592-94, 562 P.2d 771, 775-76 (1977) (consistent with public policy considerations, land court decrees regarding registration of land and describing boundaries are not dispositive despite statutory language that decrees "shall be conclusive upon and against all persons, including the State"). *But see* Minnesota Educ. Ass'n v. State, ___ Minn. ___, 282 N.W.2d 915 (1979), *appeal dismissed,* 100 S. Ct. 1001 (1980). Enforcement of the no-rejection interpretation is nonetheless problematical, *see* note 310 *supra.*

[350] This is Minnesota's approach, *see* MINN. STAT. ANN. § 179.64 (West Supp. 1980). The alternative of repeating the arbitral mechanism would require a statutory amendment, *see* note 344 *supra.*

[351] *See* text accompanying note 265 *supra.*

[352] *See* note 331 *supra* and accompanying text.

[353] *See* Honolulu Advertiser, June 24, 1979, at A-2, cols. 4-6 (HFFA advertisement threatening strike action in face of legislature's bad faith). Allen C. Wilcox, Jr., the former president of Alexander & Baldwin, Inc., one of Hawaii's oldest and largest firms, described a full-

The strike was averted by a last-minute negotiated settlement which by its terms only could be considered a victory for HFFA.[354] The Governor and the legislature had been subjected to a long campaign of adverse publicity and loss of public support. The law had been declared inadequate by the agency with authority to implement it.

This limited experience suggests that the cost of effectively outlawing strike action is greater than the legislature originally perceived. To ensure that "employees covered by this method of impasse resolution voluntarily relinquish their right to strike",[355] the legislature must forfeit its right to reject.[356]

IV. Conclusion

The short period of development under Hawaii's Collective Bargaining Act reveals a pattern of erosion that has weakened the theoretical infrastructure supporting successful use of arbitration as a means of resolving labor disputes. HPERB has demonstrated a proclivity to interject itself into the grievance arbitration process instead of promoting exclusivity of the arbitral mechanism. The manifest willingness of legislative bodies to disregard final-offer awards, coupled with the ability of public employers to advocate rejection without impunity, has transformed the final and binding decisions of neutral arbitrators into a factfinding recommendation by an advisory panel for the employer.

The very narrow grounds for vacating an arbitration award provided in the Arbitration and Awards Act are in obvious conflict with the board's broad guidelines for reviewing awards and obligations to arbitrate. Grievance arbitration awards scarcely can be considered final and binding if the board can review them within the wide parameters it has established for itself. On the basis of HPERB's rationale, the board's jurisdiction to review awards would apply to those in interest arbitration, including compulsory arbitration, as well as those in grievance arbitration. Thus, the legislature is not the only potential impediment to the finality of interest arbitration.

The objective of avoiding litigation by arbitration is far from being accomplished in the public sector. HPERB's policy encourages the current

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scale firefighters strike as the only "honorable alternative [the union] having been betrayed by the ineptness or outright treachery of some politicians." *Id.*, June 29, 1979, at A-23, col. 2.

[354] The union extracted a 7% pay hike in the first year and 10 ½% in the second. Honolulu Advertiser, June 30, 1979, at A-1, cols. 7-8. The newspapers characterized the award as a "wage adjustment not pegged to the Consumer Price Index" but a clear victory for the union. *Id.* HFFA ratified the negotiated contract by a vote of 601 to 554. *Id.*, July 3, 1979, at A-3, cols. 1-5.

[355] S. Stand. Comm. Rep. No. 632-78, 9th Hawaii Leg., 2d Sess., *reprinted in* Senate Journal 1032, 1033 (1978).

[356] Comment, *supra* note 2, at 141, 143.

tendency of the public employers to rush to the board with petitions for declaratory rulings in an effort to prevent arbitration or to discredit awards adverse to them. Legislative action is required to clarify the roles of HPERB and circuit courts in the enforcement of arbitration agreements in public-sector collective bargaining.

The prospects for voluntary interest arbitration are now very dim indeed. It is hardly conceivable that any union would agree to such arbitration if public employers can reject a so-called final and binding arbitration award. Finally, it is intolerable for the State to impose compulsory arbitration of interest disputes on public employees and to strip them of their right to strike without effectively recognizing its obligation to comply with awards resulting from such arbitration.

THE CONSTITUTION: THE SAFEGUARD OF OUR FREEDOMS

Arthur J. Goldberg*

The Constitution of the United States is a brief document consisting of a preamble and seven articles, containing in all about six thousand words.[1] It was a unique feature of the Constitution when adopted that it is a written document, unlike the British Constitution which, to this very day, never has been put down on paper.[2]

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[1] The length of constitutions varies dramatically from the seven articles in the United States Constitution to the 395 articles (excluding nine long schedules) in India's Constitution. Length may be explained as a function of several factors including tradition, the form of executive government instituted, and whether the constitution is unitary or federal. B. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 31-34 (1973) [hereinafter cited as NWABUEZE] (discussing why constitutions of ex-French territories are shorter than those of ex-British territories). Generally speaking, a shorter constitution contains vague language, recognizing that unanticipated future conflicts cannot be specifically provided for, while a longer constitution may indicate less trust in the ability of a political system to survive liberal judicial interpretations of unclear language, thereby prompting the constitutional drafters to specifically define and limit individual rights in the interest of governmental self-preservation. Baldwin, *A Constitutional Comparison: Mexico, the United States and Uganda*, 10 CAL. W.L. REV. 82, 88 (1973).

[2] The British Constitution is not a single, integrated document but rather consists of "a complex of laws, customs, and changing ways of behaving," while our Constitution "is at the outset a formal document, carefully thought out in all its parts and seeking to construct a *rational* whole." C. FRIEDRICH, THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD 12 (1967) (footnote omitted) (original emphasis) [hereinafter cited as FRIEDRICH, IMPACT]. Some writers disdain the classification of unwritten constitutions as applied to the United Kingdom, noting that British statutory law defines individual liberties and the powers of political institutions. *See* CONSTITUTIONS OF MODERN STATES at xi (L. Wolff-Phillips ed. 1968) [hereinafter cited as Wolff-Phillips]. *But see* H. GREAVES, THE BRITISH CONSTITUTION 15, 20-22 (3d ed. 1958) [hereinafter cited as GREAVES]. *See also* Sager, *Israel's Dilatory Constitution*, 24 A.J. COMP. L. 88 (1976). While it may be correct that few countries have no codified constitutional principles, and none of them are major powers, Wolff-Phillips, *supra* at xi-xii, the attempt to equate British codified principles with the nature of the American Constitution ignores a revolutionary feature of the latter. When it was written, the United States Constitution departed significantly from the British model precisely because the document

Perhaps our Constitution's most distinguishing feature is the source. The Constitution is an act of the people.[3] Its very first words are "WE THE PEOPLE of the United States".[4] Under the Constitution, therefore, the people are the real sovereignty; not the President, not Congress, and not the judiciary.[5]

The Constitution also, by its express words, is the supreme Law of the Land.[6] All federal and state officials are bound by "Oath or Affirmation,

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was intended to limit the ability of legislative bodies to alter the fundamental principles it contained by later codifications. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), in THE AMERICAN CONSTITUTION 20, 23-24 (P. Goodman ed. 1970).

There has been much debate as to the relative merits of the United States and British Constitutions. *See, e.g.*, FRIEDRICH, IMPACT, *supra*, at 12-13; D. VERNEY, BRITISH GOVERNMENT AND POLITICS 34-47 (2d ed. 1971). The British Constitution has been criticized especially in recent years as creating a barrier to resolution of such prominent problems as the political strife in Ireland and human rights in general. Williams, *The Constitution of the United Kingdom*, 31 CAMBRIDGE L.J. 266 (1972). *See generally* K. WHEARE, THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH 89-113 (1960); Mair, *The Break-up of the United Kingdom: The Irish Experience of Regime Change, 1918-1949*, XVI J. COMMONWEALTH & COMP. POL. 288 (1978). One scholar has noted, however, that constitutionalism in both countries has been mutually influenced, so that the "British constitution has become more formalized as the American has been overgrown with custom and judicial interpretation." FRIEDRICH, IMPACT, *supra*, at 12 (footnotes omitted).

[3] In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402-05 (1819), Chief Justice Marshall specifically rejected the contention that the Constitution did not emanate from the people. Constitutions of other countries also are acts of the people, or so the preambles to their respective charters would imply. *See, e.g.*, GRUNDGESETZ preamble (W. Ger.); INDIA CONST. preamble; KENPO (Constitution) preamble (Japan), *reprinted in* Wolff-Phillips, *supra* note 2, at 27, 53, 106.

In recent years, however, constitutions have been imposed on countries by "outside" forces, especially when former colonies and territories are liberated, thereby raising questions regarding the legitimacy of those constitutions. NWABUEZE, *supra* note 1, at 23-24. Even in the case of a document such as the United States Constitution wherein the "people" are the source, there is still some question as to the inclusiveness of that term. Thus, we also may speak of the democratization of a constitution where the "people" as a class is gradually expanded to include women and racial minorities. C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 31-33 (1968) [hereinafter cited as FRIEDRICH, CONSTITUTIONAL GOVERNMENT].

[4] U.S. CONST. preamble. "The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' " Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324 (1816). While the preamble does not, of itself, afford any basis for a claim either of government power or private rights, Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905), a preamble serves as a guide to those values and beliefs which the constitution is designed to perpetuate, E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 1 (13th ed. 1973); FRIEDRICH, CONSTITUTIONAL GOVERNMENT, *supra* note 3, at 163.

[5] "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[6] U.S. CONST. art. VI, para. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

to support this Constitution".[7]

Another special quality of the Constitution is its innate capacity for growth. We are largely indebted to Chief Justice John Marshall for this; he recognized, in the early days of the Republic, that the capacity for growth and change was essential if the Constitution was to endure.[8] The

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United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As Chief Justice Marshall put it:

> It is also not entirely unworthy of observation, that in declaring what shall be the *Supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (original emphasis).

[7] U.S. CONST. art. VI, para. 3. The purpose of this constitutional provision was explained in an early Supreme Court decision:

> The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all executive and judicial officers of the several States (as well as those of the General Government), shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of Government, with the powers hereinbefore specified, had been adopted by the Convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several States, for their consideration and decision.

Ableman v. Booth, 62 U.S. (21 How.) 506, 524-25 (1859).

[8] Chief Justice Marshall's term on the United States Supreme Court (1801-1835) was marked by a series of highly influential decisions that continue to govern our understanding of the Constitution. *See* E. CORWIN, THE TWILIGHT OF THE SUPREME COURT 6-7 (1934); W. SWINDLER, THE CONSTITUTION AND CHIEF JUSTICE MARSHALL (1978). The idea that the Constitution is a living document capable of adapting to the changing needs of the people through the mechanism of judicial interpretation was advocated by other early Justices as well as Marshall, the most famous of whom was Justice Story, a member of the Court at the same time as Marshall. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816). Marshall, however, is generally credited with firmly establishing the concept. As seen from the following passage, Marshall based the elastic qualities of the Constitution in its brevity and vagueness.

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget, that it is *a constitution* we are expounding.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (original emphasis). *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921) ("The great generalities of the constitution have a content and a significance that vary from age to age."), *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 111 (M. Hall ed. 1947).

Marshall concept of the Constitution was reiterated many years later by Justice Joseph McKenna in the case of *Weems v. United States*,[9] in which the Court struck down as cruel and unusual punishment the imposition of *cadena temporal*, a harsh and inhuman penalty, then used in the Philippines Territory.[10]

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[9] 217 U.S. 349 (1910).

[10] Weems, a United States Coast Guard disbursing officer stationed in Manila, was convicted of falsifying a public document. His criminal act consisted of entering into his cash book, as wages paid out, the amount of 616 pesos, *id.* at 363, which he had in fact misappropriated. The Philippine court of first instance sentenced Weems to 15 years of *cadena temporal*—imprisonment in chains and with hard labor—together with accessory penalties which would have deprived him of civil rights during imprisonment, disqualified him permanently from enjoyment of political rights, and subjected him to governmental surveillance for the remainder of his life. The supreme court of the Philippines affirmed, but the United States Supreme Court reversed the judgment, holding that the penal code provision under which Weems had been sentenced, as well as the particular sentence imposed, constituted cruel and unusual punishment in violation of the Philippine Bill of Rights. Departing from the traditionally limited reading given the eighth amendment to the United States Constitution, *see In re* Kemmler, 136 U.S. 436 (1890) (penalty of death by electric chair not cruel within meaning of eighth amendment as constituting something inhuman and barbarous, more than the mere extinguishment of life); Wilkerson v. Utah, 99 U.S. 130 (1879) (death by public shooting for conviction of murder in first degree not prohibited by the eighth amendment); Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (cited in Gregg v. Georgia, 428 U.S. 153, 169 (1976); Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring)), the Court rejected the notion that "cruel and unusual" described only intrinsically torturous modes of punishment against which the amendment was originally aimed. Justice McKenna, writing for the majority, instead explained that constitutional and statutory language should not "be necessarily confined to the form that evil [for which the legislation is enacted] had theretofore taken." 217 U.S. at 373. The constitutional prohibition of the eighth amendment therefore would apply where a penalty, not inherently cruel or unusual, became such by being unduly severe. The Court contrasted the punishment imposed upon Weems with penalites provided for more serious offenses under the Penal Laws of the United States and the Philippine Penal Code, concluding that Weems' sentence and its statutory source were unconstitutionally excessive in relation to the particular offense in question. *Id.* at 380-81.

Since *Weems*, the Court generally has met eighth amendment challenges to penal schemes and punishments with the elastic approach to the amendment's interpretation advocated by Justice McKenna. *See, e.g.*, Robinson v. California, 370 U.S. 660, 666-67 (1962) (criminal punishment for narcotics addiction violates eighth amendment); Trop v. Dulles, 356 U.S. 86, 101-03 (1958) (alternative holding that expatriation is cruel and unusual punishment for desertion during time of war); Louisiana v. Resweber, 329 U.S. 459, 463-64 (1947) (eighth amendment does not preclude second electrocution after first attempt failed by accident). *See generally* Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1003-15 (1964). Indeed, the *Weems* analysis, together with the now familiar mandate from *Trop* that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," 356 U.S. at 101, has continued in force through the Court's more recent and significant eighth amendment controversies: the death penalty cases. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 593 & n.4 (1977) (sentence of death for rape constitutes cruel and unusual punishment because it is grossly disproportionate to the crime); Gregg v. Georgia, 428 U.S. 153, 179-82, 195, 198 (1976) (contemporary standards of decency do not preclude death penalty; statute prescribing death penalty for murder, requiring bifurcated proceeding

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not emphemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[11]

Another significant feature of our Constitution is that it has not been changed fundamentally in the almost two hundred years since its adoption.[12] True, the Constitution has been amended sixteen times since the

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in which jury must make specific findings regarding the crime or defendant's character and requiring state court to compare issued sentence with others, not prohibited by eighth amendment); Furman v. Georgia, 408 U.S. 238, 297-300 (1972) (Brennan, J., concurring) (contemporary society rejects death penalty; statute granting wide discretion to jury held unconstitutional under the eighth amendment). *See generally* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Goldberg, *Human Rights—An Issue for Our Time*, 29 HASTINGS L.J. 887, 889 (1978); Goldberg, *The Death Penalty for Rape*, 5 HASTINGS CONST. L.Q. 1 (1978). *See also* Beck v. Alabama, 48 U.S.L.W. 4801 (June 20, 1980) (No. 78-6621) (jury must be permitted to consider guilt of a lesser crime where evidence would have supported such a verdict); Godfrey v. Georgia, 100 S. Ct. 1759 (1980) (Georgia statute allowing death penalty based on jury finding that the murders were outrageously vile or inhumane is unconstitutionally vague).

[11] 217 U.S. at 373.

[12] *See*, A. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 1-2 (1978) [hereinafter cited as GRIMES]. This is so despite more than 3,000 proposals submitted to Congress to amend the Constitution, FRIEDRICH, CONSTITUTIONAL GOVERNMENT, *supra* note 3, at 142, and more than 300 applications from every state in the Union calling for constitutional conventions dealing with subjects ranging from prohibition of polygamy to world federal government, ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION 60-61, 69 (1974). *See generally* Clark, *Some Recent Proposals for Constitutional Amendment*, 12 WIS. L. REV. 313 (1937).

Incorporation of a formal amendatory process was unique to the United States Constitution at the time it was written. "[T]he clear recognition and deliberate organization of the amending power was an achievement of the American revolution. The Philadelphia Convention *invented* it." FRIEDRICH, CONSTITUTIONAL GOVERNMENT, *supra* note 3, at 138 (original emphasis). Several countries subsequently adopted constitutional provisions comparable to article V of the United States Constitution, *quoted in* note 18 *infra*, requiring popular participation precedent to certification of an amendment. *See* Wolff-Phillips, *supra* note 3, at xvi-xvii. Many others established amendatory procedures requiring only a special legislative or parliamentary majority, *id.* at xv-xvi. Indeed, a proposal to change the amending procedure of our Constitution by eliminating the convention alternative quietly disappeared in the 1960s, but not before a warning was sounded that it would deliver "ultimate power into the hands of a minority." Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 966 (1963). *See also* Platz, *Article Five of the Federal Constitu-*

passage of the Bill of Rights,[13] but most of these amendments are designed to improve the functioning of government and the electoral process,[14] and the few that deal with citizens' rights[15] enlarge rather than contract them,[16] with the notable exception of the prohibition

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tion, 3 GEO. WASH. L. REV. 17, 47-49 (1934) (proposing changes to the article).

Organized violence by *coup de'etat* frequently has characterized constitutional change in the emergent states, largely because the governments have suspended civil rights under emergency powers designed to control political insurrections, thereby forcing military intervention. NWABUEZE, *supra* note 1, at 219-25.

[13] The Bill of Rights, the attachment of which to a written constitution has been noted as "a distinctive American innovation in politics," GRIMES, *supra* note 12, at 3, has been in force since December 15, 1791, IV THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93 n.3 (rev. ed. M. Farrand ed. 1937) [hereinafter cited as FARRAND'S RECORDS]. The idea of a bill of rights arose only indirectly during the last week of proceedings at the Philadelphia Convention and immediately became the center of contention between the Anti-Federalist proponents and the Federalists. GRIMES, *supra* note 12, at 6-7. The vigorous debates between these factions over the theoretical underpinnings of such a delineation of rights have been recorded and commented upon frequently. *See* 1 ANNALS OF CONG. (Gales & Seaton eds. 1789); II FARRAND'S RECORD'S, *supra*, at 637, III *id.* at 256; R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 (1955); B. SCHWARTZ, I THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 435-591 (1971). The First Congress proposed the ten amendments ultimately composing the Bill of Rights on September 25, 1789, together with two others which failed to receive the requisite approval of three-fourths of the State legislatures. The rejected amendments dealt with apportioning the House of Representatives and compensating Members of Congress. Martin, *State Legislative Ratification of Federal Constitutional Amendments: An Overview*, 9 U. RICH. L. REV. 271 n.3 (1975).

The remaining 16 amendments were proposed by Congress and ratified by the States in the following years: 11th amendment (1798); 12th amendment (1804); 13th amendment (1865); 14th amendment (1868); 15th amendment (1870); 16th amendment (1913); 17th amendment (1913); 18th amendment (1919, repealed 1933); 19th amendment (1920); 20th amendment (1933); 21st amendment (1933); 22nd amendment (1951); 23rd amendment (1961); 24th amendment (1964); 25th amendment (1967); 26th amendment (1971).

[14] U.S. CONST. amend. XXV (succession to Presidency, Vice-Presidency in case of death, resignation, or removal); *id.* amend. XXIII (District of Columbia electors for President and Vice-President); *id.* amend. XXII (Presidential tenure); *id.* amend. XX (commencement of terms of Office; convening of Congress; death or disqualification of President and Vice-President); *id.* amend. XVII (popular election of Senators, vacancies); *id.* amend. XVI (income tax); *id.* amend. XIV, §§ 2 (apportionment), 3 (disqualification of Office, electors), 4 (public debt); *id.* amend. XII (election of President, Vice-President); *id.* amend. XI (federal courts without jurisdiction to hear suits against States (but not state officials, *see Ex parte* Young, 209 U.S. 123 (1908)) by citizens of another State or foreign country).

[15] U.S. CONST. amend. XXVI (right to vote of citizens 18 years or older shall not be abridged on account of age); *id.* amend. XXIV (right to vote in Presidential, Vice-Presidential, or congressional election shall not be abridged by failure to pay any tax); *id.* amend. XIX (women's suffrage); *id.* amend. XV (right to vote shall not be abridged on account of race, color, previous servitude); *id.* amend. XIV, § 1 (equal protection, due process, privileges or immunities clauses); *id.* amend. XIII (slavery and involuntary servitude abolished).

[16] The 13th amendment's abolition of slavery and involuntary servitude is a commanding example. Adoption of this Civil War amendment superseded constitutional provisions reinforcing the slaves' existence and unequal status. *See* U.S. CONST. art. I, § 2, para. 3; *id.* art. IV, § 2, para. 3. The amendment also forced the Court to abdicate its toleration of human bondage seen in Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that Congress

amendment.[17]

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could not prohibit slavery in the territories). Indeed, in The Civil Rights Cases, 109 U.S. 3, 20-21 (1883), the Court acknowledged that Congress could enact primary legislation to rid the nation of public and private incidents of slavery, even while the Court determined that denial of public accommodations was not incident thereto. And although a later decision established that the amendment's prohibition does not extend to all acts of private discrimination, Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (13th amendment does not prohibit individuals from entering into racially restrictive covenants), the Court more recently stated that Congress does have plenary power to define and prohibit the badges of slavery in both private and public contexts. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-43 (1968) (federal statute barring all racial discrimination in the sale or rental of property is valid enforcement of 13th amendment, *id.* at 413). *See generally* G. BUCHANAN, THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 129-55 (1976).

The ambit of the 14th amendment's prohibition against governmental abridgments of the privileges or immunities of United States citizenship, denials of life, liberty, and property (due process), and equal protection of the laws is incapable of brief capitulation. It has been said that the 14th amendment "has touched the life of every American by nationalizing the fundamental constitutional standards of freedom expressed in the federal Bill of Rights." Brennan, *Landmarks of Legal Liberty*, in *B. Schwartz*, THE FOURTEENTH AMENDMENT 1 (1970). That the amendment expands individual rights is manifested both in the development of racial equality under the equal protection clause and in the Court's enlargement of the concept of personal liberty originating in the due process clause.

In the first instance, for example, the Court found sufficient state action in the judicial enforcement of private, racially restrictive covenants to invoke the amendment's strictures, Shelley v. Kraemer, 334 U.S. 1 (1948), and later repudiated its separate-but-equal notion of racial equality from Plessy v. Ferguson, 163 U.S. 537 (1896). The historic *Brown* decision, Brown v. Board of Educ., 347 U.S. 483 (1954) (rejecting the separate-but-equal justification in the area of public education and holding that segregated schools are inherently unequal), and its progeny "made clear what we take for granted today—no governmental entity may segregate or burden people because of their race or national origin." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 560 (1978). Similarly, the clause protects political liberties that were once thought to be the exclusive province of the states. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (striking New York law requiring residents of a school district to own or lease taxable property or to have had children enrolled in the district's schools as a precondition to voting in school elections); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding unconstitutional a Virginia poll tax and its concomitant disenfranchisement of those not making timely payment); Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment); R. BERGER, GOVERNMENT BY JUDICIARY 85-90 (1977).

Judicial interpretation of the due process clause likewise has been expansive. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186 (1977) (quasi-in-rem jurisdiction); O'Connor v. Donaldson, 422 U.S. 563 (1975) (mental health confinement); Goss v. Lopez, 419 U.S. 565 (1975) (academic dismissal); Roe v. Wade, 410 U.S. 113, 153 (1973) (right to privacy); *In re* Gault, 387 U.S. 1, 13 (1967) (juvenile proceedings).

The 15th, 19th, 24th, and 26th amendments grant Congress the power to enforce the individual's right to vote free from certain governmental abridgments. The amendments thus give specific constitutional recognition to a right independently protected by the 14th amendment, Yick Wo v. Hopkins, 118 U.S. 356, 370-71 (1886) (dictum), and carefully scrutinized in equal protection analyses, 377 U.S. at 562. For a general discussion of the historical context of each voting rights amendment, see GRIMES, *supra* note 12, at 51-64, 90-100, 130-36, 141-47.

[17] U.S. CONST. amend. XVIII (1919, repealed 1933):

> SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the expor-

I do not favor a new Constitution for the United States, as some persons of good will have advocated.[18] I believe we have a good Constitution which, if honored by those who govern and by those who are governed,

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tation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

In questioning the validity of the ratification, one commentator wrote that "[t]he 'Eighteenth Amendment' brings the country . . . to a parting of the ways, not only . . . as to the nature of the subject, in that it is the first attempt in the constitution to control or restrict individual liberty, but also because . . . it [illegitimately] seeks to take [powers and rights] from the people and the states." White, *Is There an Eighteenth Amendment?*, 5 CORNELL L.Q. 113, 126-27 (1920). *See also* Comment, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183, 184 (1920) (analogizing the 18th amendment to the oppression symbolized by the Boston Tea Party).

[18] R. TUGWELL, INTRODUCTION TO A CONSTITUTION FOR A UNITED REPUBLICS OF AMERICA 24-45 (1970) (reprinted from III THE CENTER MAGAZINE No. 5 (Center for the Study of Democratic Institutions, Santa Barbara, Cal.)). *See* Noonan, *The Convention Method of Constitutional Amendment—Its Meaning, Usefulness, and Wisdom*, 10 PAC. L.J. 641 (1979); Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627 (1979). The procedure for amending the Constitution is contained in article V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V. Since the convention procedure never has been used, the validity of recent proposals to limit the subject matter that a convention could consider has been widely discussed, with several commentators concluding that article V permits such a procedure. Rhodes, *A Limited Federal Constitutional Convention*, XXVI U. FLA. L. REV. 1 (1973); Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295; Note, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. LEGIS. 127 (1973). *See generally* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, A CONVENTION TO AMEND THE CONSTITUTION? (1967).

As of February 1980, at least 15 states had passed resolutions calling for a convention to consider anti-abortion amendments to the Constitution. Proposals for changes by the traditional method have been introduced in Congress and are susceptible of the following categorization: (1) Protecting the right to life, without exception, from fertilization, *see, e.g.*, S.J. Res. 6, 95th Cong., 1st Sess. (1977); (2) exception only to prevent death of the pregnant woman, *see, e.g.*, S.J. Res. 14, 95th Cong., 1st Sess. (1977); and (3) reserving to the States the power to determine the legality of abortions, *see, e.g.*, H.J. Res. 89, 95th Cong., 1st Sess. (1977). *See* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975).

can continue to serve us well for ages to come.

It was not very long ago that not only the public but even judicial and scholarly critics proposed to alter the fundamental balance between the power of government and the autonomy of the individual as established in the Constitution and particularly by the Bill of Rights.[19] A rising rate of crime spawned an outcry that permissive Supreme Court decisions had handcuffed the police and over-protected the criminal at the expense of public safety.[20] These attacks centered on the rights and privileges afforded by the fourth, fifth, and sixth amendments, arguing that if these rights were limited there would be more convictions, and more convictions would mean less crime.[21] It is easy to point to a suspected criminal and characterize his rights as self-imposed restraints that the law-abiding members of society have adopted only out of an exaggerated sense of fair play. Murderers and thieves are seen as "taking advantage" of constitu-

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[19] In the context of criminal law, these proposals sought to reduce or eliminate the applicability of the exclusionary rule. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); *id.* at 426-27 app.; Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 1002 (1967); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

Changes also were sought to overturn Supreme Court decisions in several areas, including racial integration and separation of church and state. One proposed constitutional amendment would have allowed nondenominational prayers in public schools. S.J. Res. 148, 89th Cong., 2d Sess. (1966). Organized religion split on the issue, with fundamentalists often opposing the contemplated legislation, preferring to retain first amendment principles of noninterference by government. *Compare Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary on S.J. Res. 148 Relating to Prayer in Public Schools*, 89th Cong., 2d Sess. 532 (1966) (statement of Elder W. Melvin Adams) (opposing passage), *with id.* at 274 (statement of Gary G. Cohen) (favoring passage). The 1971 House vote defeating such a proposal reflected this split. N.Y. Times, Nov. 9, 1971, at 42, col. 3. That same year, amendments were introduced which would eliminate bussing to achieve racial integration. *See, e.g.*, H.J. Res. No. 620, 92d Cong., 1st Sess. (1971).

[20] Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964); Murphy, *Judicial Review of Police Methods in Law Enforcement*, 44 TEX. L. REV. 939 (1966); Wilkey, *The exclusionary rule: why suppress valid evidence?*, 62 JUD. 215 (1978). *See generally* Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Court*, 49 CORNELL L.Q. 436 (1964).

[21] The United States Supreme Court anticipated these attacks when deciding each of the landmark cases. In the 1966 fifth amendment decision, the Court explained at great length why the constitutional guarantees should not be outweighed by law enforcement needs. Miranda v. Arizona, 384 U.S. 436, 479-91 (1966). The logic of the sixth amendment decision issued two years earlier may be succinctly stated:

> No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (footnotes omitted) (original emphasis). In the fourth amendment context, the Court reminded us: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

tional protections that the average citizen rarely has cause to exercise.[22]

Perhaps nothing but the wrenching national agony of Watergate[23] could bring home the realization that the constitutional rights which were so criticized are the rights essential for all citizens and not merely safeguards for criminals. The break-in of the Democratic National Committee offices at Watergate,[24] the burglarizing of the office of Dr. Daniel Ell-

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[22] "Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends." Harris v. United States, 331 U.S. 145, 156 (1947).

[23] The June 17, 1972 break-in at the Democratic National Committee headquarters in the Watergate Office Building in Washington, D.C., was the first detected incident in a series of revelations leading ultimately to the resignation of the President of the United States under threat of impeachment. *See generally* HOUSE COMM. ON JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, 93rd Cong., 2d Sess. (1974); *Hearings Before the House Comm. on the Judiciary on H. Res. 803: A Resolution Authorizing and Directing the Comm. on the Judiciary To Investigate Whether Sufficient Grounds Exist for the House of Representatives To Exercise Its Constitutional Power To Impeach Richard M. Nixon President of the United States of America*, 93rd Cong., 2d Sess. (1974); THE WATERGATE HEARINGS (N.Y. Times ed. 1973).

In March 1974, a grand jury authorized the Special Prosecutor to name President Richard M. Nixon as an unindicted coconspirator under 18 U.S.C. § 371 (1970). United States v. Nixon, 418 U.S. 683, 687 & n.4 (1974); United States v. Haldeman, 559 F.2d 31, 51 n.2 (1976), *cert. denied*, 431 U.S. 933 (1977). Five months later, the President resigned. XXXII CONG. Q. No. 32, at 2193-94 (1974). Precisely one month following the resignation, President Gerald R. Ford pardoned the former President for all crimes committed against the United States, without specifying those crimes. Proclamation No. 4311, F.R. Doc. No. 74-21059, 39 Fed. Reg. 32601, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8214. The national upheaval caused by these events is reflected in the contemporaneous legal literature discussing the propriety of the preindictment and preconviction pardon. *See, e.g.*, Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1099-1102 [hereinafter cited as Firmage & Mangrum] (criticizing the pardon); Kutner, *A Legal Note on the Nixon Pardon: Equal Justice* Vis-A-Vis *Due Process*, 9 AKRON L. REV. 243 (Nixon pardon was valid); Macgill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN. L. REV. 56 (1974) (validity of Nixon pardon questionable due to its nonspecific nature and because it interfered with the Special Prosecutor's jurisdiction); Comment, *On Executive Clemency: The Pardon of Richard M. Nixon*, 2 PEPPERDINE L. REV. 353 (1975) (arguing that the pardon was invalid or ineffective because it failed to list the offenses pardoned and because it was not accepted by President Nixon who maintained his innocence, but that the pardon should not be challenged in court). For an account of Watergate from the perspective of presiding District Court Judge John J. Sirica, see J. SIRICA, TO SET THE RECORD STRAIGHT (1979). For a detailed description of the investigation of Watergate by the press, see C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1974) [hereinafter cited as BERNSTEIN & WOODWARD].

[24] Police arrested five men inside Democratic National Committee headquarters. The burglars were connected with the Committee for the Reelection of the President and their activities were part of a plan sanctioned by high government officials who would later conspire to hide their involvement. It was the coverup that led to the downfall of the President. Detailed facts of the break-in and subsequent events are found in several reported cases. *See, e.g.*, United States v. Haldeman, 559 F.2d 31, 52-59 (1976), *cert. denied*, 431 U.S. 933 (1977); United States v. Mardian, 546 F.2d 973, 975-76 (1976); United States v. Barker, 514 F.2d 208, 211-12, *cert. denied*, 421 U.S. 1013 (1975); United States v. Liddy, 509 F.2d 428,

sberg's psychiatrist,[25] the illegal wiretappings,[26] the obstruction of justice,[27] and the subversion of the political process by those in high governmental office[28] demonstrated most vividly that the Bill of Rights is needed to protect the average citizen from governmental excesses. The Bill of Rights protects all of us, and the timeless wisdom embodied in its protections once again has been revealed to a public badly in need of enduring principles by which to chart the future. Watergate centrally in-

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431-34 (1974), *cert. denied*, 420 U.S. 911 (1975); United States v. McCord, 509 F.2d 334, 339 (1974), *cert. denied*, 421 U.S. 930 (1975).

[25] Daniel Ellsberg, formerly a Defense Department official, was responsible for transmitting the Pentagon Papers, classified government documents regarding United States' involvement in Viet Nam, to the New York Times. The newspaper published part of the material in the summer of 1971, *see* New York Times Co. v. United States, 403 U.S. 713 (1971). The "leak" caused great concern among government officials who eventually authorized the September 1971 break-in at Dr. Louis J. Fielding's office in Los Angeles for the purpose of obtaining the psychiatrist's file on Ellsberg. The covert operation was organized by several of the same persons involved in Watergate events, and two persons who broke into Dr. Fielding's office, Bernard L. Barker and Eugenio R. Martinez, were among the five men arrested at the Watergate office in 1972. Details of the Fielding break-in are contained in several reported cases. *See, e.g.*, United States v. Haldeman, 559 F.2d 31, 54-55, 88-91 (1976), *cert. denied*, 431 U.S. 933 (1977); United States v. Barker, 546 F.2d 940, 943-44 (1976); United States v. Ehrlichman, 546 F.2d 910, 914-17 (1976), *cert. denied*, 429 U.S. 1120 (1977); United States v. Liddy, 542 F.2d 76, 78-79 (1976).

[26] An intelligence gathering group operating under the auspices of the Committee for the Reelection of the President infiltrated rival democratic campaign organizations and illegally intercepted and monitored conversations on the telephone of the executive director of the Democratic National Committee. United States v. Liddy, 509 F.2d 428, 433 (1974), *cert. denied*, 420 U.S. 911 (1975). Government officials within the Nixon administration itself were also targets of wiretapping. BERNSTEIN & WOODWARD, *supra* note 23, at 286-88, 343-44. Testimony at congressional hearings revealed the President's "bugging" of his own office. *Hearings on Watergate and Related Activities Before the Senate Select Comm. on Presidential Campaign Activities*, 93rd Cong., 1st Sess., 2074-76 (1973). Although consensual eavesdropping is not illegal, United States v. White, 401 U.S. 745 (1971), the incriminating conversations of the President are generally considered pivotal to his downfall. *See* United States v. Nixon, 418 U.S. 683 (1974) (enforcing en camera examination of subpoenaed tapes and documents of conversations and meetings between the President and others over the President's objection based, *inter alia*, on executive privilege); TRANSCRIPTS OF TAPES SUBMITTED BY THE PRESIDENT: PUBLIC TRANSCRIPTS I-III, 93rd Cong., 2d Sess., 120 CONG. REC. 12825-38, 13122-29, 13445-56 (1974); *id.* at 12877-79 (transcripts reprinted from newspaper report); *id.* at 15912 (public reaction to transcripts); UNITED STATES v. NIXON (L. Friedman ed. 1974).

[27] Article 1 of the impeachment resolution adopted by the House Committee on the Judiciary charged President Nixon with obstruction of justice. H.R. REP. No. 93-1305, 93rd Cong., 2d Sess. 1-2, *reprinted in* 120 CONG. REC. 29219 (1974). Several high officials were convicted of obstruction of justice, 18 U.S.C. § 1503 (1970). United States v. Haldeman, 559 F.2d 31, 51 & nn.3 & 6 (1976), *cert. denied*, 431 U.S. 933 (1977).

[28] "On March 1, 1974 a grand jury in Washington, D.C. returned a 13-count indictment against seven individuals. It charged what amounted to an unprecedented scandal at the highest levels of government, for most of the defendants had held major positions in the Nixon administration." United States v. Haldeman, 559 F.2d 31, 51 (1976), *cert. denied*, 431 U.S. 933 (1977). *See generally* BERNSTEIN & WOODWARD, *supra* note 23, at 116-36, 142-51, 293-95.

volved the nature and extent of the right to personal privacy[29] — a fundamental right at long last constitutionally protected.[30]

How many details of one's life are perfectly legal, honorable, yet personal; how many facts are there about each of us that the state or private institutions may at some point seek, but that we legitimately do not want known or publicly exposed? Modern computerized information systems threaten that justifiable right to anonymity by their memory banks.[31] The collection of personal information through tax forms, hospital and medical records, credit data, checking and savings accounts and the like, for use in other areas creates a potential for repression that can chill the exercise of guaranteed freedoms.[32] Highly sophisticated electronic snooping

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[29] *See* S. REP. No. 93-1183, 93rd Cong., 2d Sess. _, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6916, 6926. "[O]ver 2 years of Watergate has unquestionably raised public consciousness on the matter of civil liberties and the individual's right to privacy. Today, more than ever, the average American is sensitive to any invasion of his basic constitutional rights." 120 CONG. REC. 24777 (1974) (remarks of Rep. Rangel).

[30] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (Wisconsin statute prohibiting marriage when child support obligations not met violates equal protection clause by establishing classification that impermissibly burdens right to marry, a fundamental privacy right); Carey v. Population Servs. Int'l, 431 U.S. 678, 693-96 (1977) (4-3-2 decision) (New York law forbidding sale of contraceptives to minors under 16 unconstitutionally burdens the right to privacy in connection with decisions affecting procreation); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (Missouri statute unconstitutional; State cannot delegate to any particular person, including spouse or parent of minor, the authority to prevent an abortion); Roe v. Wade, 410 U.S. 113, 153 (1973) (Texas criminal abortion laws held unconstitutional because the right of personal privacy "encompasses a woman's decision whether or not to terminate her pregnancy"); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (Connecticut law forbidding the use of contraceptives violates privacy rights of the marital relationship).

[31] *See, e.g., Hearings on Criminal Justice Data Banks and Privacy Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. (opening statement of Sen. Sam J. Ervin, Jr.), *reprinted in* 120 CONG. REC. 5801 (1974); Forst & Weckler, *Research Access into Automated Criminal Justice Information Systems and the Right to Privacy*, 5 U. SAN. FERN. V.L. REV. 321 (1977); Grenier, *Computers and Privacy: A Proposal for Self-Regulation*, 120 CONG. REC. 18659 (1974); Meldman, *Centralized Information Systems and the Legal Right to Privacy*, 52 MARQ. L. REV. 335 (1969); *A Symposium—Computerized Criminal Justice Information Systems: A Recognition of Competing Interests*, 22 VILL. L. REV. 1171 (1976-1977); Kantor, *Fight Is Mapped Against U.S. Computer "Snooping"*, Detroit Sunday News, May 5, 1974, *reprinted in* 120 CONG. REC. 15170 (1974).

[32] The lack of self-restraint in information-gathering from and about citizens on the part of some agencies has demonstrated the potential throughout government for imposing coercive information burdens on citizens or for invading areas of thought, belief or personal life which should be beyond the reach of the Federal data collector.

S. REP. No. 93-1183, 93rd Cong., 2d Sess. _, *reprinted in* [1974] U.S. CODE & CONG. AD. NEWS 6916, 6929-30. *See generally* G. MCCLELLAN, THE RIGHT TO PRIVACY (1976); INFORMATION TECHNOLOGY IN A DEMOCRACY (A. Westin ed. 1971). This concern has led Congress to enact several laws establishing the general criteria for gathering relevant information, providing individuals with the right of access to information about themselves, and the opportunity to correct certain records. *See, e.g.*, Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (Supp. II 1978) (negating the impact of United States v. Miller, 425 U.S. 435

whose object may never know his conversations have been overheard leads to a temptation for exploratory eavesdropping with frightening implications.[33]

(1976), which held that a customer of a financial institution has no standing under the Constitution to challenge Government access to financial records, by providing for prior notice to customer of attempt to gain access and judicial opportunity to contest access, H.R. REP. No. 1383, 95th Cong., 2d Sess. 33-34, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9273, 9305-06); Privacy Act of 1974, 5 U.S.C. § 552a (1976); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1976); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1976).

The federal legislation is by no means considered a panacea in either theoretical or practical terms. *See* Belair, *Agency Implementation of the Privacy Act and the Freedom of Information Act: Impact on the Government's Collection, Maintenance and Dissemination of Personally Identifiable Information*, 10 J. MAR. J. PRAC. & PROC. 465 (1977); Halls, *Raiding the Databanks: A Developing Problem for Technologists and Lawyers*, 5 J. CONTEMP. L. 245 (1979). One commentator has noted that the modern totalitarian state relies upon great invasions of privacy for regime control. A. WESTIN, PRIVACY AND FREEDOM 23-26 (1970) [hereinafter cited as WESTIN].

Concern for accelerating encroachment on personal freedom by increased surveillance and data collection activity is manifested in recent state constitutional amendments establishing the right of privacy. *See* ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1, *construed in* White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975); HAWAII CONST. art. I, § 6; MONT. CONST. art. II, § 10. *Cf.* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958) (both cases holding government-compelled disclosure of affiliations with nonsubversive groups engaged in advocacy unconstitutional as a restraint on freedom of association).

> In sum, official, governmental activity in the civil liberties field can, under some conditions, produce what the Supreme Court has called a "chilling effect." The data tend to support the initial hypothesis that *public tolerance declines in association with the rise of government investigations and prosecutions of dissent and that public tolerance returns only slowly as such government actions decline.*

T. LOWI, THE POLITICS OF DISORDER 118 (1971) (original emphasis).

[33] The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

S. REP. No. 1097, 90th Cong., 2d Sess. —, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2154. For specific examples of intrusive electronic snooping see WESTIN, *supra* note 32, at 67-168; Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 165-72 (1952).

In Berger v. New York, 388 U.S. 41, 55-60 (1967), the Court found the state statute facially defective because it would allow eavesdropping in the nature of a general warrant, in violation of the fourth amendment's requirement that search warrants be carefully circumscribed so as to prevent unauthorized invasions of privacy. In response to *Berger*, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976) (amended 1978). S. REP. No. 1097, 90th Cong., 2d Sess. —, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2113, 2153.

Constitutional and statutory protections already exist to safeguard the individual from such intrusions,[34] provided the Executive resects these safeguards and the courts courageously enforce them.[35] The right to be

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Awareness of the dangers inherent in exploratory electronic eavesdropping has led some state courts to require court authorization for interception or recording even where one of the participants consented thereto. The supreme courts of New Hampshire and Wisconsin reached this result based on statutory interpretation of their respective wiretap laws. State v. Ayres, 118 N.H. 90, 383 A.2d 87 (1978) (recordation); State v. County Ct., 51 Wisc. 2d 434, 187 N.W.2d 354 (1971) (transmission). Michigan courts reached the same result through the equivalent fourth amendment provision of the state constitution. People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1974), *cert. denied*, 423 U.S. 878 (1975) (participant transmission); People v. Hall, 88 Mich. App. 324, 276 N.W.2d 897 (1979) (participant recording); People v. Livingston, 64 Mich. App. 247, 236 N.W.2d 63 (1975) (participant recording). Alaska and Montana courts relied on their respective state constitutional "right of privacy" amendments to reach similar conclusions. Coffey v. State, 585 P.2d 514, 518 (Alaska 1978); Aldridge v. State, 584 P.2d 1105, 1106 (Alaska 1978); State v. Thornton, 583 P.2d 886, 887 (Alaska 1978); State v. Glass, 583 P.2d 872 875-81 (Alaska 1978); State v. Brackman, _ Mont. _, 582 P.2d 1216 (1978). *But cf.* United States v. Caceres, 99 S.Ct. 1465 (1979) (exclusionary rule not applied to evidence obtained by I.R.S. agent in violation of internal regulations prohibiting consensual eavesdropping without prior administrative authorization in nonemergency situations); United States v. White, 401 U.S. 745 (1971) (warrant requirement does not apply to one-party consensual recording); 18 U.S.C. §§ 2511(2)(c)-(d) (1976) (consensual wiretapping not illegal).

The threat is perceived as the potential alteration of lifestyle, 88 Mich. App. at 330, 276 N.W.2d at 899, with significant implications for cherished rights. "Knowledge that the courts will permit warrantless monitoring of innocent conversations could chill the conversations themselves." 583 P.2d at 878 n.18. In White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975), for example, the Los Angeles police infiltrated the UCLA campus, posing as students and covertly recording discussions in classes and public and private meetings. Justice Tobriner, writing for the California Supreme Court, held that the intelligence activities stated a prima facie violation of the first amendment and the state constitutional right of privacy. The court concluded:

> The English historian, Sir Thomas Erskine May, writing in the middle of the nineteenth century, observed:
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> "Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators,—who shall say that they are free? Nothing is more revolting . . . than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency." (2 May, Constitutional History of England (1883) 275.)

Id. at 776, 533 P.2d at 235, 120 Cal. Rptr. at 107. For a critical analysis of *White* see *The Supreme Court of California 1974-1975*, 64 CALIF. L. REV. 284, 347 (1976).

[34] *See* notes 32, 33 *supra*, 36 *infra*.

[35] [Watergate] demonstrated how disproportionate is the harm to the political fabric which a king (or President) can cause when compared to the ability of the law to contain such harm. . . . An unlikely concatenation of events—the inept burglary of the Democratic Party Headquarters, the lost notebook revealing White House involvement, the chance disclosure of the presidential tape recordings—saved our system this time. Institutions are at best frail defenses against the propensities of men. . . . The combination of good men and good laws together represent the ultimate safeguard for republican

free from unreasonable searches and seizures is guaranteed to all by the fourth amendment.[36] By my reading of this amendment, each and every time the government singles out an American citizen and directs an investigation against him, the warrant procedure is required, except in the most urgent and exceptional circumstances,[37] to assure a disinterested ju-

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government.

Firmage & Mangrum, *supra* note 23, at 1108. *See also* P. KURLAND, WATERGATE AND THE CONSTITUTION 180-99 (1978).

[36] U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth amendment protections apply in some part, if not completely, to aliens in this country, *see, e.g.*, Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977) (authorizing preliminary injunction only to prohibit detention by force where I.N.S. agents lack reasonable suspicion that alien is illegally in country but not prohibiting questioning based on agents' belief that person questioned is an alien); Au Yi Lau v. United States Immigration & Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971) (I.N.S. statutory power to arrest "must be read in light of constitutional standards" requiring probable cause); Schenck v. Ward, 24 F. Supp. 776, 778 (D. Mass. 1938); United States v. Wong Quong Wong, 94 F. 832, 833-34 (D. Vt. 1899), and aliens searched by United States officials beyond the continental shelf, United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974). *But cf.* 20 U.S.C. § 2511(3) (1976) (federal wiretap law not applicable to constitutional exercise of Presidential authorization of intelligence activities for national security purposes). See note 38 *infra*.

[37] It is well established that the warrant requirement of the fourth amendment does not apply in certain circumstances. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (inventory search of an automobile according to routine police procedures); United States v. Robinson, 414 U.S. 218, 235 (1973) (full search of a person incident to a lawful custodial arrest); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (voluntary consent to a search); Chambers v. Maroney, 399 U.S. 42, 52 (1970) (automobile search upon probable cause); Chimel v. California, 395 U.S. 752, 762-63 (1969) (search incident to lawful arrest where confined to area within arrestee's immediate control for weapons or destructible evidence); Terry v. Ohio, 392 U.S. 1, 27 (1968) (protective search of person's outer clothing to discover weapons where officer reasonably suspects that detainee is involved in criminal activity and is armed and dangerous); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (house search where exigencies of hot pursuit make a search imperative).

The federal wiretap law permits 48 hours of surveillance without court approval in certain emergency situations involving organized crime or national security. 18 U.S.C. § 2518(7) (1976). The constitutionality of this provision has not been tested, but the emergency provision has been narrowly construed. *See* Shingleton v. State, 39 Md. App. 527, 387 A.2d 1134 (1978). No warrant is required if the court determines that the person under surveillance has no reasonable expectation of privacy under the fourth amendment. United States v. White, 401 U.S. 745, 753-54 (1971) (informant may constitutionally relate conversations between himself and the defendant through a concealed radio transmitter); Lopez v. United States, 373 U.S. 427, 439-40 (1963) (fourth amendment does not prohibit I.R.S. agent from simultaneously recording conversations between himself and the defendant); On Lee v. United States, 343 U.S. 747, 753-54 (1952) (agent may simultaneously transmit conversations between himself and the defendant to recording equipment elsewhere or to a monitoring agent); 18 U.S.C. §§ 2511 (2)(c)-(d) (1976). Despite the lack of constitutional or statutory restraints, "Justice Department approval for all consensual monitoring of nontelephone

dicial determination that the potential invasion of privacy is justified.[38]

There are myriad other aspects to the right of personal privacy which are not mentioned explicitly in the Bill of Rights, but which some Justices of the Court have found in the penumbras and emanations of those rights.[39] As I indicated in my concurrence in *Griswold v. Connecticut*,[40] I find such rights to be reserved to the people by the ninth amendment.[41]

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conversations by federal departments and agencies" has been required since October 1972, with certain exceptions for emergency situations. United States v. Caceres, 99 S.Ct. 1465, 1468 n.3 (1979). The Court recently held that evidence obtained in violation of agency regulations implementing the Attorney General's mandate is admissible in a criminal prosecution, rejecting the respondent's argument, *inter alia*, "that the regulations concerning eavesdropping . . . are of such importance in safeguarding the privacy of the citizenry that a rigid exclusionary rule should be applied." *Id.* at 1473.

[38] Justice White concurring in Katz v. United States, 389 U.S. 347, 363 (1967) (White, J., concurring), suggested that there may be a national security exception to the warrant requirement, however, Justice Douglas, joined by Justice Brennan, clearly rejected that view, *id.* at 359-60 (Douglas, J., concurring). Justice Stewart in Giordano v. United States, 394 U.S. 310, 315-16 (1969) (Stewart, J., concurring), emphasized that the issue remains open. In United States v. United States Dist. Ct., 407 U.S. 297, 316-20 (1972), the Court held that the warrant requirement applied to domestic aspects of national security wiretaps. Some lower courts, however, have found an exception. United States v. Butenko, 494 F.2d 593, 605 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974) (prior court authorization unnecessary where domestic surveillance conducted solely for the purpose of gathering foreign intelligence information); United States v. Brown, 484 F.2d 418 (5th Cir. 1973) (disclosure of contents of wiretap not required where defendant was overheard on warrantless tap authorized by President to obtain foreign intelligence).

[39] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). For example, the first amendment protects the right to receive information, Martin v. Struthers, 319 U.S. 141, 146-47 (1943), the right to distribute literature, Lovell v. Griffin, 303 U.S. 444, 452 (1938). Freedom to associate and privacy in one's associations has been protected by the first amendment, NAACP v. Alabama, 357 U.S. 449, 462 (1958), including forms of association that are not political in the customary sense but relate to the social, legal, and economic benefit of the members, NAACP v. Button, 371 U.S. 415, 430-31 (1963).

[40] 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

[41] The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

. . . .

. . . [A] judicial construction that this fundamental right [of privacy in marriage] is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people."

Id. at 488-92 (footnotes omitted) (original emphasis). *See* B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 55 (1955); Kelsey, *The Ninth Amendment of the Federal Constitution*,

More important than scholastic differences over the particular location of these rights, whether in the first, fourth, fifth, ninth, or fourteenth amendments or in a combination of them,[42] is the fact that a majority of the Supreme Court now appears to agree that the right to personal privacy exists and protects interests not specifically enumerated in the Constitution.[43] I venture the hope that the Court will take the opportunity afforded by cases as they arise to protect this "right 'to be let alone' "[44] — eloquently described by Justice Louis D. Brandeis as "the most comprehensive of rights and the right most valued by civilized men."[45]

The increased recognition of the right to personal privacy by the Court mirrors the increased public awareness of the importance of individual rights and liberties.[46] Recent public opinion polls indicate that sizeable majorities of the American people now support measures which would strongly protect individual citizens from illegal wiretapping and electronic surveillance.[47] The same polls document a substantial increase in public concern for protection of citizens' fundamental rights and liberties compared with polls of a few years ago.[48] It would appear that the people now

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11 IND. L.J. 309, 313 (1936). *Cf.* H. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 42-43 (ninth amendment may protect a fundamental right to life which, together with the eighth amendment, may prohibit the death penalty).

[42] *See, e.g.*, Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833 (1974); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Rhoades & Patula, *The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since* Griswold v. Connecticut, 50 DENVER L.J. 153 (1973); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973).

[43] *See* note 30 *supra*.

[44] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (footnote omitted) (quoting I T. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888)).

[45] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[46] *See, e.g.*, Davis, *Communism, Conformity, Cohorts, and Categories: American Tolerance in 1954 and 1972-73*, 81 AM. J. SOC. 491 (1975); Erskine & Siegel, *Civil Liberties and the American Public*, 31 J. SOC. ISSUES No. 2, at 13 (1975) [hereinafter cited as Erskine & Siegel]; Williams, Nunn & Peter, *Origins of Tolerance: Findings from a Replication of Stouffer's Communism, Conformity, and Civil Liberties*, 55 SOC. FORCES 394 (1977). The classic work of Samuel A. Stouffer provides a baseline from which contemporary societal values and levels of tolerance are evaluated. *See* S. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES (1955) (Stouffer data is compared with recent findings in the previously cited authorities).

[47] [I]n 1954, 65% of Americans thought it was perfectly legitimate for the government to tap private telephone conversations—as long as the purpose was to gather evidence against Communists. As late as 1969 only 47% of the electorate disapproved of wiretapping in principle (Gallup). Watergate-related events contributed to a quick about-face. In late 1972, 75% believed that "wiretapping and spying under the excuse of national security is a serious threat to people's privacy," and 88% specifically objected to the bugging of a political headquarters (Harris).

Erskine & Siegel, *supra* note 46, at 24.

[48] Polls of the American electorate show tolerance for first amendment rights of an admitted Communist increased from 27% in 1954 to 58% in 1974; those who would allow a Communist's book to remain in a public library increased by exactly the same figures over the same period. Erskine & Siegel, *supra* note 46, at 15 tables 1 & 16. The willingness of the

seem increasingly to realize that free speech, a free press, the vigilant protection of personal privacy, and the other safeguards of the Bill of Rights are potent weapons against governmental lawbreaking or overreaching.

In response to Watergate, the people once again are seeking refuge in the principles of the Constitution as the safeguard of our freedoms.[49] No steadier guide could be found by which the Nation should chart its future course. As a nation, we have risked our all on our faith in the Constitution. The Constitution will not fail us; let us not fail it.

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electorate to allow persons admittedly against religion, advocates of government ownership, and homosexuals to speak similarly increased in recent years. *Id.* at 15 table 1.

Gallup polls conducted in December 1972, March 1974, and October 1974 showed the percentage of those favoring legalized abortions rose from 46% to 47%, and finally, to 51% in October of 1974. Since a substantial number of those polled expressed no opinion, the number favoring legalized abortions constituted a plurality of those who expressed an opinion in the earlier two polls. I G. GALLUP, THE GALLUP POLL 94, 247, 379 (1978). In June 1972, fully 64% of those polled agreed that the decision to terminate pregnancy "should be made solely by a woman and her physician," *id.* at 54.

Dr. George H. Gallup also notes "the latest findings represent a continuing erosion in the opposition to legalization [of the use of marijuana]. In 1973 the public voted against legalization, 78-16%. In 1969 the comparable figures were 84-12%." II *id.* at 1085. For the significance of the decriminalization of marijuana to the right of privacy, see Ravin v. State, 537 P.2d 494 (Alaska 1975) (privacy amendment to state constitution protects possession and use of marijuana by adults in their homes).

[49] Important new survey findings show the American public's restrictive approach to the First Amendment rights of people who express deviant views to be moderating over the last two decades. This mellowing is backed up by parallel findings of major liberalizing of the consensus in other areas, notably equality and sexual freedom. Liberalization has been limited in such areas as criminal justice and separation of church and state. Post-McCarthy and post-Watergate developments are credited, along with educational progress, with much of the advance. Reduced value consensus and a growing sense of self-interest in civil liberties seem to have contributed to the trends in support of civil liberties.

31 J. Soc. ISSUES No. 2, at 13 (1975).

DISCLOSURE OF SOCIALLY ORIENTED INFORMATION UNDER THE SECURITIES ACTS

The thesis of this comment is that the Securities and Exchange Commission[1] (SEC or Commission) should exercise its authority to require corporations[2] to disclose information about the social impact of their activities. For the purposes of this discussion, the term "socially oriented information" will be used to describe the type of disclosure contemplated, including corporate policies and practices on environmental pollution, equal employment, consumer protection, and any other areas of social concern about which investors express significant interest.[3]

The thesis presented here is contrary to the SEC's present position regarding the disclosure of socially oriented information, which is set forth primarily in Securities Act Release 33-5627.[4] Release 5627 describes the public proceedings conducted by the SEC in 1975 on the desirability of requiring disclosure of information about corporate environmental and equal employment policies.[5] Indeed, the SEC received investor requests

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[1] The Securities and Exchange Commission is the agency charged with principal responsibility for the enforcement of the federal securities laws pursuant to section 4 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(d) (1976).

[2] The corporations referred to throughout this comment are those subject to SEC disclosure requirements and filings under the Securities Acts. For a list of securities which are exempt from disclosure and filing requirements, see *id.* §§ 77c(a), 78(*l*) (1976 & Supp. III 1979).

[3] No attempt is made here to define precisely what would constitute "significant" interest in an area of social concern. Although the SEC does not usually quantify significance, an attempt was made to do so with respect to socially oriented information. The SEC used the number of investors that participated in the administrative proceedings and the amount of their assets, both of which were "insignificant" when compared with the total 30 million shareholders in this country. Securities Act Release No. 33-5627, 40 Fed. Reg. 51656, 51663 (1975).

[4] 40 Fed. Reg. 51656 (1975). *See generally* Note, *Disclosure of Corporate Payments and Practices: Conduct Regulation Through the Federal Securities Laws*, 43 BROOKLYN L. REV. 681, 687-99 (1977).

[5] 40 Fed. Reg. at 51660-63, 51665-67. The equal employment proposals would have required corporations to disclose the following: (1) A statistical breakdown of minority and female employment in each of the nine job categories specified in Consolidated Employer Information Reports EEO-1, and (2) all court and agency proceedings concerning alleged noncompliance with the Federal Equal Employment Opportunity Act by the registrant or any subsidiary. *Id.* at 51665. See notes 7-8 *infra* regarding the environment-related proposals.

for corporate disclosure in over 100 areas of social concern;[6] hence, the Release 5627 proceedings and conclusions constitute the most comprehensive record of SEC policy on disclosure of socially oriented information.

In Release 5627, the SEC decided to consider, *inter alia*, requiring disclosure of corporate noncompliance with environmental standards.[7] The Commission later withdrew all proposals except those requiring disclosure of the "material" capital expenditures made by a corporation in compliance with environmental laws because this limited disclosure policy would provide meaningful information to investors without disproportionately burdening corporations.[8] The SEC's decision not to require disclosure of socially oriented information was based on the assumption that the Commission lacked authority to require disclosure of information not financially significant and on a cost-benefit analysis that found socially oriented information not "important to the reasonable investor—[not] 'material information.' "[9] Even a cursory review of relevant law suggests that the SEC narrowly interpreted both the concept of materiality and its authority to require disclosure.

The SEC administers the Securities Act of 1933[10] and the Securities Exchange Act of 1934,[11] which contain a general outline of the information that Congress has determined should be included in registration and periodic reporting documents filed with the SEC.[12] The Securities Acts

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[6] *Id.* at 51666 n.72 (broadly covering such areas as advertising; contract disputes; potential and actual litigation; governmental agency actions; charitable contributions; economic and taxation issues; consumer protection and complaints; energy, food, toxic substance, alcohol, tobacco, gambling equipment production; federal subsidies; boycotts; domestic and foreign political activities and investments; discrimination based, *inter alia*, on race, sex, and height; compliance with antitrust, labor, and safety laws and applicable regulations).

[7] The proposal would have required disclosure of "the registrant's most recently filed environmental compliance reports which indicate that the registrant has not met, at any time within the previous 12 months, any applicable environmental standard established pursuant to the Federal statute," *id.* at 51667. The Commission also proposed that corporations supply copies of the reports to any beneficial owner of its securities upon written request accompanied by a fee. *Id.*

[8] Securities Act Release No. 33-5704, 41 Fed. Reg. 21632 (1976). The effect of the SEC's actions was to continue its policy of requiring disclosure only of material environmental information. *Accord,* Securities Exchange Act Release No. 16224, 44 Fed. Reg. 56924, 56925 n.11 (1979). *See also* United States Steel Corp., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,319 (Sept. 27, 1979) (amplification of the SEC reporting requirements).

[9] 40 Fed. Reg. at 51660. *See* Note, *Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 HARV. L. REV. 1848, 1864-65 (1976); note 157 *infra*. The SEC determined that it would be overly burdensome for a corporation to provide every item of information that might be of interest to an investor in making investment and voting decisions. If unlimited, widespread disclosure were required, the disclosure documents might become so voluminous that they would become significantly less readable and therefore less useful to investors generally. 40 Fed. Reg. at 51660, 51662, 51666.

[10] 15 U.S.C. §§ 77a-77aa (1976 & Supp. III 1979).

[11] *Id.* §§ 78a-78kk.

[12] *Id.* §§ 77g, 77j(c), 78m, 78n(a), 78o(d), 78*l*.

themselves, however, are not the sole repositories of securities law. As one commentator has noted, "most of the 'law' is found in the rules, forms, and policy statements of the . . . [SEC]."[13] This is true in large part because the Acts invest the SEC with broad authority to add "such other information . . . as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."[14]

The SEC's authority to require disclosure therefore is not limited by a finding that information be "material."[15] Although the Securities Acts do refer to the disclosure of "material" information,[16] the SEC's only statutory guideline in formulating additional requirements is a finding that the information required be "necessary or appropriate in the public interest or for the protection of investors."[17]

In addition to this broad legislative mandate, the SEC has general rulemaking power under section 19(a) of the Securities Act[18] and section 23(a) of the Securities Exchange Act.[19] These sections give the SEC authority to make such rules and regulations as may be necessary or appropriate to carry out its functions under the Securities Acts. Moreover, these sections do not limit the SEC's authority over disclosure policy to the concept of materiality.

Part I of this comment discusses the concept of materiality and attempts to demonstrate that socially oriented information falls within materiality standards established by the SEC. Part II considers grounds other than materiality on which the SEC might rely to require disclosure. Part III suggests that the SEC could use its power over the registration of securities and the enforcement of the Securities Acts to require disclosure as a matter of SEC general policy. This three-part analysis leads to the conclusion that the SEC could require disclosure of socially oriented information and indeed should reevaluate its current nondisclosure policy.[20]

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[13] D. RATNER, SECURITIES REGULATION 19 (1975) [hereinafter cited as RATNER]. The major exception is the extensive caselaw construing the fraud provisions of the Securities Acts.

[14] 15 U.S.C. § 77g (1976); *accord, id.* §§ 78*l*(b)(1), 78m(a)-(b), 78n(a), 78o(d) (1976 & Supp. III 1979).

[15] *See* text accompanying notes 129-36 *infra.*

[16] *See, e.g.*, 15 U.S.C. §§ 77h(b)-(d), 77j(b), 77k(a), 77 *l*(2), 78m(a)(1), (d)(2), 78n(e) (1976).

[17] The language pervades the Securities Acts, *see, e.g.*, note 14 *supra*, note 149 *infra.*

[18] 15 U.S.C. § 77s(a) (1976).

[19] *Id.* § 78w(a).

[20] In announcing its position on the proposed environmental disclosure policies and in rejecting disclosure requirements for socially oriented information, the Commission determined to reevaluate the policy from time to time. 41 Fed. Reg. at 21635; 40 Fed. Reg. at 51667.

I. THE MATERIALITY STANDARD: FINDING THAT SOCIALLY ORIENTED INFORMATION IS MATERIAL

The term "material" is not defined in the Securities Acts. Thus, to guide corporations in determining what information is material, the SEC defined materiality in Rule 405 with respect to registration statements[21] and in Rule 14a-9 regarding proxy solicitations,[22] using a contextual approach.[23]

Rule 405 defines materiality in terms of what "an average prudent investor ought reasonably to be informed before *purchasing* the security registered."[24] The focus clearly is on the facts investors need to make informed investment decisions. Rule 14a-9, as interpreted by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*,[25] defines materiality in terms of whether "there is a substantial likelihood that a reasonable shareholder *would* consider . . . [a fact] important in deciding how to *vote*."[26]

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[21] 17 C.F.R. § 230.405 (1980). Rule 405 is part of Regulation C which sets forth the general requirements for registration under the 1933 Act.

[22] *Id.* § 240.14a-9. The Rule defines materiality by giving examples of information which may be false or misleading statements:

(a) Predictions as to specific future market values, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

Id.

[23] *See* R. JENNINGS & H. MARSH, SECURITIES REGULATION 954 (4th ed. 1977); Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1262 (1977) [hereinafter cited as Coffee]; Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW. 887, 893 (1977) [hereinafter cited as Hewitt].

[24] 17 C.F.R. § 230.405(*l*) (1980) (emphasis added). The term "average prudent investor" comes from the common law of fraud and was first used as a standard under the Securities Acts in Charles A. Howard, 1 S.E.C. 6, 8 (1934). *See* Hewitt, *supra* note 23, at 894.

[25] 426 U.S. 438 (1976). The Court held that the proxy statement issued in conjunction with a proposal to liquidate and sell TSC's assets to National Industries was not materially misleading as a matter of law. The statement omitted to identify a TSC director and an officer as officers of National Industries and omitted SEC filings indicating that National Industries may be TSC's parent, but the proxy statement did say National Industries owned 34% of the outstanding shares in TSC, and no other person owned more than 10%. The Court also reversed partial summary judgment regarding omission of information clarifying an investment banking firm's favorable opinion of the proposed transaction to TSC shareholders.

[26] *Id.* at 449 (emphasis added at "vote"). *TSC* resolved the "would" versus "might" debate in favor of the more narrow standard of materiality, derived from tort law. 13 NEW ENGLAND L. REV. 151 (1977); 38 OHIO ST. L.J. 379 (1977); 22 VILL. L. REV. 205 (1977).

In Release 5627, the SEC used the term "reasonable investor,"[27] which was presumably a combined reference to the Rules 405 and 14a-9 definitions,[28] to describe an individual primarily interested in financial information.[29] It then found that most socially oriented information was nonfinancial, thus not important to a reasonable investor and not material.[30] Although the Commission acknowledged that nonfinancial motives do exist for some investors,[31] the SEC found the cost of disclosure would outweigh the benefits.[32]

The Release 5627 proceedings were conducted pursuant to remand in *Natural Resources Defense Council, Inc. v. SEC*[33] *(NRDC I)*, where public interest groups first challenged the SEC's decision not to require disclosure of environmental and equal employment information. Dissatisfied with the result on remand, the public interest groups brought a second action. The district court in *National Resources Defense Council, Inc. v.*

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[27] 40 Fed. Reg. at 51660.

[28] *Id.* (citing the Regulations containing Rules 405 and 14a-9, as well as Rules 408 and 12b-20, which supplement the former rules). Reasonableness is determined from an objective viewpoint, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976).

[29] 40 Fed. Reg. at 51664:

> [T]he principal, if not the only, reason why people invest their money in securities is to obtain a return. A variety of other motives are probably present in the investment decisions of numerous investors but the only common thread is the hope for a satisfactory return, and it is to this that a disclosure scheme intended to be useful to all must be primarily addressed.

See generally Note, *supra* note 9, at 1853-55 & n.47. The SEC had sought the public's view on whether the Commission had authority to require disclosure of nonmaterial information of social concern that lacks economic significance, Securities Exchange Act Release No. 11236, 40 Fed. Reg. 7013, 7014 (1975).

[30] *See* note 8 and text accompanying note 9 *supra*.

[31] 40 Fed. Reg. at 51664. The SEC essentially ignored the fact that cogent examples of the economic significance of socially oriented information offered by the participants, *id.* at 51666; text accompanying note 125 *infra*, would establish the economic significance for all shareholders, not just the participants, *see* note 3 *supra*. The financial implications of much of the information sought, see note 6 *supra*, include fines for violations of federal and state laws, the cost of related litigation, and decline in sales due to damaging publicity. *See* Stevenson, *Corporations and Social Responsibility: In Search of the Corporate Soul*, 42 GEO. WASH. L. REV. 709, 724-27 (1974) [hereinafter cited as Stevenson].

[32] 40 Fed. Reg. at 51659-60, 51662, 51666.

[33] 389 F. Supp. 689 (D.D.C. 1974). Although the case focused primarily on environmental and equal employment considerations, the SEC's entire approach to disclosure of socially oriented information was challenged by public interest groups. The Natural Resources Defense Council, a nonprofit membership corporation of lawyers, scientists, and citizens who shared environmental interests, was joined by two other plaintiffs, Project on Corporate Responsibility, Inc. and Center on Corporate Responsibility, Inc, which engaged in "public interest proxy contests, research, litigation, agency proceedings, and educational activities." *Id.* at 693. The district court was "not prepared to say that . . . [ethical investors including plaintiffs] are not rational investors and that the information they seek is not material information within the meaning of the securities laws." *Id.* at 700. The court remanded the case to the SEC for reconsideration of the agency's findings; the reconsideration constituted the Release 5627 proceedings, 40 Fed. Reg. at 51657.

SEC[34] *(NRDC II)* found the SEC's position arbitrary and capricious, but in 1979 the District of Columbia Circuit reversed on appeal.[35]

The polar positions represented by the district court and the SEC illustrate that "[m]aterial information can be described accurately only as a tautology: the SEC's and the courts' views from time to time of what they believe investors believe is important."[36] The court in *NRDC II* noted that the SEC had acknowledged its disclosure authority may vary according to context, and for purposes of its rulemaking authority under section 14(a) of the Securities Exchange Act "the primacy of economic matters, particularly with respect to shareholder proposals, is somewhat less."[37] The court further noted that the SEC had found that "investors would utilize environmental information more in making voting decisions than in making investment decisions."[38] Thus, the court could not understand the SEC's failure to consider seriously the materiality of socially oriented information under section 14(a), which focuses on voter decisions.[39]

A. The Materiality of Socially Oriented Information Under Rule 14a-9

The SEC's decision on socially oriented information is difficult to reconcile with subsequent action taken to amend Rule 14a-8, the shareholder proposal rule,[40] in response to the "demonstrated interest of shareholders in a number of significant [social] matters in which their corporations are involved."[41] Arguably, the SEC could have found that socially oriented

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[34] 432 F. Supp. 1190 (D.D.C. 1977), *rev'd*, 606 F.2d 1031 (D.C. Cir. 1979), *discussed in* Comment, Natural Resources Defense Council, Inc. v. SEC: *Disclosure of Environmental Information Under the Securities Acts and NEPA—The Merits and Judicial Review*, VIII N.Y.U. REV. L.& SOC. CHANGE 121 (1978-1979).

[35] Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979). The appellate court reasoned that publication of the SEC's findings satisfied the limited review afforded agency decisions because the SEC had examined the facts and given the reasons for its conclusions. *Id.* at 1047. The court did suggest, however, that the Commission need not base any future disclosure requirements for socially oriented information on the materiality rule, *id.* at 1062. The basis for the circuit court reversal, which was judicial deference to agency discretion, has little bearing on this comment which urges the SEC to invoke its discretion to require disclosure.

[36] Fiflis, *Soft Information: The SEC's Former Exogenous Zone*, 26 U.C.L.A. L. REV. 95 (1978) (footnote omitted) [hereinafter cited as Fiflis].

[37] 432 F. Supp. at 1205 (quoting 40 Fed. Reg. at 51659) (footnote omitted).

[38] 432 F. Supp. at 1205-06 (footnote omitted).

[39] *See id.* at 1194.

[40] The rule affords shareholders the opportunity to require management to include a shareholder's proposal in the corporation's proxy statement. Although there are procedural requirements that shareholders must meet, including that the proposal have a "proper purpose", the rule significantly enhances the ability of shareholders to disseminate information at the corporation's expense. 17 C.F.R. § 240.14a-8 (1980).

[41] Securities Exchange Act Release No. 34-13482, 42 Fed. Reg. 23901, 23903 (1977) (announcing reexamination of proxy rules which later were amended by Securities Exchange Act Release No. 34-16356, 44 Fed. Reg. 68764 (1979)). The social matters included environ-

information is material under Rule 14a-9 for the same reasons relied upon by the Commission in relaxing Rule 14a-8.

Since the early 1970's, shareholders increasingly used proxy solicitations as a means of communicating their views to each other on the social impact of corporations.[42] The amendment provided shareholders greater access to proxy materials for disseminating their social views.[43] Like the public interest groups in *NRDC I*, shareholders emphasized the importance of socially oriented information to proxy contests through litigation, this time challenging the SEC's decision on what constituted a proper proposal under Rule 14a-8.[44]

For example, during the Vietnam War a number of shareholders who opposed corporate involvement in the manufacture of war materials instituted an action considered by the District of Columbia Circuit in *Medical Committee for Human Rights v. SEC*.[45] There the shareholders proposed that the corporate charter of Dow Chemical Company be amended to prohibit the sale of napalm to any buyer who refused to give assurance that the chemical would not be used on humans.[46] Contrary to the SEC's view, the court found that for purposes of section 14(a) the proposal was a proper subject for shareholder action and should be included in Dow Chemical Company's proxy materials.[47] Management could not exclude proposals merely because they were made by shareholders who wanted their assets to be used "in a manner which they believe to be more socially responsible but less profitable than that which is dictated by present company policy."[48]

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mental and employment practices, discriminatory practices, and political contributions. 42 Fed. Reg. at 23902.

[43] 42 Fed. Reg. at 23902. In 1974 alone, 17 resolutions asking for disclosure of equal employment opportunity information were filed by shareholders for inclusion in the proxy materials of 16 corporations. Mundheim, *Selected Trends in Disclosure Requirements for Public Corporations*, 3 SEC. REG. L.J. 3, 29 (1975) [hereinafter cited as Mundheim]. *See generally* Black, *Shareholder Democracy and Corporate Governance*, 5 SEC. REG. L.J. 291 (1978); Black & Sparks, *The SEC As Referee—Shareholder Proposals and Rule 14a-8*, 2 J. CORP. L. 1 (1976).

[44] *See* note 40 *supra*.

[45] The shareholder proxy rules require that the proposal have a proper purpose, and the SEC has adopted specific regulations describing improper purposes, 17 C.F.R. § 240.14a-8(c) (1980). *See, e.g.*, Sun Co., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,187 (Mar. 14, 1979) (shareholder's proxy proposal seeking adoption of an equal employment opportunity policy was not required to be included in company's proxy material on the ground that it related to a personal grievance).

[46] 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). *See generally* J. SIMON, C. POWERS, & J. GUNNEMAN, THE ETHICAL INVESTOR: UNIVERSITIES AND CORPORATE RESPONSIBILITY 54 (1970) [hereinafter cited as THE ETHICAL INVESTOR]; Note, *The Ethical Investor and the SEC: Conflict Over the Proper Scope of the Shareholder's Role in the Corporation*, 2 J. CORP. L. 115, 131-35 (1976).

[47] 432 F.2d at 662.

[48] *Id.* at 681.

[49] *Id.*

In another proxy contest, generally referred to as Campaign GM,[49] the shareholders wanted to make General Motors more socially responsible. They unsuccessfully tried to obtain proxies in support of proposals to create a shareholder committee on public policy; expand the board to include directors experienced in ecological, minority, and consumer issues; permit the nomination of directors by employees, dealers, and consumers; and require mandatory disclosure of information on minority hiring, pollution control, and safety measures.[50]

In response to such proxy contests, the SEC amended Rule 14a-8, thereby "explicitly confirming shareholders' rights to raise social issues through the medium of the corporations' proxy materials."[51] This action is indeed an acknowledgement that socially oriented information is important for shareholder voting decisions.

The logical extension of the SEC's reevaluation of Rule 14a-8 would be to expand Rule 14a-9 by requiring management to disseminate socially oriented information to shareholders. Amending Rule 14a-9 to require such disclosure would accord with the more recent SEC effort to expand the role of shareholders in corporate governance by amending the proxy rules.[52] The Commission considered, *inter alia,*

> (1) the adequacy of existing avenues of communication between shareholders and corporations, and, particularly, whether shareholders should be provided with more information than is now available with respect to *socially significant matters* affecting their corporations; . . . and (4) whether additional disclosure relevant to an assessment of the quality and integrity of management should be required.[53]

Thus, relaxing Rule 14a-8 because of investor concern regarding corporate social practices and the quality and integrity of management is a reason equally applicable to a finding that socially oriented information is material under Rule 14a-9. Both rules are designed to further the policy of section 14(a) to give shareholders an opportunity to make informed voting decisions on the performance of management.[54]

Another approach to materiality under Rule 14a-9 is to view shareholders in their capacity as owners of the corporation as having a public obligation to make socially responsible voting decisions.[55] The substantial

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[49] Note, *supra* note 45, at 135-38.

[50] THE ETHICAL INVESTOR, *supra* note 45, at 3.

[51] Schwartz & Weiss, *An Assessment of the SEC Shareholder Proposal Rule*, 65 GEO. L.J. 635, 637 (1977) (footnote omitted) [hereinafter cited as Schwartz & Weiss].

[52] See notes 40-41 *supra.*

[53] Securities Exchange Act Release No. 15384, 43 Fed. Reg. 58522 (1978).

[54] *See* text accompanying notes 25-26 *supra. But cf.* Amalgamated Clothing & Textile Workers v. J.P. Stevens & Co., 475 F. Supp. 328 (S.D.N.Y. 1979) (disclosure of corporation's alleged policy to thwart federal labor laws not required under section 14(a)).

[55] *See* 432 F.2d at 681. Although the primary motive for most investment decisions is pecuniary gain, *see* note 29 *supra,* that does not diminish shareholders' power to influence

likelihood that objectively reasonable shareholders discharging this responsibility would consider socially oriented information important in deciding how to vote thus provides a potential basis for finding such information material.[56] This view finds support in *Medical Committee for Human Rights* where the court declared the overriding purpose of the proxy rules "is to assure to corporate shareholders the ability to exercise their right—some would say their *duty*—to control the important decisions which affect them in their capacity as stockholders and *owners* of the corporation."[57]

One rationale for this view is that a shareholder has a stringent duty to exercise control over the valuable assets which he has turned over to the corporation for use and increase.[58] Although he has surrendered immediate disposition of his goods to the corporation, "he never can shirk a supervisory and secondary duty (not just a right) to make sure these goods are used justly, morally, and beneficially."[59]

It is important that shareholders be able to exercise control with knowledge because, for a variety of reasons, most managers and directors assume little responsibility for the social harms caused by their corporations.[60] Although management may be well equipped to carry on the day-to-day business operations of the corporation, management may not be equally expert in assessing the consequences of decisions which have a wider social effect.[61] Under the business judgment rule, however, management is accorded broad discretionary latitude.[62] Thus, if management's decisions are within the corporation's powers and have been made on a reasonable basis and in good faith, a court will defer to management. Similarly, directors' responsibilities are largely limited to the standard set forth in the business judgment rule.[63]

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corporate social policies. THE ETHICAL INVESTOR, *supra* note 45, at 57.

[56] *See* note 28 and text accompanying notes 25-26 *supra*.

[57] 432 F.2d at 680-81 (footnote omitted) (emphasis added).

[58] Bayne, *The Basic Rationale of* PROPER SUBJECT, 34 U. DET. L.J. 575, 579 (1957).

[59] *Id.*, *quoted in* 432 F.2d at 680-81 n.31.

[60] *See* THE ETHICAL INVESTOR, *supra* note 45, at 62; Stevenson, *supra* note 31, at 717-22. The problem results from the separation of ownership and control. Earle, *Corporate Governance and the Outside Director—A Modest Proposal*, 36 WASH. & LEE L. REV. 787, 787-88 (1979) [hereinafter cited as Earle]. *See generally* NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, CRITICAL CHOICES FOR THE 80'S 10-26, 45-46 (1980) [hereinafter cited as CRITICAL CHOICES]; Mundheim, *supra* note 42.

[61] THE ETHICAL INVESTOR, *supra* note 45, at 63.

[62] H. HENN, CASES AND MATERIALS ON THE LAWS OF CORPORATIONS 587-88 (1974).

[63] *See, e.g.*, Lewis v. Anderson, 615 F.2d 778 (9th Cir. 1979), *cert. denied*, 101 S. Ct. 206 (1980) (shareholders derivative suit alleging federal securities law violations by corporate directors dismissed upon a finding that a committee of disinterested directors had exercised good-faith business judgment); Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980) (shareholders derivative suit against corporate officers and directors for illegal foreign payments dismissed under business judgment rule). *But cf.* Escott v. Barchris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968) (directors held to standard of care approaching strict liability for failing to make a reasonable investigation into

Both directors and management may argue that their primary obligation is to maximize corporate profits for shareholders, not to make socially responsible decisions for the benefit of the public.[64] This argument should not be accepted uncritically.

First, the failure of corporations to regulate themselves invites increased governmental regulation. Requiring disclosure is perhaps the least intrusive form of governmental regulation because it does not necessarily prescribe what a corporation may do but merely exposes activities in which the corporation itself chooses to engage.[65] The hope is to deter management from engaging in questionable business practices so that direct regulation would not be necessary.[66]

Second, the assertion that management's primary duty to shareholders is to maximize corporate profits regardless of social impact may best be tested by allowing shareholders to consider the social consequences.[67] Even if the assertion proves uniformly accurate, disclosure is not necessarily incompatible:

> [T]he addition of society-oriented disclosure rules to present [SEC] regulation need not involve a departure from the principle of profit maximization or require the acceptance of a totally new concept of corporate duty. It would merely be a recognition of the fact that the large corporation is not a private and autonomous institution, but is a community asset which is public in its conduct, its mores and its impacts. The basis of increased disclosure is simply that although a corporation exists to maximize profits, society has a right to be informed of the undeniable public impact of its actions.[68]

The SEC need not take the position that all shareholders have a personal obligation to prevent corporate social harms. The Commission could find, however, that at least those shareholders who assume such responsibility have a material need for socially oriented information relevant to their voting decisions.[69]

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the accuracy of registration statements). *See also* Burks v. Lasker, 441 U.S. 471 (1979); text accompanying notes 199-201 *infra*.

[64] *See* THE ETHICAL INVESTOR, *supra* note 45, at 62-63; note 29 *supra*.

[65] *But cf.* Surrey, *The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime*, 20 HARV. INT'L L. REV. 293, 295-97 (1979) [hereinafter cited as Surrey] (some disclosures regarding foreign payments have provided the basis for SEC enforcement actions and criminal investigations).

[66] *See* Schoenbaum, *The Relationship Between Corporate Disclosure and Corporate Responsibility*, 40 FORDHAM L. REV. 565, 578 (1972) [hereinafter cited as Schoenbaum].

[67] *See* 432 F.2d at 681.

[68] Schoenbaum, *supra* note 66, at 587-88 (footnotes omitted).

[69] Several investors strongly asserted precisely this need in the Release 5627 proceedings, *see* 40 Fed. Reg. at 51666 & n.56, and the proxy contests with Dow Chemical Company and General Motors, *see* text accompanying notes 45-51 *supra*. Although adoption of general disclosure requirements premised on the needs of only certain groups has been criticized, the Commission has not been restrained in adopting disclosure provisions related to questionable and illegal corporate payments which are even less likely to be of interest to many

B. *The Materiality of Socially Oriented Information Under Rule 405*

As mentioned above, Rule 405 focuses on the information an investor needs for investment decisions.[70] In this context, the SEC could have applied three different tests of materiality which existed at the time of the Release 5627 proceedings to determine the status of socially oriented information.[71] The separate analyses used to define materiality in an investment-decision context derive from caselaw and were recently referred to by the SEC in *The Boston Company Institutional Investors, Inc.*[72] as the tests of "probability vs. significance,"[73] "market-impact,"[74] and "reasonable-investor."[75]

The first two tests are relatively unlikely to be applied to socially oriented information because they refer primarily to economic changes in the value of a security. But the reasonable-investor test is directly applicable in determining the materiality of socially oriented information in the context of investment decisions. For example, the SEC found in Release 5627 that some investor-participants "indicated that such [social information] would be taken into account in determining what securities to *purchase, hold or sell.*"[76] This is precisely the type of materiality the SEC required in *The Boston Company* where the issue turned on whether a reasonable investor would "consider the information important in deciding whether to purchase, sell, or hold."[77]

The SEC's finding in Release 5627 may reflect the fact that several investor-participants were institutional investors—members of a group which has increasingly expressed a need for socially oriented information precedent to making an investment.[78] In numbers alone, institutional in-

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investors than is other socially oriented information, *see* Note, *supra* note 9, at 1866-67; text accompanying notes 101-12, 127-38 *infra*.

[70] *See* text accompanying note 24 *supra*.

[71] *See generally* A. JACOBS, THE IMPACT OF RULE 10B-5, at § 61.02 (1979). Although the reasonable-investor standard was not settled at the time of Release 5627, the existing alternative interpretation would have provided the Commission with even greater leeway to find socially oriented information material. *See* note 26 *supra*.

[72] [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,705, at 80,848 (Sept. 1, 1978).

[73] The test is set forth in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), and described as "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."

[74] The essence of this test, also derived from *Texas Gulf Sulphur*, is whether disclosure of the inside information, in reasonable and objective contemplation, might have a substantial impact on the market price of the securities involved, *id.* at 849-50.

[75] The test is established by TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976), *quoted in* text accompanying notes 25-26 *supra*.

[76] 40 Fed. Reg. at 51664 (emphasis added).

[77] [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,705, at 80,847 (footnote omitted) (discussing materiality of inside information).

[78] Grienenberger, *Disclosure of Environmental and Social Concerns*, 31 BUS. LAW. 1671, 1674 (1976).

vestors constitute the major activists in compelling corporations to disclose socially oriented information. At least nineteen universities and colleges participated in the Campaign GM proxy contest,[79] and the Release 5627 proceedings involved, *inter alia*, seven foundations, twenty-two religious institutions, eleven educational institutions, and five environmental groups.[80]

Some investor groups are formed expressly for the purpose of influencing corporate social policies,[81] but the point here is that socially oriented information is important to a broader spectrum of investors, including institutions that previously considered only the potential return on their investments.[82] Some of the changes were virtually forced on the institutions by donors and beneficiaries. For example, intense pressure brought by students to effect college and university investment decisions has been widespread:

> [D]emands of this kind have caused considerable debate, if not turmoil, at Princeton, Cornell, Union Theological Seminary, and Wesleyan (over South Africa), at Mount Holyoke and the University of Pennsylvania (over *Campaign GM)*, at Dartmouth and Union College (over Eastman Kodak minority hiring), and at Harvard (over a similar problem at Middle South Utilities).[83]

Thus, the SEC could have found socially oriented information material under Rule 405 when viewed in the context of institutional investors. Arguably, there is a substantial likelihood that institutional investors, like those which participated in the Release 5627 proceedings, would consider the information important in deciding whether to purchase, sell, or hold.[84]

C. The Materiality of Socially Oriented Information Under Rationales the SEC Has Used To Expand the Materiality Concept

The SEC has used two rationales in other areas to expand the concept of materiality, thereby requiring disclosure of information not previously thought to be material. These rationales are (1) finding that certain information may be material, and (2) finding that certain information is mate-

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[79] THE ETHICAL INVESTOR, *supra* note 45, at 3.

[80] 40 Fed. Reg. at 51663 n.49. Two mutual funds, 37 individuals, and the State of Minnesota also participated. *Id.*

[81] *See* note 33 *supra*.

[82] *See* Grienenberger, *Emerging Disclosure Requirements: Environmental and Socially Significant Matters*, 31 BUS. LAW. 1423, 1431 (1976).

[83] THE ETHICAL INVESTOR, *supra* note 45, at 1. *See* Schwartz & Weiss, *supra* note 51, at 643-48.

[84] The disruption to investor institutions and resulting opprobrium that could be avoided by providing these investors with socially oriented information supports the proposition that objectively reasonable institutional investors need this information. See note 28 *supra*.

rial per se. Both could be used to justify an expanded concept of materiality that includes socially oriented information.

1. Finding that Socially Oriented Information May Be Material.— The SEC has abandoned its longstanding policy of discouraging disclosure of financial projections in favor of promoting their disclosure.[85] Initially the Commission did "not object" to disclosure of financial projections, such as sales and earnings estimates,[86] but did express concern that unsophisticated investors might be misled by what the Commission viewed as subjective and unverifiable information.[87] This conservative posture provoked criticism because, as one commentator noted, the SEC policy excluded "highly material information . . . from disclosure documents, while requiring that included information be stated in such a negative manner as to be possibly misleading."[88] On the recommendation of the SEC's Advisory Committee on Corporate Disclosure,[89] the Commission decided to "encourage" disclosure of projections.[90]

The creative rationale accompanying the Commission's about-face supports the proposition that the SEC has considerably more flexibility in making and changing disclosure requirements than was acknowledged in Release 5627. Instead of expressly finding that financial projections are material and should be disclosed on that basis, the SEC merely found that projections "may be material to informed investment decisionmaking,"[91] and encouraged their disclosure. In addition, the SEC adopted a "safe-harbor rule."[92] The rule provides that corporations generally will not be held liable under the securities laws for projections prepared on a reasonable basis and disclosed in good faith, even if the projections later

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[85] Securities Act Release No. 33-5992, 43 Fed. Reg. 53246 (1978).

[86] *Id.* at 53247.

[87] *See generally* Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 HASTINGS L.J. 311, 336 (1974) [hereinafter cited as Anderson]; Fiflis, *supra* note 36, at 107-11.

[88] Anderson, *supra* note 87, at 312. *See also* Freeman, *The Legality of the SEC's Management Fraud Program*, 31 BUS. LAW. 1295 (1976) [hereinafter cited as Freeman]; Kripke, *A Search for a Meaningful Securities Disclosure Policy*, 31 BUS. LAW. 293 (1976); Kripke, *The Myth of the Informed Layman*, 28 Bus. Law. 631 (1973); Schoenbaum, *supra* note 66, at 575; Note, *Disclosure of Future-Oriented Information Under the Securities Laws*, 88 YALE L.J. 338 (1978).

[89] The Advisory Committee met for 18 days between February 1976 and September 1977, conducted a survey of the primary participants in the corporate disclosure system, consulted with experts, and examined other studies and research reports. The Committee's study of the disclosure of soft information comprised but a small part of its 21-month long effort. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION 344 (Comm. Print 1977).

[90] 43 Fed. Reg. at 53247.

[91] *Id.* (footnote omitted).

[92] 17 C.F.R. § 230.175 (1980); Securities Act Release No. 6084, 44 Fed. Reg. 38810 (1979); *see* Securities Act Release No. 33-5993, 43 Fed. Reg. 53251 (1978) (proposed rule).

prove to be erroneous.[93]

In effect, the SEC has changed the standard from what *is* material to what *may be* material as applied to projections. The Commission could adopt a similar rationale for expanding materiality to include socially oriented information. Given the increased investor interest in this information,[94] the SEC would have support for a finding that it may be material to investors and for encouraging disclosure.

The safe-harbor rule might be adapted to reduce the risk of liability when the socially oriented information later proves erroneous or misleading. SEC resistance to disclosure even with a safe-harbor rule is likely to be premised on insufficient knowledge of social issues necessary to formulate criteria to guide corporations from the outset. The Commission relied on a similar assessment of environmental information in Release 5627: "There appears to be no established, uniform method by which the environmental effects of corporate practices may be comprehensively described."[95] This perceived problem is hardly insurmountable.

First, absent an attempt to develop relevant criteria, the problem is purely conjectural. The district court in *NRDC II* concluded the SEC did not undertake "serious consideration of the costs and benefits of developing standards and guidelines."[96] Moreover, two organizations—the Council on Economic Priorities and the American Institute of Certified Public Accountants Special Task Force—testified during the Release 5627 proceedings that standards and guidelines governing environmental information could be developed.[97]

Second, the SEC had invoked the same type of observation as an obstacle to requiring disclosure of financial projections before changing its policy. As the new policy and safe-harbor rule demonstrate, the SEC no longer considers the development of standards for disclosure an obstacle to encouraging disclosure of projections. Hence, the SEC could take the same approach to disclosure of socially oriented information as it has for projections.

2. *Finding that Socially Oriented Information Is Material Per Se.*— The SEC has taken an even more expansive view of the materiality of information relating to the quality and integrity of management than it applied to projections. The Commission's approach to certain information

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[93] *See generally* Comment, *The SEC Safe Harbor for Forecasts—A Step in the Right Direction?*, 1980 DUKE L.J. 607.

[94] *See* text accompanying notes 42-50, 78-83 *supra*.

[95] 40 Fed. Reg. at 51662. The SEC reiterated this theme in rejecting certain disclosure proposals because the Commission is unauthorized to "set environmental standards, determine when conduct lawful under such standards is environmentally injurious, or determine when conduct unlawful under such standards is environmentally insignificant." Securities Act Release No. 33-5704, 41 Fed. Reg. 21632, 21635 (1976). The SEC later adopted imprecise regulations in other contexts, *see* note 98 *infra*.

[96] 432 F. Supp. at 1206. See note 35 *supra*.

[97] 432 F. Supp. at 1206 n.67.

concerning management may be characterized as a finding that the information is material per se. This approach to disclosure has been applied to the following areas: (1) Questionable and illegal corporate payments,[98] (2) management remuneration,[99] and (3) biographical information regarding directors and nominees.[100] The rationale underlying SEC policy in these areas obtains to other socially oriented information as well.

It should be recalled that Release 5627 established that only socially oriented information which is primarily of a financial nature would be considered material.[101] This narrow definition contrasts sharply with the Commission's approach to the materiality of questionable and illegal corporate payments. The point is best illustrated by statements contained in a 1976 SEC report on illegal corporate payments and practices which expressly rejected a disclosure standard tied exclusively to financial relevance:

> The disclosure system is oriented toward the basic interests of investors, but *it does not speak exclusively to financial relationships and data.* Disclosure requirements also should facilitate an evaluation of management's stewardship over corporate assets. In this context, *investors should be vitally interested in the quality and integrity of management.*[102]

Thus, while the Commission refused to abandon the selective focus on

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[98] *See generally* Solomon & Gustman, *Questionable and Illegal Payments by American Corporations* (pt. 1), 1980 J. Bus. L. 67 [hereinafter cited as Solomon]. Defining questionable payments or developing standards for their disclosure is inherently difficult, *see* Note, *supra* note 4, at 716-20, but that did not deter the SEC. *See* Securities Exchange Commission, Report of the Securities Exchange Commission on Questionable and Illegal Corporate Payments and Practices, in Sec. Reg. Rep. Bull. No. 11 (P-H) 19 (1976) [hereinafter cited as Payments Report]; note 102 *infra*. The issue is raised here to emphasize that disclosure requirements involving questionable payments are no less imprecise than would be requirements governing other socially oriented information. The SEC's dissimilar treatment of the two kinds of information seems unjustified because both are indicative of the quality and integrity of management. *See* text accompanying note 111 *infra*. *Cf.* Baker, *Accounting and Accountability: Overview of the Accounting Provisions of the Foreign Corrupt Practices Act of 1977*, 36 Wash. & Lee L. Rev. 809, 813-19 (1979) (proposing approach to develop criteria for bookkeeping and accounting provisions of the federal legislation and SEC rules); Profusek, *Nonmonetary Forms of Remuneration Under the Federal Securities Laws*, 30 Case W. Res. L. Rev. 3, 9-10, 15, 32 (1979) (SEC disclosure requirements for corporate perquisites has produced inconsistent results and failed to articulate properly the standards that corporations must follow). *See also* Securities Act Release No. 33-6166, 44 Fed. Reg. 74808, 74813-14 (1979); Securities Act Release No. 33-5904, 43 Fed. Reg. 6060 (1978) (clarifying disclosure requirements for perquisites).

[99] *See* Tomm, *Director and Audit Committee Responsibilities Relating to Perquisites*, 36 Wash. & Lee L. Rev. 83, 88 (1979) [hereinafter cited as Tomm] (perquisites disclosure requirements exceed traditional concepts of materiality).

[100] 17 C.F.R. § 229.20 Item 3(f) (1980); Securities Act Release No. 33-5949, 43 Fed. Reg. 34402 (1978).

[101] *See* text accompanying notes 8-9, 29-30 *supra*.

[102] Payments Report, *supra* note 98, at 19-20 (emphasis added).

financially related information in Release 5627, primarily nonfinancial information is deemed material when the data would expose management's involvment in questionable and illegal corporate payments. Here, too, the SEC used a creative rationale for its marked change in policy.

First, the SEC declared in the 1976 report that under certain conditions questionable and illegal corporate payments "are material and required to be disclosed."[103] This statement was tantamount to a finding that the information is material per se.[104] In effect, the SEC was amending Schedule A, the "basic canon of the disclosure system,"[105] by asserting that the changes were in the "spirit of Schedule A."[106]

The new policy did cause a good deal of controversy, but the SEC was not deterred from mandating disclosure by concern that the Commission would thereby exceed its authority.[107] Moreover, the policy was not de-

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[103] *Id.* at 14-15. The disclosure requirements are triggered if the recipients are government officials and the purpose of the payment is (1) to influence the officials' judgment regarding special legislation where the amount or corporate benefits are significant; (2) to procure government contracts where the payment appears to be a bribe or is to a person not authorized to accept money for services; (3) to facilitate or grease the decisionmaking process by influencing low-level officials where individual payments are large, the aggregate amount distributed is large, or management has concealed the payments; or (4) a political contribution that is illegal under local law or designed to influence unduly the official's public policy decisions. If the recipients are commercial agents and consultants, the factors considered are (1) the relationship of the agent to the government entity or contracting party, (2) the size and nature of the payment, (3) the services to be performed, and (4) whether the commission or consultant fee and payments are substantially in excess of the going rate in light of the significance of the business involved. No standard is established where the recipient accepts a commercial bribe, but the bribe may be a disclosable event. Payments must be disclosed where the amount is either significant or related to a significant amount of business. In any case, falsified payments must be disclosed. *Id.* at 25-29. *See generally* Coffee, *supra* note 23, at 1260; Sommer, *Therapeutic Disclosure*, 4 SEC. REG. L.J. 263, 270 (1976) [hereinafter cited as Sommer].

[104] Note, *supra* note 4, at 744. *See* Solomon, *supra* note 98, at 69:

> Whether a particular fact is material depends upon an assessment of its significance within the context of the relevant facts and circumstances of a situation. Thus, under this concept of materiality, corporate political contributions in foreign countries, the payment of bribes or fees to consultants, and the use of slush funds and other accounting machinations would not in themselves be material.
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> To establish the materiality of questionable and illegal overseas payments and activities by American corporations and to force the disclosure of such payments and activities, the SEC has applied a concept of integrity disclosure.

[105] PAYMENTS REPORT, *supra* note 98, at 17-18.

[106] *Id.* at 19. Schedule A describes the routine information which corporations should disclose in registering with the SEC.

[107] *See, e.g.*, Hewitt, *supra* note 23, at 921:

> While materiality posed no problem at the outset when the failure to disclose involved egregious domestic political contributions, as the investigations broadened in scope, the SEC began to consider payments that were neither black nor white. To require disclosure of such "grey" payments required justification under the concept of materiality. It is these justifications that have spawned the controversy concerning the scope of materiality.

feated by the possibility that requiring a broader category of management-related disclosure under a liberal standard of materiality would enlarge management's liability beyond the limits established by settled state law.[108] The debate surrounding both the authority of the SEC to effect disclosure of corporate payments abroad and the merits of this policy has underscored the SEC's expanded view of materiality, which could be consistently applied to other information.[109]

It must be emphasized that socially oriented information is as important to some investors in evaluating management as are data concerning questionable and illegal corporate payments. Indeed, the concept of socially oriented information embraces the corporate payments information now required to be disclosed.[110] Thus, it is difficult to reconcile the SEC's materiality standard for corporate payments with the result in Release 5627.

Former SEC Commissioner A. A. Sommer, Jr., a critic of the material-per-se approach, finds socially oriented information no less material than data involving questionable and illegal corporate payments:

> I find it increasingly difficult to understand why every peccadillo of a corporation committed overseas is of importance to investors, while the manner of corporate compliance with the laws relating to equal employment, air and water pollution, safety standards, and the like, need only be disclosed when the impact of non-compliance *is material in economic and financial terms.*[111]

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[108] *See* notes 62-63 *supra* and accompanying text. The SEC first addressed disclosure requirements to aid investors in evaluating the quality and integrity of management in Franchard Corp., 42 S.E.C. 163 (1964), *discussed in* note 182 *infra*, and declined to adopt disclosure mandates in part because of the subjective nature of the analysis required, 42 S.E.C. at 169-70, but also for lack of proper authority. "The [Securities] Act [of 1933] does not purport, however, to define Federal standards of directors' responsibility in the ordinary operations of business enterprises and nowhere empowers us to formulate administratively such regulatory standards." *Id.* at 176 (footnote omitted). The SEC no longer abstains from issues related to corporate governance. Sommer, *The Impact of the SEC on Corporate Governance*, 41 LAW & CONTEMP. PROB. No. 3, at 115, 121 (1977).

[109] *Cf.* Note, *supra* note 4, at 724-29 (ethical materiality standard is undesirable departure from traditional SEC standard and would provide basis for requiring disclosure of socially oriented information); Comment, *Bribes, Kickbacks, and Political Contributions in Foreign Countries—The Nature and Scope of the Securities and Exchange Commission's Power To Regulate and Control American Corporate Behavior*, 1976 WIS. L. REV. 1231, 1256-59 (foreign bribes and payments meet traditional materiality standards which apply to socially significant matters).

[110] The regulation of corporate conduct involving corruption of government officials is but one example of attempts to make business more socially responsible, *see* text accompanying notes 79-83 *supra*, and information regarding both foreign and domestic political activities was indeed among the myriad disclosures sought through the Release 5627 proceedings, 40 Fed. Reg. at 51666 n.72.

[111] Sommer, *A Parting Look at Foreign Payments*, in 1 INTRODUCTION TO SECURITIES LAWS DISCLOSURE 443, 466 (PLI Course Handbook Series No. 212, 1976) (emphasis added). *Accord*, 432 F. Supp. at 1208 n.77.

The logic of this comparison has prevailed in at least two other areas where investors sought information in the Release 5627 proceedings;[112] namely, the subsequent SEC disclosure requirements of management perquisites and biographical information on directors.[113]

The SEC has used its disclosure authority expansively in the area of management remuneration, where the Commission requires that certain levels of compensation be disclosed.[114] For example, in 1977 the SEC announced that certain perquisites received by management must be given a value and reported.[115] This marked a significant change in policy and reflected a liberal standard of materiality,[116] even though the Commission finessed the materiality issue by declaring simply that the existing reporting provisions required the information.[117]

A year later, the Commission adopted a requirement that directors and nominees for directorships and executive officers disclose, *inter alia*, their involvement in bankruptcy, criminal proceedings, and other litigation.[118] The SEC summarily determined that this biographical information is material, in language that appears to eliminate the subjectivity barrier to mandated disclosure of socially oriented information:

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[112] 40 Fed. Reg. at 51666 n.72.

[113] 17 C.F.R. § 229.20 Item 3(f) (biographical information), Item 4(a), Instruction 2(d) (perquisites) (1980).

[114] For example, when the remuneration of the highest paid five executive officers or directors exceeds $50,000, each person and the amount of remuneration must be disclosed. If for any executive officer, officer, or director, the value of personal benefits exceeds $10,000, the value must be disclosed. If the value of such personal benefits exceeds 10% of the aggregate amount of remuneration, or $25,000, whichever is less, then a brief description of such benefits must be disclosed in a footnote. *Id.* Item 4. *See also* Securities Exchange Act Release No. 33-6157, 44 Fed. Reg. 70130 (1979) (disclosure of management remuneration by foreign private issuers). Prior to the amendment, top management was required to disclose only direct remuneration from the corporation for the prior fiscal year but now must include compensation from third parties for services to the corporation and its subsidiaries and, in certain instances, for services rendered in prior years. Securities Act Release No. 33-6003, 43 Fed. Reg. 58181, 58182 (1978)

[115] Securities Act Release No. 5856, 42 Fed. Reg. 43058 (1977), *supplemented by* Securities Act Release No. 33-5904, 43 Fed. Reg. 6060 (1978); Securities Act Release No. 33-6166, 44 Fed. Reg. 74808 (1979).

[116] Tomm, *supra* note 99, at 85-90.

[117] 42 Fed. Reg. at 43059. The Release incorporated considerations of management integrity that underpinned the expanded concept of materiality in the context of corporate payments:

> Full disclosure of remuneration is necessary to informed voting and investment decisions regardless of whether the company's board of directors or its security holders have approved the remuneration package received by management because of the substantial influence of management in determining its remuneration. . . . [A]nalysis of the use of corporate funds and assets and an assessment of the value of management to a corporation necessitate the presentation of complete remuneration information.

Id. at 43060 (footnotes omitted).

[118] Securities Act Release No. 33-5949, 43 Fed. Reg. 34402 (1978). *See also* Earle, *supra* note 60, at 796-99 (discussing SEC proposals to categorize management).

> Because information reflecting on management ability and integrity is, in part, subjective, it is difficult to articulate a meaningful, well-functioning objective disclosure requirement which will elicit it. The Commission believes that the categories of information about officers' and directors' involvement in litigation . . . are material to investors. They represent factual indicia of past management performance in areas of investor concern. Bankruptcy, injunctions (whether litigated or entered into by consent), and violations of the securities laws reflect on management's competence and integrity.[119]

Thus, in reformulating disclosure policy on socially oriented information, the SEC could take several approaches, any one of which could logically result in a finding that the information is material. The creative rationales previously used to explain disclosure requirements for projections and questionable and illegal corporate payments may be consistently applied to other socially oriented information as well. But the more expansive approaches to materiality represented by either the per-se rules involving investor assessment of management or the policy of encouraging disclosure of information that may be material need not be invoked. The Commission could find socially oriented information material for investment and voting decisions under the traditional SEC definitions of materiality contained in Rules 405 and 14a-9, respectively.

II. Finding that Socially Oriented Information Should Be Disclosed Even If It Is Not Deemed Material

The previous discussion dealt with the concept of materiality as a basis for requiring disclosure of socially oriented information. The following discussion considers the alternative of requiring nonmaterial information to be disclosed. The two approaches are not, however, mutually exclusive. Although disclosure of information may be compelled on the grounds considered here, the same information may be subject to disclosure because the SEC has deemed it to be material. In order to distinguish the following analysis from the concept of materiality, all information will be described as nonmaterial.

There are three grounds for requiring disclosure of nonmaterial data. The first is based on a determination that information is economically significant; the second, on a finding that information should be disclosed under the SEC's general rulemaking authority; the third, on a finding that information is "necessary or appropriate in the public interest."[120] Certain elements of each may overlap, but the SEC could use any or all three as the basis for requiring disclosure of socially oriented information.

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[119] 43 Fed. Reg. at 34405.

[120] *See* note 14 *supra*.

A. *Economically Significant Information*

Requiring disclosure on the basis that information is economically significant is neither expressly authorized by the Securities Acts nor supported by SEC rules. The SEC nevertheless has asserted this ground to require disclosure of nonmaterial information.[121] It is possible, therefore, that the Commission could have required disclosure of any socially oriented information deemed economically significant, notwithstanding the negative assessment of materiality in Release 5627.

The SEC acknowledged its congressional mandate to require disclosure of "information which is or may be economically significant"[122] in Release 5627, but the result appears to have subsumed economic considerations under the narrow inquiry undertaken regarding the materiality of socially oriented information. While economic significance logically must be considered an element of materiality, the district court in *NRDC II* would have elevated this element to an independent basis for requiring disclosure. "[T]here can be no doubt that the Commission has the authority to require registrants to disclose 'nonmaterial' information that has economic significance."[123] The court failed to understand why the Commission did not assert disclosure authority, having "recognized that those investors interested in environmental disclosure were 'virtually unanimous' in stating that such disclosure would reveal information of *economic significance* to them as investors."[124]

Given the SEC's clear understanding that Congress intended disclosure of economically significant information, it is worth listing the economic arguments of the public interest groups involved in the Release 5627 proceeding:

> (1) [N]on-compliance with environmental, equal employment, and similar laws could lead to extensive corporate costs or liabilities; (2) the ability to avoid such problems provides an index to management's overall quality; and (3) in the long run, corporate social responsibility determines the public relations and regulatory framework in which a company operates.[125]

Although these examples are also relevant to a determination of materiality that focuses on the financial impact of socially oriented information, the SEC ostensibly did not undertake an analysis of economic significance either as an independent basis for disclosure or as an element of materiality.[126] The lack of analysis makes predictive statements about the future success of investor requests for nonmaterial information of economic sig-

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[121] *See* 432 F. Supp. at 1200 n.26.

[122] 40 Fed. Reg. at 51658.

[123] 432 F. Supp. at 1204 n.56.

[124] *Id.* (quoting 40 Fed. Reg. at 51664). See note 35 *supra* and accompanying text.

[125] 40 Fed. Reg. at 51664 (footnote omitted).

[126] *See* note 31 *supra*.

nificance virtually impossible. Perhaps the only conclusion to be drawn regarding this aspect of Release 5627 is that investors' perceptions of economically significant information will not control the SEC evaluation.

B. *The SEC's General Rulemaking Authority*

The SEC's general rulemaking authority is established by section 19(a) of the Securities Act[127] and section 23(a) of the Securities Exchange Act.[128] The SEC has invoked rulemaking power to act without regard to the concept of materiality. The Commission emphasized the independent nature of this authority in adopting recordkeeping rules[129] primarily designed to expose questionable and illegal corporate payments.[130] Indeed, the SEC expressly rejected a limitation based on the materiality standard because it "would result in an unwarranted diminution of investor protection."[131]

The Commission could have promulgated the new rules based on the Foreign Corrupt Practices Act of 1977[132] (FCPA), which added a new provision to section 13(b) of the Securities Exchange Act.[133] Instead, the SEC referred to "disclosure-related provisions" to "distinguish" that basis of authority from any power derived from the new FCPA provision.[134] The SEC justified the new rules "in the public interest, for the protection of investors and to insure fair dealing in securities,"[135] and attenuated materiality considerations from future enforcement by declaring that "[t]he new requirements may provide an independent basis for enforcement ac-

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[127] 15 U.S.C. § 77s(a) (1976).

[128] *Id.* § 78w(a).

[129] 17 C.F.R. § 240.13b2-1 (1980): "No person shall directly or indirectly, falsify or cause to by [*sic*] falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act." Section 13(b)(2)(A) was added to the Securities Exchange Act by the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78m, 78o, 78dd-1 to -2, 78ff (Supp. III 1979)). Rule 13b2-2 prohibits officers and directors of a corporation from making materially false, misleading, or incomplete statements to an accountant in connection with any audit or examination of the financial statements of the corporation or the filing of required reports. 17 C.F.R. § 240.13b2-2 (1980).

[130] Securities Exchange Act Release No. 34-15570, 44 Fed. Reg. 10964 (1979).

[131] *Id.* at 10968.

[132] 15 U.S.C. §§ 78m, 78o, 78dd-1 to -2, 78ff (Supp. III 1979). *See generally* Solomon, *supra* note 98, at 70-74; Surrey, *supra* note 65.

[133] *See* note 129 *supra.*

[134] "Although the rules adopted today will be codified with rules promulgated under Section 13 of the Securities Exchange Act, the Commission is not relying exclusively on Section 13 as a foundation for the rules." 44 Fed. Reg. at 10967. *But cf.* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) (antifraud provisions of federal securities laws do not extend to internal mismanagement); Goelzer, *The Accounting Provisions of the Foreign Corrupt Practices Act—The Federalization of Corporate Recordkeeping and Internal Control,* 5 J. CORP. L. 1, 5, 39-40 (1979) (FPCA conferred new jurisdiction on SEC without which enforcement of recordkeeping rules would have exceeded scope of Commission's power).

[135] 44 Fed. Reg. at 10967.

tion by the Commission, *whether or not* violation of the provisions may lead, in a particular case, to the dissemination of materially false or misleading information to investors."[136]

This aggressive rulemaking comports with Commission action involving questionable and illegal corporate payments, and both rules appear to be motivated by the perceived need to provide shareholders with information by which to judge the quality and integrity of management. In adopting the recordkeeping rules, the SEC emphasized that "the accounting provisions of the FCPA are *not* exclusively concerned with the preparation of financial statements. An equally important objective of the new law, as well as pre-existing provisions of the federal securities laws . . . is the goal of corporate accountability."[137]

If the motivation for aggressive SEC rulemaking is to raise corporate accountability, then mandated disclosure of socially oriented information also should be required because it reflects equally on the quality and integrity of management.[138] Furthermore, disclosure of socially oriented information could be required under the SEC's general rulemaking authority even if the information is not deemed material.

C. *Information Necessary or Appropriate in the Public Interest*

As with the SEC's general rulemaking authority, the Commission's power to require disclosure of information "necessary or appropriate in the public interest or for the protection of investors" is expressly provided for under the Securities Acts.[139] But in the context of socially oriented information, the Commission has focused only on disclosure of financial information necessary to protect investors,[140] thus failing to give content to the public interest element.

In defining a security, the Supreme Court has emphasized economic reality over form, giving due regard to the focus of the Acts which is, *inter alia*, on "the need for regulation to prevent fraud and to protect the interest of investors."[141] Because the federal legislation is remedial, the Court favors a broad and flexible reading of the provisions.[142] Therefore, a literal interpretation of the statutory language which would establish the

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[136] *Id.* (emphasis added). The Commission emphasized that "the new requirement is qualified by the phrase 'in reasonable detail' rather than by the concept of 'materiality.'" *Id.*

[137] *Id.* at 10966 (original emphasis).

[138] *See* text accompanying notes 110-11 *supra*.

[139] *See* note 14 *supra*.

[140] 40 Fed. Reg. at 51660: "[I]nsofar as is relevant here, the Commission may require disclosure . . . if it believes that the information would be necessary or appropriate for the protection of investors or the furtherance of fair, orderly and informed securities markets or for fair opportunity for corporate suffrage." *See* Note, *supra* note 9, at 1863, 1866-69; text accompanying notes 5-9, 27-32 *supra*.

[141] United Hous. Foundation, Inc. v. Forman, 421 U.S. 837, 849 (1975).

[142] Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971).

public interest as a basis for requiring disclosure of socially oriented information must be discarded unless the interpretation is within the spirit of the laws or the intent of the drafters.[143]

In the context of disclosure, the purpose of the Securities Acts "was to provide the public with full and fair disclosure of all relevant information concerning securities offered to the public."[144] Moreover, use of the conjunction "or" to separate "public interest" and "protection of investors" signals that each phrase is to be considered a distinct ground for authorizing disclosure.[145] Thus, nothing on the face of the pervasive statutory language manifests congressional intent to limit SEC disclosure policy to a narrowly defined concept of investor protection that addresses only financial information. The SEC is not justified in treating the public interest phrase as mere surplusage.[146]

This analysis does not change under the proposed Federal Securities Code,[147] which is designed to consolidate and improve the Securities Acts.[148] The proposed code incorporates the public interest or investor protection language in one section, making it applicable to all SEC actions.[149] "The 'public interest' standard must be read, of course, in statu-

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[143] *See* 421 U.S. at 849 (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940)). *Cf.* New York Central Securities Corp. v. United States, 287 U.S. 12, 20-21, 24-25 (1932) (upholding Interstate Commerce Commission's exercise of authority based on the agency determination that the proposed acquisition would be "in the public interest" which does not mean public welfare in general but rather means within the objectives of the relevant statute).

[144] SEC v. National Bankers Life Ins. Co., 334 F. Supp. 444, 455 (N.D. Tex. 1971), *aff'd*, 477 F.2d 920 (5th Cir. 1973) (determining that officers, directors, and control persons have fiduciary duty to investing public).

[145] *See* United States v. Naftalin, 441 U.S. 768, 774 & n.5 (1979).

[146] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (interpreting constitutional rather than statutory provision and announcing rule of construction to avoid construing language as surplusage). Indeed, the Commission has invoked the public interest element in promulgating recordkeeping rules, *see* text accompanying note 135 *supra*, and in proposing new disclosure rules related to tender offers, Securities Act Release No. 33-6022, 44 Fed. Reg. 9956 (1979). *Cf.* Mathews, *Litigation and Settlement of SEC Administrative Enforcement Proceedings*, 29 CATH. U.L. REV. 215, 241-44 (1980) [hereinafter cited as Mathews] (propriety and severity of enforcement sanction judged by public interest element).

[147] 1-2 ALI FED. SEC. CODE (Official Draft 1978) [hereinafter cited as ALI CODE].

[148] *See generally Symposium: The American Law Institute's Proposed Federal Securities Code* (pt. 2), 32 VAND. L. REV. 455 (1979); Loss, *Introduction: The Federal Securities Code—Its Purpose, Plan, and Progress*, 30 VAND. L. REV. 315 (1977) [hereinafter cited as Loss].

[149] 2 ALI CODE, *supra* note 262, at § 1804(b):

> **In exercising its authority under section 1804, the Commission shall determine (and so state) that its action is necessary or appropriate in the public interest or for the protection of investors (as well as consumers so far as part XV [utility holding companies] is concerned) and in furtherance of the purposes of this Code, in addition to satisfying whatever other standards are made applicable by particular provisions.**

This section was proposed to avoid "repeating *ad naseam* the 'public interest' and 'protection of investors' standards" that pervade the current Securities Acts. Loss, *supra* note 148,

tory context."[150]

The proposed code has been characterized as a restatement of the SEC's present authority to require disclosure.[151] The pertinent sections require the contents of various types of filings to contain "whatever information . . . the Commission specifies by rule."[152] Critics, however, conclude that the draft legislation would expand the SEC's power and produce the danger that "the Commission will substitute a regulatory scheme in areas of securities law that have traditionally adopted a disclosure policy."[153]

Given the express reference to the public interest in the Securities Acts and the potential liberalization of disclosure under the proposed code, the SEC should view the public interest element as important authority for requiring disclosure. In addition, the disjunctive modifier "necessary or appropriate" does not limit the Commission to requiring disclosure of information "necessary" in the public interest, but instead gives the SEC flexibility to adopt rules that are sensitive to changing disclosure needs.[154] Indeed, the SEC recognized the importance of its broad discretion to change disclosure requirements as the needs of investors change in Release 5627:

> If the Commission had not been vested with broad discretion to review continuously and determine the appropriate content of its disclosure requirements, either periodic review and adjustment thereof by Congress would have been necessary or disclosure would have been frozen in the mold dictated by conditions perceived in 1933 and 1934.[155]

Disclosure needs of investors have changed. National events such as Watergate and the Vietnam War led to proxy contests and adoption of the FCPA,[156] which are both reflections of increased investor desire for

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at 323.

[150] 2 ALI CODE, *supra* note 147, at § 1804(b), comment (3), at 834.

[151] 34 BUS. LAW 345, 350-51 (1978).

[152] 1 ALI CODE, *supra* note 147, at §§ 404 (registration statements), 502(c)(1) (offering statements), 603(c) (proxy statements), 607(b) (directors, officers, principal stockholders, and tender offers); *accord, id.* §§ 510(c) (secondary distributions), 602(a) (postregistration annual reports), 605(a) (directors, officers, and principal stockholders). *Cf. id.* §§ 505(a) (prospectuses), 603(h) (information statements when proxies are not solicited), 604(a) (duty to furnish information to shareholders), 606(d) (tender offers).

[153] Lowenfels, *The Case Against the Proposed Federal Securities Code*, 65 VA. L. REV. 615, 617 (1979). *Cf.* Benston, *Required Periodic Disclosure Under the Securities Acts and the Proposed Federal Securities Code*, 33 U. MIAMI L. REV. 1471, 1482-83 (1979) (criticizing the proposed code for expanding SEC rulemaking authority thereby promoting adoption of additional disclosure requirements when the author finds the current requirements undesirable for economic reasons).

[154] Sonde & Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!"*, 16 How. L.J. 831, 849 (1971).

[155] 40 Fed. Reg. at 51659.

[156] Surrey, *supra* note 65, at 293-94; *Topical Survey of Selected Recent Developments in*

socially oriented information beyond that level perceived in the 1930's. Given these developments, the SEC would be justified in exercising its broad discretion to find socially oriented information either necessary or appropriate in the public interest.

The SEC's suggestion in Release 5627 that the social goals of investors are unrelated to the goals underlying the Securities Acts[157] exposes part of the reason that the SEC failed to give substantial weight to investors' proclaimed needs for socially oriented information.[158] The Commission seemed to have lost sight of the fact that investors' goals, whether they be financial or social, are necessarily related to goals underlying the Acts, because disclosure is the cornerstone of the legislation[159] — providing investors with information they need to make informed investment and voting decisions.[160]

The Securities Acts manifest congressional preference for simple disclosure rather than regulation that passes on the merits of an investment.[161] This suggests that the goals pursued by investors should not be judged or influenced by the SEC. The Commission nevertheless has asserted its influence, notably through disclosure requirements designed to enhance scrutiny of management. Assuming, as the SEC did, that objectively reasonable investors are "vitally interested in the . . . integrity of management,"[162] it is just as likely that reasonable investors are keenly interested in the integrity of the corporation.

In the context of socially oriented information, shareholders have the potential power to affect corporate social policies, but the potential is unlikely to be fully realized without disclosure requirements that facilitate informed shareholder decisionmaking.[163] The mechanisms for disseminating information to shareholders already exist in many forms, including annual reports, proxy solicitations, and other materials.[164] Shareholders

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International Trade and Investment Law, 4 INT'L TRADE L.J. 221, 351 (1979); text accompanying notes 45-48 *supra*.

[157] 40 Fed. Reg. at 51660: "[D]isclosure which is necessary or appropriate 'in the public interest' does not generally permit the Commission to require disclosure for the sole purpose of promoting social goals unrelated to those underlying these [Securities] Acts."

[158] 432 F. Supp. at 1208 n.77; text accompanying note 124 *supra*.

[159] Solomon, *supra* note 98, at 68; Comment, *supra* note 34, at 127.

[160] *See* text accompanying notes 24-26, 144 *supra*.

[161] Hewitt, *supra* note 23, at 889. It was thought that simple disclosure would protect investors by indirectly deterring fraud and unethical behavior and, at the same time, be acceptable to corporations because disclosure would involve minimal government intervention. *See* Anderson, *supra* note 87, at 319-20.

[162] *See* text accompanying note 102 *supra*; note 28 *supra*.

[163] *See* 40 Fed. Reg. at 51664 (shareholder proposals that appear to have social implications received only two or three percent of the vote).

[164] *See, e.g.*, 15 U.S.C. § 78m(d) (Supp. III 1979) (tender offers); 17 C.F.R. §§ 240.14a-1 to -12 (1980) (proxy rules). One commentator concludes that "the annual report to shareholders is probably the single most important disclosure document required by the Commission," Schoenbaum, *supra* note 66, at 589, and the proposed code treats the annual report as "*the primary device for continuous disclosure*," 1 ALI CODE, *supra* note 147, at § 602, com-

therefore may have some notice of the social impact of a corporation's activities.[165] Once alerted to an issue, they can inspect corporate records if they have a reasonable question about the activity,[166] and they may be able to use corporate funds to communicate their own views to coshareholders about corporate social practices.[167] Moreover, shareholders can change policy through by-law and charter amendments.

Because shareholders have the power to affect corporate social policies, they arguably have a concomitant obligation to exercise their power in a socially responsible manner.[168]

> To view economic institutions as "private" made sense when most Americans spent their lives on family farms or in family firms. But today when most American men and a rapidly increasing proportion of American women spend much of their lives in large economic structures that are for most purposes "public"—except that the profits they make go to institutional and individual "private" stockholders—it become [*sic*] imperative to bring the forms of citizenship and of civic association more centrally into the economic sphere.[169]

It must be emphasized that more than a vague notion of the public interest is inherent in this analysis. Socially responsible corporate policies are ultimately in the corporate self-interest,[170] if for no other reason than to avoid government intervention by self-regulation to prevent public harm.[171] Thus, the SEC could find that disclosure of socially oriented information is well within both the spirit and the letter of the securities law.

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ment (2)(c), at 294 (original emphasis). The annual report must contain information describing the general nature and scope of a corporation's business, *see, e.g.*, Securities Exchange Act Release No. 11079, 39 Fed. Reg. 40766 (1974), and therefore would be a logical place for a corporation to detail the impact of its operations in socially oriented terms, presumably in the narrative style currently used for SEC reports. Annual reports may contain information not required by the Commission; therefore, the SEC could at least encourage disclosure of socially oriented information as it has for projections, *see* text accompanying notes 85-97 *supra*.

[165] THE ETHICAL INVESTOR, *supra* note 45, at 49 (shareholders are on "constructive notice" as to the corporation's activities).

[166] *See, e.g.*, ALI-ABA MODEL BUS. CORP. ACT § 52 (rev. ed. 1974).

[167] *See* notes 40, 44 *supra*.

[168] *See* text accompanying notes 55-69 *supra*.

[169] CRITICAL CHOICES, *supra* note 60, at 40. *Accord, Rosenfeld, Corporate Governance*, 7 SEC. REG. L.J. 171, 172 (1979); text accompanying note 68 *supra*. *See also* Mundheim, *supra* note 42, at 28-29; Stevenson, *supra* note 31, at 718-22.

[170] Comment, *supra* note 34, at 134-37 (discussing environmental disclosure); *see* S. REP. No. 114, 95th Cong., 1st Sess. 4, *reprinted in* [1977] U.S. CODE CONG. & AD NEWS 4098, 4101: "Corporate bribery is bad business. . . . [F]oreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business."

[171] *See* Earle, *supra* note 60, at 796; note 161 *supra* and text accompanying note 153 *supra*.

Even if the SEC were not to find disclosure of socially oriented information necessary or appropriate in the public interest on the theory that shareholders have an obligation to monitor harmful corporate activities, and if the Commission declined to act on the basis that such information is economically significant,[172] the agency still must confront the precedent established in promulgating new accounting and disclosure regulations governing nonmaterial information under its general rulemaking powers.[173] Hence, the very least that can be said is that materiality no longer poses an overwhelming obstacle to mandated disclosure of socially oriented information.

III. Requiring Disclosure of Socially Oriented Information in Return for Favorable SEC Action

The three approaches to requiring disclosure of nonmaterial information and the several analyses available under the materiality concept are not the only means by which the SEC could effect disclosure of socially oriented information. The Commission also has the power to require disclosure as a matter of policy before acting favorably on corporate filings and requests. There are two sources for the SEC's power in this area: the control over securities registration, and the ability to bring enforcement proceedings against corporations which may be in violation of the Securities Acts.

Before a corporation can sell securities, it must have an effective registration statement filed with the SEC.[174] Although the registration statement automatically becomes effective twenty days after filing,[175] filing is not deemed to have occurred if there are deficiencies in the registration statement—a problem which often exists.[176] Most corporations consider it critical to have the twenty-day waiting period "accelerated" so securities can be sold as soon as the last amendment is filed.[177] The prefiling period is the time when the SEC can effectively persuade corporations to comply with SEC policy.

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[172] *See* text accompanying notes 121-26 *supra*.

[173] *See* text accompanying notes 127-36 *supra*.

[174] 15 U.S.C. § 77e(c) (1976):

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

Many corporations of course are exempt from registration requirements, *see* note 2 *supra*.

[175] 15 U.S.C. § 77h(a) (1976).

[176] 1 L. Loss, Securities Regulation 272-74 (1961) [hereinafter cited as L. Loss].

[177] Ratner, *supra* note 13, at 124.

Before granting acceleration, the SEC can require corporations to comply with conditions imposed with "due regard to the public interest and the protection of investors."[178] For example, a corporation must not have agreed to indemnify management for Securities Act violations without a prior judicial determination that the agreement would not contravene the public policy of the Securities Act.[179] Although this condition may constitute good public policy, it has little to do with the substantive requirements of registration. Assuming that socially oriented information is in the public interest and serves to protect investors, the Commission could require disclosure as a condition for granting acceleration.

Another SEC enforcement technique is to commence stop-order proceedings which suspend an effective registration statement if the statement contains a misstatement or omission of a material fact.[180] The Commission may terminate the proceeding if the corporation consents to the publication of the violations giving rise to the stop-order proceeding. In *Franchard Corp.*,[181] the seminal case in the SEC's movement to require disclosure concerning the quality and intergrity of management, the SEC agreed not to issue the stop order if the corporation would send the SEC's opinion containing a summary of the violations to all present and past shareholders.[182]

Although *Franchard* has had some bearing on the information which should be contained in a registration statement, the larger impact has been on the internal relations of management and shareholders—raising management's duty to disclose its activities.[183] The SEC infrequently has used stop-order power,[184] but the technique provides the SEC with broad discretion to affect corporate internal policies and practices and might be applied in the context of socially oriented information.[185]

Aside from the registration-related mechanisms for establishing policy,

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[178] 15 U.S.C. § 77h(a) (1976).

[179] 17 C.F.R. § 230.460(f) note (a), at 585 (1980).

[180] 15 U.S.C. § 77h(d) (1976). *See generally* Mathews, *supra* note 146, at 221-22.

[181] 42 S.E.C. 163 (1964), *discussed in* note 108 *supra*.

[182] The SEC determined that failure of the Franchard prospectus to discuss huge cash withdrawals by real estate franchise operator Louis J. Glickman, the controlling owner, constituted a material omission. Failure to disclose "Glickman's unauthorized dealings with registrant's funds," his own weak financial situation, and doubts regarding his control position would have required a stop order absent publication. 42 S.E.C. at 185.

[183] *See* Schneider, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. PA. L. REV. 254, 288-90 (1972). *See generally* Goldstein & Shepherd, *Directors' Duties and Liabilities Under the Securities Acts and Corporation Law*, 36 WASH. & LEE L. REV. 759, 763-64 (1979).

[184] *See* 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 7.12[1] (1979); RATNER, *supra* note 13, at 124.

[185] Although the SEC has developed a broad range of ancillary remedies, use of the various techniques reflects a lower priority for compelling disclosure investment information than for other goals achieved by their use. Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779, 1807-08 (1976).

the SEC has adopted a creative use of consent decrees[186] in connection with its general enforcement powers.[187] For example, consent decrees have been used to (1) permit the SEC to appoint outside directors to the corporation's board of directors,[188] (2) continue an existing audit committee or permit the SEC to appoint one,[189] (3) permit the SEC to appoint special counsel to conduct investigations into corporate practices,[190] and (4) require the board of directors to undertake new responsibilities imposed by the SEC.[191]

One proceeding instituted against Lockheed Aircraft Corporation exemplifies the tremendous leverage the SEC has over corporations by virtue of its enforcement powers.[192] The corporation had planned to recapitalize but instead renewed existing loans at great expense because it was virtually impossible to obtain shareholder approval necessary for recapitalization until the enforcement proceeding ended.[193]

When the Commission exercises this kind of power, corporations prefer to surrender "to the SEC's demands rather than face the risk of losing access to their shareholders or to the markets."[194] Moreover, the SEC's power is virtually unreviewable and therefore unlimited.[195] As a practical

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[186] Block & Barton, *Administrative Proceedings to Enforce the Foreign Corrupt Practices Act*, 7 SEC. REG. L.J. 40, 42 (1979) [hereinafter cited as Block & Barton] (nearly all enforcement proceedings involving payments and perquisites have been settled); Mathews, *supra* note 146, at 273-74 (consent settlements are particularly advantageous in administrative disciplinary proceedings). *See generally* Sommer, *supra* note 102, at 128-29; Treadway, *SEC Enforcement Techniques: Expanding and Exotic Forms of Ancillary Relief*, 32 WASH. & LEE L. REV. 637 (1975).

[187] The SEC derives its authority from section 20 of the Securities Act, 15 U.S.C. § 77t (1976), and section 21 of the Securities Exchange Act, *id.* § 78u. *See generally* 3 L. LOSS, *supra* note 176, at 1945-2004.

[188] SEC v. Mattel, Inc., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,807 (D.D.C. Oct. 1, 1974); Sommer, *supra* note 102, at 133. The SEC's power is, however, limited when the corporation objects, *see* SEC v. Falstaff Brewing Corp., [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,583, at 94,473 (D.D.C. Oct. 28, 1978), *discussed in* Block & Barton, *supra* note 186, at 45-46.

[189] SEC v. Killearn Properties, Inc., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,256 (N.D. Fla. May ___, 1977); SEC v. Mattel, Inc., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,807 (D.D.C. Oct. 1, 1974); Tomm, *supra* note 99, at 96-98.

[190] SEC v. Ormand Indus., Inc., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,046 (D.D.C. May ___, 1977), *discussed in* Block & Barton, *supra* note 186, at 48.

[191] *See* Report of Investigation in the Matter of National Telephone Co., Inc., Relating to Activities of the Outside Directors of National Telephone Co., Inc., Securities Exchange Act Release No. 14380, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,410 (Jan. 16, 1978), *quoted in* text accompanying note 200 *infra*.

[192] *See* SEC v. Lockheed Aircraft Corp., 404 F. Supp. 651 (D.D.C. 1975) (ordering Lockheed's compliance with subpoenaed documents concerning potentially illegal foreign payments and precluding public disclosure of the information obtained without court approval).

[193] Freeman, *supra* note 88, at 1302. *But cf.* SEC v. Sloan, 436 U.S. 103 (1978) (SEC without authority to suspend trading beyond 10 days under section 12k of the Securities Exchange Act for single violation).

[194] Freeman, *supra* note 88, at 1302.

[195] Coffee, *supra* note 23, at 1252; *see* Freeman, *supra* note 88, at 1303; *cf.* SEC v. Cana-

matter, the trend to settle SEC charges is more likely to continue than to abate.[196]

Even beyond their impact on the corporation involved, consent decrees have far-reaching effects on the development of SEC disclosure policy in general,[197] particularly when the Commission makes use of its somewhat controversial power to resolve charges by publishing reports of investigations.[198] Recent action involving the National Telephone Company[199] provides a suitable example of a new policy established by this method. The SEC instituted an investigation which ended when, by consent decree, the Commission published its conclusions regarding the duties of outside directors:

> In general, outside directors should be expected to maintain a general familiarity with their company's communications with the public. In this way, they can compare such communications with what they know to be the facts, and if the facts as they know them are inconsistent with those communications, they can see to it, as stewards for the company, that appropriate revisions or additions be made.[200]

This announcement had the effect of raising the general standard of care for outside directors, which under state law had been limited to the exer-

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dian Javelin Ltd., 64 F.R.D. 648 (S.D.N.Y. 1974), *appeal dismissed mem.*, 538 F.2d 313 (2d Cir. 1976) (denying intervention for purpose of attempting to vacate consent decree). *But cf.* SEC v. Falstaff Brewing Corp., [1978 Transfer Binder], FED. SEC. L. REP. (CCH) ¶ 96,583, at 94, 473 (D.D.C. Oct. 28, 1978) (denying SEC request to appoint independent directors and audit committee over corporation's objection).

[196] It has been suggested that the collateral estoppel effect of SEC litigation in subsequent private actions, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), will encourage settlements and thereby enhance the Commission's power. Note, SEC v. Falstaff Brewing Corp.: *Imposing a Stringent Duty of Care on Corporate Board Nominees Under Section 14(a) of the Securities Exchange Act of 1934*, 74 NW. U.L. REV. 468, 472 n.14 (1979), but another view is that collateral estoppel and res judicata effects may be given to administrative findings, so that consent injunctive decrees may be susceptible to the *Parklane* rule, Mathews, *supra* note 146, at 276-77.

[197] Sommer, *supra* note 102, at 133-34.

[198] 15 U.S.C. § 78u(a) (1976) (section 21(a) of the Securities Exchange Act of 1934). One Commissioner recently attacked the use of this section as exceeding the agency's jurisdiction and prosecutorial power, Spartek Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,961, at 81,408 (Feb. 14, 1979) (Karmel, Commissioner, dissenting), but the SEC is not likely to abandon its use of section 21(a) public reports of investigations to influence corporate conduct and federal legislation, Securities Exchange Act Release No. 15,664, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,014 (Mar. 21, 1979); Mathews, *supra* note 146, at 226-29.

[199] Report of Investigation in the Matter of National Telephone Co., Inc., Relating to Activities of the Outside Directors of National Telephone Co., Inc., Securities Exchange Act Release No. 14380, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,410 (Jan. 16, 1978).

[200] *Id.* at 88,880.

cise of reasonable business judgment.[201]

Given the wide range of remedies available to the SEC by consent decree, the lack of judicial restraints imposed on decrees, and the far-reaching effects that result, the SEC has a powerful tool that could be used to require disclosure of socially oriented information. Similarly, the SEC has invoked its broad power over the registration of securities to impose its own policies on corporations and to publicize the Commission's views on the quality and integrity of management. There is nothing to prevent the SEC from using the same approach with respect to socially oriented information, which would provide investors with highly relevant facts to assess what is simply another dimension of management integrity, corporate responsibility in the marketplace.

IV. CONCLUSION

The SEC should reconsider its policy on the disclosure of socially oriented information[202] in view of its clear authority and broad discretion to require such disclosure and in view of the increased need that investors have for such information. Although the Commission confined its original inquiry to materiality, subsequent disclosure decisions have not been constrained by the narrow definition applied in Release 5627.

Socially oriented information could be deemed material under the standard SEC definitions or under the emerging expanded concept of materiality. Rule 14a-9 is applicable because there is a substantial likelihood that a reasonable investor would consider the data important in deciding how to vote.[203] Socially oriented information also could be material under Rule 405 because a reasonable investor would consider it important in deciding whether to purchase, hold, or sell.[204] Shareholders and institutional investors have asserted such needs through active participation in proxy contests, SEC administrative proceedings, and litigation.[205]

In addition, rationales previously used for expanding the boundaries of materiality could be applied to socially oriented information. Thus, the SEC could find that such information "may be material," as are financial projections, or that socially oriented information is material per se, as are data concerning questionable and illegal corporate payments and management remuneration.[206]

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[201] *See* Hahn & Manzoni, *The Monitoring Committee and Outside Directors' Evolving Duty of Care*, 9 LOY. CHI. L.J. 587, 600, 607, 611 (1978); note 63 *supra*. *See also* Block & Barton, *The Business Judgment Rule as Applied to Stockholder Proxy Derivative Suits Under the Securities Exchange Act*, 8 SEC. REG. L.J. 99 (1980).

[202] *See* note 20 *supra*.

[203] *See* text accompanying notes 25-26, 40-69 *supra*.

[204] *See* text accompanying notes 70-84 *supra*.

[205] See text accompanying notes 33-35, 42-50, 81-83 *supra*.

[206] *See* text accompanying notes 85-119 *supra*.

Alternatively, the SEC could find that socially oriented information should be disclosed even if such information is not deemed material. The Commission could require disclosure of nonmaterial information because it is either economically significant or because it is "necessary or appropriate in the public interest."[207] The SEC could exercise its general rulemaking authority, as it did in promulgating new accounting rules, to provide greater exposure of the quality and integrity of management through disclosure of socially oriented information.[208] Finally, the SEC could use its broad power over securities regulation and enforcement of the Securities Acts to require disclosure of such information.[209]

A reasonable time has passed since the Release 5627 proceedings were concluded, and, during the interim, the SEC itself has laid the foundation for a positive assessment of investors' needs for socially oriented information.[210] There is no doubt that corporate shareholders have potential power to effect socially responsible decisions nor that the Commission has the authority to provide them with the information precedent to exercising that power. The opportunity is ripe, and the choice is clear: "If we would recover against the social and personal commitment to free institutions that is the life-blood of a democratic society, then we must bring the public democratic ethos into the sphere of economic life."[211]

Phyllis Spradlin

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[207] *See* note 14 *supra* and text accompanying notes 120-26, 139-73 *supra*.

[208] *See* text accompanying notes 127-38 *supra*.

[209] See text accompanying notes 174-201 *supra*.

[210] *See* note 110 *supra*.

[211] CRITICAL CHOICES, *supra* note 60, at 40.

KAISER AETNA V. UNITED STATES: PRIVATE PROPERTY RIGHTS IN A NAVIGABLE MARINA

A dispute arose in 1972 between Kaiser Aetna and the United States Army Corps of Engineers regarding the extent of Kaiser Aetna's property rights in a privately owned marina. The resulting litigation involved the federal law of navigable waters governing the assertion of regulatory control and the constitutional question of when governmental regulation becomes a taking of private property. The first issue was whether the Hawaii Kai Marina, an artificially improved private waterway connected to the sea, was subject to federal regulation by the Corps of Engineers. The more important issue was whether, as a result of regulation, the marina could be opened to free public use without payment of compensation to the owner by the Federal Government.

In December 1979, the United States Supreme Court in *Kaiser Aetna v. United States*[1] resolved the issue of regulation in favor of the Federal Government but upheld the exclusive private property character of the Hawaii Kai Marina. Although the Government had sufficient authority under the commerce clause of the United States Constitution[2] to assert regulatory control, imposing a public right of way on the marina exceeded mere regulation and constituted a governmental taking for which just compensation must be made under the fifth amendment.[3] Kaiser Aetna won a major victory in delimiting the extent of regulatory control over navigable waterways and preserved its right to exclude the public from unsolicited and uncompensated use and access to the Hawaii Kai Marina.

This note will describe the factual circumstances involved in the case while focusing on the historical and constitutional bases for the establishment of federal regulatory control and public use of navigable waterways in an effort to lend perspective to the Court's decision. There is little doubt that *Kaiser Aetna* strikes a new balance between competing public and private interests in favor of individual property rights.

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[1] 444 U.S. 164 (1979), *discussed in* Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls, 1978 Survey of Hawaii Law*, 2 U. HAWAII L. REV. 167, 201-06 (1979); *The Supreme Court, 1978 Term*, 94 HARV. L. REV. 75, 205-14 (1980); 10 ENV'L L. 654 (1980).

[2] U.S. CONST. art. I, § 8, para. 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[3] *Id.* amend. V: "[N]or shall private property be taken for public use, without just compensation."

I. BACKGROUND

The Hawaii Kai Marina is located in the eastern sector of Honolulu and is currently an integral feature of the residential subdivision known as Hawaii Kai.[4] The marina opens out to the adjacent Pacific Ocean through a single artificial channel that had been dredged through a natural barrier beach. Both the marina and the surrounding residential area are the products of the private development efforts of Kaiser Aetna.

Prior to its transformation into a marina by Kaiser Aetna, the marina had been known by its Hawaiian name, Kuapa Pond. The pond had been a shallow lagoon,[5] contiguous to the sea but blocked from practical boating access to or from the ocean by a natural barrier sand beach. This natural impediment was artificially enhanced by the erection of stone walls and sluice gates at the mouth of the pond to allow the influx and ebb of the ocean tide.[6] Kuapa Pond thus became useful as a breeding and trapping ground for ocean mullet and was employed by the ancient Hawaiians as an aquacultural facility.[7] The tidal flooding enriched the pond's waters with nutrients and small, young fish. As the fish grew larger, they were trapped within the pond and provided an accessible source of seafood. Until 1961, Kuapa Pond was used as a fishpond in this traditional manner.[8]

In 1961, Kaiser Aetna leased Kuapa Pond and the surrounding tract for development from the Bernice Pauahi Bishop Estate,[9] the fee owner. Kaiser Aetna transformed the shallow fishpond into a navigable marina accessible to and from the sea by excavating the depths,[10] reinforcing the

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[4] 444 U.S. at 167-68. Approximately 22,000 persons live in Hawaii Kai. *Id.*

[5] United States v. Kaiser Aetna, 408 F. Supp. 42, 46 (D. Hawaii 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd in part*, 444 U.S. 164 (1979). At high tide, the waters of the lagoon reached a maximum depth of approximately two feet.

[6] A littoral formation separated from the sea by an artificially enhanced natural barrier beach was known as a *loko kuapa* style of fishpond; hence, Kuapa Pond's name. *Id.* at 46 n.3.

[7] *Id.*

[8] *Id.* at 47.

[9] The Bernice Pauahi Bishop Estate joined Kaiser Aetna at trial on all appeals as the fee title owner of Kuapa Pond. The Bishop Estate is one of the largest landowners in Hawaii. Bernice Pauahi Bishop was of royal lineage, the great granddaughter of King Kamehameha I, the unifier and conqueror of the Hawaiian Islands. Princess Bernice lived from 1831 until 1884, accumulating vast tracts of land devised to her by other Kamehameha relatives. At her death, her estate contained 375,560 acres of land or nearly one-ninth of all surface lands in the island chain. Her estate was set up in trust for the establishment of a private school for children of Hawaiian ancestry, still in operation as Kamehameha Schools. *In re* Bishop Estate, 36 Hawaii 403, 426-29 (1943).

[10] The improved marina presently covers 523 acres of land, extending two miles inland from the point where the marina opens into the Pacific Ocean. The marina has a present average depth of six feet, in contrast with the original maximum depth of two feet. 408 F. Supp. at 46.

banks with retaining walls, and dredging a channel to the sea.[11] Kaiser Aetna constructed an attractive residential community around the marina, charging waterfront residents, other subdivision residents, and members of the public[12] an annual use and maintenance fee for fishing, boating, and other marina activities.

The dispute between Kaiser Aetna and the Corps of Engineers arose over the efforts of the latter to declare the marina a navigable water of the United States and thereby subject it to the Engineers' regulatory control,[13] commonly referred to as "dredge and fill" jurisdiction.[14] The corps also sought to enjoin Kaiser Aetna from further excluding the public or charging an entry fee for access to the marina. When Kaiser Aetna refused to admit navigability for federal regulatory purposes, the Corps of Engineers filed suit for declaratory and injunctive relief in the United States District Court for the District of Hawaii.[15]

The district court held the marina was navigable for federal regulatory purposes but opening the marina to free public use could not be accomplished absent payment of compensation. The court reasoned that the public right of use was not coextensive with the assertion of federal regulatory authority and would deprive Kaiser Aetna of its "investment or any return on it."[16] On appeal by both parties, the Ninth Circuit affirmed the district court's holding regarding proper regulatory jurisdiction but reversed on the matter of public use and compensation.[17] The Ninth Circuit determined that "federal regulatory authority over navigable waters . . . and the right of public use cannot consistently be separated."[18] In-

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[11] The channel to the sea has a depth of approximately eight feet and passes under a state highway bridge which leaves a maximum overhead clearance of 13.5 feet over mean sea level. *Id.* at 47.

[12] At the time of trial in 1976, 66 boats were registered and licensed to use the marina, while some 1,500 residential lots fronted marina waters. *Id.* at 47-48.

[13] The Corps of Engineers asserted regulatory jurisdiction under section 10 of the Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (codified at 33 U.S.C. § 403 (1976)). Under this section, it is unlawful to excavate or fill any haven, harbor, or enclosure of any water designated as a navigable water of the United States. Moreover, the Engineers must review and approve any development, excavation, dredging, or filling which would alter the present navigable, useful capacity of a navigable water of the United States.

[14] *See generally* Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19 (1973).

[15] United States v. Kaiser Aetna, 408 F. Supp. 42 (D. Hawaii 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd in part*, 444 U.S. 164 (1979). The original action was brought by the United States to seek (1) declaratory relief designating the marina as a navigable water of the United States and subject to the regulatory jurisdiction of the Corps of Engineers, (2) injunctive relief against any future alteration of the physical condition of the marina by Kaiser Aetna without the prior approval of the Engineers, and (3) injunctive relief to prevent Kaiser Aetna from precluding free public access to and use of the marina.

[16] 408 F. Supp. at 54.

[17] United States v. Kaiser Aetna, 584 F.2d 387 (9th Cir. 1978), *rev'd in part*, 444 U.S. 164 (1979).

[18] *Id.* at 383.

voking the doctrine of navigational servitudes,[19] the Ninth Circuit held that the Government was not obliged to compensate private claims for loss and deprivation of property when furthering the interest of public navigation.

The United States Supreme Court reversed the portion of the Ninth Circuit's decision which denied Kaiser Aetna a right of compensation. In an opinion written by Justice William H. Rehnquist for the majority of six Justices,[20] the Court separated the question of federal regulatory power from the issue of public use. While private property considerations would not impair the imposition of regulatory control, they would operate as an effective limitation on the extent of that authority. The majority refused to extend the Government's regulatory power so far as to create a public right of way over waters that were privately owned and developed. The majority held that the doctrine of navigational servitude, long used to immunize the federal government from the payment of compensation while exercising the federal navigational power, did not apply to the type of waterway created by Kaiser Aetna.[21] If the Government insisted on creating a public right of access to the marina, it would be required to pay for the taking of private property.

II. Federal Regulatory Power

The power of the federal government to regulate and appropriate interstate waters has as its source various provisions of the United States Constitution,[22] but the source most often relied upon is the commerce clause.[23] The power to regulate interstate waterways was first established in *Gibbons v. Ogden*[24] where Chief Justice John Marshall interpreted commerce to include transportation, which in turn encompassed navigation. Vesting regulatory power in the national government would prevent any state or private party from obstructing a passageway or monopolizing the use of a waterway to the detriment of the flow of commerce over water.[25] Thus, regulation of waterways based upon the authority of the

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[19] *See* Part IIIB *infra*.

[20] In dissent were Justices Brennan, Blackmun, and Marshall. 444 U.S. at 180 (Blackmun, J., dissenting).

[21] *Id.* at 179-80.

[22] Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters* (pt. 1), 5 Land & Water L. Rev. 391, 401-08 (1970) (reviewing the sources of constitutional authority, U.S. Const. art. II, § 2 (treaty and war clause), art. III, § 2 (admiralty and maritime jurisdiction), art. I, § 8 (general welfare clause), art. IV, § 3 (property)).

[23] U.S. Const. art. I, § 8, para. 3, *quoted in* note 2 *supra*.

[24] 22 U.S. (9 Wheat.) 1 (1824).

[25] For instance, in *Gibbons*, the Court enjoined the State of New York from enforcing a state statute which required a federally licensed shipping vessel to be additionally licensed by New York before entry into state waters. The law was held to be an impediment to interstate traffic over water, and the Federal Government had preempted the area by certi-

commerce clause required a finding that the waterways were navigable and subject to interstate transportation.

A. *Standards of Navigability*

Since the early case of *Gibbons*, three federal tests of navigability have been employed by the courts to determine the appropriateness of federal regulatory control over private or State-owned waterways. Two of these standards were inherited from early English common-law concepts of navigability, while the most recent one is a product of the American courts.

The first criterion for purposes of defining the extent of sovereign control over waterways and public access was the "ebb and flow" test, developed in England and adopted by the United States. Any water affected by the tidal action of the sea was relegated to sovereign control and became part of the public domain.[26] In the early days of the Republic, this analysis was regarded as the exclusive test of federal jurisdiction over waterways.[27]

The English common law subsequently developed the test of "navigability in fact" which applied to waters not amenable to the ebb and flow of the tides.[28] Any inland waterway capable of actual navigation by the public was burdened with a navigational "servitude"[29] or "easement"[30] in favor of the public. This public right was deemed superior to any claims

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fying shipping vessels for federal purposes. *See also* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (removal of negligently sunken vessels); Willink v. United States, 240 U.S. 572 (1916) (pilings and wharf removed); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (low-hanging bridge ordered raised); United States v. Bellingham Bay Boom Co., 176 U.S. 211 (1900) (boom across river ordered abated); United States v. Maidman, 340 F. Supp. 395 (S.D.N.Y. 1971) (loose boards and timber floating around fire-damaged pier ordered abated); United States v. New York R.R., 252 F. Supp. 508 (D. Mass. 1965), *aff'd per curiam*, 358 F.2d 747 (1st Cir. 1966) (overhead bridge ordered raised; supporting columns shifted to widen channel).

[26] 4 R. CLARK, WATERS AND WATER RIGHTS § 305.1(D) (1970) [hereinafter cited as CLARK].

[27] *See* Waring v. Clarke, 46 U.S. (5 How.) 441, 463-64 (1847); The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825).

[28] The ebb-and-flow test was rejected only insofar as it was inapplicable to freshwater inland streams. The test still survives in some jurisdictions for the purpose of determining federal regulatory control over tidal waters, *see, e.g.*, United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972). In other jurisdictions, the test is disregarded altogether, Pitship Duck Club v. Town of Sequim, 315 F. Supp. 309 (W.D. Wash. 1970); Mintzer v. North American Dredging Co., 242 F. 553, 560 (N.D. Cal. 1916), *aff'd*, 245 F. 297 (9th Cir. 1917). For a detailed discussion of the common-law origins of the concept of navigability, see MacGrady, *The Navigability Concept in Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. ST. U.L. REV. 513 (1975).

[29] *See* CLARK, *supra* note 26, at § 305.1(D), at 105.

[30] J. GOULD, THE LAW OF WATERS 119-20 (3d ed. 1900).

of private ownership to the land beneath navigable waters. Thus, the public right to free and unhindered passage over navigable waters was secured without usurping private title to riparian[31] or subaqueous lands.[32]

American courts modified the English navigability-in-fact test to accommodate the substantial commercial interests in the freshwater lakes and rivers of the United States, which had no British analogue.[33] In *The Daniel Ball*,[34] the Supreme Court confirmed that the ebb-and-flow test was not the sole criterion for establishing the appropriateness of federal control over waterways.[35] The Court instead invoked a standard of navigability in fact which differed from the English law in that it required waterways to be capable of supporting international or interstate trade as highways of commerce.[36] This test, which modified the English version, better effectuated the commerce clause interests of the Federal Government approved by *Gibbons* and reinforced the preemptive authority of federal regulation over the interests of the states.

The Court later adopted a third test, based on potential navigability, in order to extend federal control over an even greater number of waterways. Thus, a nonnavigable waterway which was once navigable is still subject to federal regulation because navigability can be revived.[37] Furthermore, the Court declared in 1940 that a nonnavigable waterway which could be rendered navigable after reasonable improvement qualifies for federal regulation and protection.[38] Together with the tests of ebb and flow and navigability in fact,[39] the standard of potential navigability is

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[31] Riparian rights are usufructary rights in water which flows over or adjacent to privately owned land. They are fixed, defined, and protected as property rights under local law and by some state constitutions. *See* notes 62, 64 and accompanying text *infra*.

[32] Considerable controversy exists as to how the public right of way originated and how far the right extended historically. *See* CLARK, *supra* note 26, at § 305.1(D), at 105-08 n.67. *See also* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 26-28 (1963) [hereinafter cited as Morreale).

[33] The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 456-57 (1851). *See* note 35 *infra*.

[34] 77 U.S. (10 Wall.) 557, 563 (1870).

[35] The ebb-and-flow test was considered insufficient in *The Daniel Ball* because, in contrast to the insular nation of England, many rivers in the continental United States flowed unaffected by any tidal action, yet were great commercial waterways. *Id.*

[36] *Id.*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

[37] Economy Light & Power Co. v. United States, 256 U.S. 113, 124 (1921).

[38] United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

[39] 33 C.F.R. § 329.4 (1980), *quoted in* note 55 *infra*. The continued vitality of the ebb-and-flow navigability test has been eroded. *See* note 28 *supra*. In some jurisdictions, the

currently codified,[40] and all three were applied by federal courts when the Corps of Engineers first asserted regulatory authority over the Hawaii Kai Marina.

B. *The Effect of a Finding of Navigability*

The various tests for navigability originally were utilized by the courts to determine whether federal jurisdiction existed over a particular waterway. A finding of actual or potential navigability became sufficient for the federal government to assert regulatory control,[41] without further identifying the specific power involved. *Kaiser Aetna* modified this trend.

A finding of navigability "must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case."[42] The majority concluded that establishing "navigability" would not advance a whole array of federal interests but must be additionally qualified by the specific objective of the Government in seeking regulation. To illustrate his point, Justice Rehnquist identified governmental interests that had been the bases for a finding of navigability in prior cases: (1) Congressional regulatory authority under the commerce clause,[43] (2) the extent of authority delegated to the Corps of Engineers under the Rivers and Harbors Act of 1899,[44] (3) the scope of the navigational servitude,[45] and (4) the extent of federal jurisdiction over admiralty

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ebb-and-flow test has been replaced with a standard of past, present, or future navigability in fact, *see* Rochester Gas & Elec. Corp. v. Federal Power Comm'n, 344 F.2d 594 (2d Cir. 1965); United States v. Crow, Pope & Land Enterprises, Inc., 340 F. Supp. 24 (N.D. Ga. 1972).

[40] 33 C.F.R. § 329.9 (1980).

[41] For example, in considering the Hawaii Kai Marina, the federal district court correlated the physical characteristics of the marina with one or more qualifying elements of the federal tests of navigability. Under the ebb-and-flow standard, the court determined that the tidal nature of the marina was evident. Under the navigability-in-fact test, the opening up and dredging of the marina had made navigation by boats physically possible. Under the test of navigable capacity, the fact that the marina had been rendered navigable attested to its susceptibility for actual navigational use. 408 F. Supp. at 49-50.

[42] 444 U.S. at 171 (quoting 408 F. Supp. at 49 (original emphasis)). The importance of this statement is already illustrated by recent decisions which have cited the exact passage, *see, e.g.*, Livingston v. United States, 627 F.2d 165 (8th Cir. 1980) (concept of "navigability" for purposes of federal admiralty jurisdiction); Cooper v. United States, 489 F. Supp. 200 (W.D. Mo. 1980) (dispute as to whether a lake was navigable for the purpose of federal admiralty jurisdiction).

[43] *See* United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

[44] 33 U.S.C. §§ 401-418 (1976). *See* United States v. Republic Steel Corp., 362 U.S. 482 (1960); Weiszmann v. District Eng'r, 526 F.2d 1302 (5th Cir. 1976); United States v. Ray, 423 F.2d 16 (5th Cir. 1970); United States v. Pot-Nets, Inc., 363 F. Supp. 812 (D. Del. 1973).

[45] *See* Part IIIB *infra*.

and maritime cases.[46] In other words, the concept of navigability does not have a fixed meaning but instead is dependent upon the context in which the particular federal governmental interest arises.

The Corps of Engineers, the federal district court, and the Ninth Circuit operated under the assumption that a general finding of navigable waters under one of the established tests was required to invoke regulatory power.[47] This assumption was rejected by the majority in *Kaiser Aetna*. The inquiry was not whether a waterway could support navigation but whether circumstances surrounding the use of the Hawaii Kai Marina potentially could affect the flow of interstate commerce.[48] Under the Court's reasoning, a finding of navigability is no longer necessary to determine whether interstate commerce would be affected.

Without specifying the precise factual basis for its decision, the Court concluded that, under the proper commerce clause analysis, the Hawaii Kai Marina could be regulated by the Federal Government.[49] The marina's relationship to the open sea may have been deemed sufficient to influence commercial activity and movement on interstate waters so as to justify federal regulation.[50] As a channel and facility of interstate commerce, the waterway is capable of supporting transportation and other activities which Congress rationally could find would affect more than one state.[51]

To summarize, Congress may have different purposes and bases for asserting regulatory control over waterways. For instance, Congress may regulate a particular waterway under the commerce clause, or the Corps

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[46] *See* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); United States v. White's Ferry Inc., 382 F. Supp. 162 (D. Md. 1974), *aff'd mem.*, 529 F.2d 518 (1975). *See generally* Guinn, *An Analysis of Navigable Waters of the United States*, 18 BAYLOR L. REV. 559 (1966).

[47] The federal district court, for example, determined the marina's qualification as a navigable waterway before reaching the issue of commercial capacity. 408 F. Supp. at 49-50. But Justice Rehnquist determined that "[r]eference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce." 444 U.S. at 173. See note 51 *infra*.

[48] 444 U.S. at 174. The modern commerce clause standard evolved in the late 1930s and early 1940s in the wake of aggressive social legislation by Congress to relieve the economic distress of business and labor. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (limit on agricultural output); United States v. Darby, 312 U.S. 100 (1941) (wage and hour controls); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (labor relations). *See* note 52 *infra*. The "affect commerce" test has been used continuously in cases of federal regulation, *see, e.g.*, Fry v. United States, 421 U.S. 542 (1975) (wage and price freezes); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[49] 444 U.S. at 174.

[50] For a discussion of interstate commercial use of the marina, see 408 F. Supp. at 52-53.

[51] In its factual summary of the case, the majority mentioned that Kaiser Aetna permitted commercial use of a small passenger vessel to promote sales of marina lots and briefly allowed the boat access to the marina in order to attract customers for marina shopping center merchants. 444 U.S. at 168.

of Engineers, in accordance with its delegated authority, may find it necessary to regulate a waterway under the Rivers and Harbors Act. *Kaiser Aetna* establishes that if the regulatory control being asserted is based on the commerce clause, then a finding of navigability is irrelevant and Congress can proceed under its vast commerce power.[52] On the other hand, when Congress seeks to establish the limits of federal jurisdiction over admiralty and maritime cases, the tests for navigability remain relevant.[53] Despite the commerce clause analysis of *Kaiser Aetna*, the tests for navigability presumably still govern where the Corps of Engineers acts pursuant to section 10 of the Rivers and Harbors Act, because the statute by its own terms applies only to navigable waters.[54] Given the expansive tests for determining navigability, especially the corps definition of navigable waters,[55] the Court's commerce clause analysis will not significantly

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[52] "[C]ongressional authority over the waters of this Nation does not depend on a stream's 'navigability.' . . . [A] wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved." *Id.* at 174. *Compare* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426 (1940) (regulation of commerce on interstate waters includes flood protection, watershed development, and recovery of the cost of improvements), *with* United States v. River Rouge Improvement Co., 269 U.S. 411, 419 (1926) ("The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation.' "). *See also* United States v. Twin City Power Co., 350 U.S. 222, 224 (1956) ("If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced."), *and* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525-26 (1941) (Congress has power to regulate a nonnavigable tributary of the navigable Mississippi River in order to protect the navigable capacity of the Mississippi River).

[53] *See, e.g., Ex parte* Boyer, 109 U.S. 629, 632 (1884) ("Navigable water . . . is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a state . . . ."); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 456-57 (1851) (rejecting ebb-and-flow test for federal admiralty jurisdiction in favor of more expansive definition that includes navigability in fact).

[54] 33 U.S.C. § 403 (1976) provides in part: "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited." In National Wildlife Fed'n v. Alexander, 613 F.2d 1054 (D.C. Cir. 1979), the court drew support from *Kaiser Aetna* for its conclusion that section 10 of the Rivers and Harbors Act limits corps jurisdiction to "waters usable in interstate commerce that connect with other waters so as to form a continuous interstate waterway." *Id.* at 1062 (footnote omitted). Thus, Devils Lake, which is navigable in fact but located entirely within the State of North Dakota and not connected to interstate or international waterways, is not a navigable water of the United States within the meaning of section 10.

[55] 33 C.F.R. § 329.4 (1980):

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

affect the Government's power to regulate waterways.

III. Public Access to Navigable Waters

Having established that power to regulate the Hawaii Kai Marina existed, the Court next considered at what point regulation amounts to a taking for which just compensation must be paid. More specifically, since Congress had the power to assure public access to the marina under the commerce clause, would the exercise of this power require payment of compensation to Kaiser Aetna under the fifth amendment?

The Corps of Engineers contended that its authority to maintain unobstructed waterways included the power to eliminate obstacles created by assertions of private property rights.[56] Kaiser Aetna took the position that a declaration of free public use exceeded the boundaries of mere regulation and constituted a deprivation of private property for which just compensation had to be made.[57] The Court agreed with Kaiser Aetna. In arriving at its decision, the majority added a new dimension to the definition of private property that would qualify for compensation within the meaning of the fifth amendment.

A. Theories of Public Use

The association of public rights of access and free navigation with the concept of navigability finds its roots in early English history. Under the English common law, the public had rights of piscary and navigation in tidal waters which were owned and controlled by the Crown.[58] As for those inland waterways not subject to the ebb and flow of the tide, the standard of navigability in fact was devised in order to secure for the public a right of way analogous to a "servitude" in waterways flowing over privately owned land.[59] Thus, American courts equated the concept of navigability with the right of public navigation.[60]

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[56] Although not conceding the Government's argument that the Hawaii Kai Marina could be opened to the public without compensation, the federal district court did recognize that as then operated, the marina had become "the legal equivalent of a toll-charging canal or harbor." 408 F. Supp. at 53.

[57] Kaiser Aetna argued that the creation of a public right of access to the marina would deprive it of the control over the surface use of the marina, would burden it with the costs of maintenance without government subsidy or public contribution, and would diminish the environmental quality of the water. Petitioner's Brief at 57-59.

[58] The test of tidality vested title to such land in the Crown, after which the land was deemed to be held by the Sovereign in his representative capacity for the benefit of all the people. 4 Clark, *supra* note 26, at § 305.1(B), at 99-100.

[59] *Id.* at § 305.1(D), at 103-05.

[60] State v. McIlroy, _ Ark. _, _, 595 S.W.2d 659, 663 (1980) (determination of "navigability of a stream is essentially a matter of deciding if it is public or private property"); Lamprey v. State, 52 Minn. 181, 199, 53 N.W. 1139, 1143 (1893) ("division of waters into naviga-

Recognition of the importance of unobstructed public passage was transferred to America with the founding of the English colonies. As discovered territory was claimed in the name of the English monarch, the Crown was vested with title and dominion over colonial lands.[61] With the American Revolution, sovereignty over the soil and navigable waters passed to "the people of each state" who assumed the duty of protecting public rights under an inherited public trust.[62] Because the states had the power to enforce public passageway, they had a corollary power to determine the scope of private riparian rights in land adjacent to publicly navigable waters, subject to federal law.[63] Many states profess to employ their own standard of navigability for the express purpose of determining the extent of public navigational rights in state waters.[64]

Federal enforcement of public rights of navigation are facilitated by the

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ble and nonnavigable is but a way of dividing them into public and private waters"); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 199-200, 163 N.E.2d 373, 377-78 (1959) (navigable lagoons which are artificial extensions of naturally navigable channel are public waters); 1A J. GRIMES, THOMPSON ON REAL PROPERTY § 258, at 300 (1980 repl.) (footnote omitted): " 'Navigable waters' and 'public waters' are synonymous terms. The term 'private waters' is used to designate nonnavigable waters.' " *See* cases cited in note 64 *infra*.

[61] Morreale, *supra* note 32, at 28-30.

[62] Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 409-10 (1842); *see* Shively v. Bowlby, 152 U.S. 1, 14-17 (1894). This assumption of sovereignty and possession is evidenced by provisions in several state constitutions either dedicating the waters to the people or preserving public ownership and use. *See, e.g.*, CAL. CONST. art. 10, §§ 2-4; COLO. CONST. art. XVI, § 5; HAWAII CONST. art. XI, §§ 1, 7; IDAHO CONST. art. XV, § 1; MONT. CONST. art. IX, § 3(3); NEB. CONST. art. XV, §§ 5-7; N.M. CONST. art. XVI, § 2; WYO. CONST. art. 8, § 1. This sovereignty and trust was assumed for nontidal waters navigable in fact as well. *See, e.g.*, Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892). *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). The public trust doctrine has long been established in Hawaii, King v. Oahu Ry. & Land Co., 11 Hawaii 717, 723-25 (1899), and has been used to determine rights of fishery, Bishop v. Mahiko, 35 Hawaii 608 (1940), and the boundaries of beachfront property, *In re* Sanborn, 57 Hawaii 585, 562 P.2d 771 (1977) (invalidating land court registration of land below high water mark).

[63] Shively v. Bowlby, 152 U.S. 1, 40 (1894).

[64] *See, e.g.*, State v. McIlroy, _ Ark. _, _, 595 S.W.2d 659, 663-65 (1980) (stream is navigable when it can be used for recreational purposes for substantial portion of the year); People v. Mack, 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 454 (1971) (test is navigability in fact "by oar or motor propelled small craft" for fishing, recreational, and boating uses); Youngstown Mines Corp. v. Prout, 266 Minn. 450, 124 N.W.2d 328 (1963) (federal test of navigability need not be accepted by the states who can devise more liberal standards); Attorney General *ex rel.* MacMullen v. Hallden, 51 Mich. App. 176, 214 N.W.2d 856 (1974) (right of public navigation attaches to waters capable of being navigated by oar or motor propelled small craft). *See generally* Bartke, *Navigability in Michigan in Retrospect and Prospect*, 16 WAYNE L. REV. 409 (1970); Waite, *Public Rights in Maine Waters*, 17 ME. L. REV. 161 (1965); Waite, *Public Rights in Indiana Waters*, 37 IND. L.J. 467 (1962); Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335; Weston, *Public Rights in Pennsylvania Waters*, 49 TEMP. L.Q. 515 (1976); Note, *Fishing and Recreational Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322 (1968); 42 MISS. L.J. 270 (1971).

doctrine of the navigational servitude. Although the exercise of the public right of navigation on interstate waters may not require compensation based upon the concept of a navigational servitude, the majority in *Kaiser Aetna* held that federal regulation is not necessarily coextensive with the public right of access.[65] An understanding of the role of the navigational servitude is vital because it delineates the boundary between governmental regulation and governmental takings.

B. The Navigational Servitude

The doctrine of the navigational servitude represents the sphere of activity that the government can undertake pursuant to its regulatory power without effecting a taking of private property. This immunity from the duty to pay compensation under the fifth amendment is unique to the navigation power. In general, an activity that ordinarily would be recognized as a taking if performed under the auspices of another federal power would not be compensable if the navigation power of the commerce clause were being properly asserted.[66]

Although the concept of the navigational servitude is firmly established, there is little explanation for the origin of this no-compensation rule. Perhaps the rule has perpetuated itself from the days when free use of waterways was absolutely necessary for survival of the country. But the realization that there is no significant functional difference between navigable waterways and other private property subject to regulation no doubt led the Court to limit the navigational servitude[67] rather than extend it to all highways of commerce.

The caselaw provides many instances where the navigational servitude has been applied. The government may prohibit obstructions in a stream,[68] or alter the physical conditions of a stream,[69] erect structures in

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[65] 444 U.S. at 172-73: "Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access."

[66] Morreale, *supra* note 32, at 19-20. *Cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 737-39 (1950) (admonishing against use of navigational servitude to avoid payment of compensation to owners of riparian grass lands for effects of irrigation project more properly authorized pursuant to the general welfare clause rather than the commerce clause); United States v. River Rouge Improvement Co., 269 U.S. 411, 419 (1926) (servitude limited to projects in the interest of navigation only). *Compare* Hartwig v. United States, 485 F.2d 615 (Ct. Cl. 1973) (no compensation required for flooding due to construction of dam), *with* United States v. 50 Foot Right of Way, 337 F.2d 956, 959-60 (3d Cir. 1964) (compensation required to run pipeline over submerged land).

[67] *See* text accompanying notes 83-93 *infra*.

[68] *See, e.g.*, Willink v. United States, 240 U.S. 572, 580 (1916) (pilings and wharf removed); Union Bridge Co. v. United States, 204 U.S. 364, 399-400 (low-hanging bridge ordered raised); United States v. Bellingham Bay Boom Co., 176 U.S. 211 (1900) (boom across river ordered abated because it violated state law when constructed); United States v.

a waterway,[70] or apportion water for redistribution.[71] In undertaking improvement projects of waterways, the government is not liable for any resulting loss to property or riparian rights.[72] Similarly, the loss of access to a waterway,[73] diminution in the natural flow of a stream for hydroelectric power,[74] loss of use of the streambed for oyster cultivation,[75] or the erosion of a bank due to indirect, upstream construction[76] do not give rise to fifth amendment claims that a taking has occurred.

The basic premise in these cases applying the navigational servitude was that the governmental activity does not impinge on the realm of private property rights.[77] Furthermore, private owners of land beneath or adjacent to navigable interstate waters were subject to certain ownership

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Maidman, 340 F. Supp. 395 (S.D.N.Y. 1971) (loose boards and timber floating around fire-damaged pier ordered abated). *Cf.* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) (congressional authorization for bridge supersedes prior court order mandating its removal).

[69] *Compare* United States v. Commodore Park, Inc., 324 U.S. 386 (1945) (no compensation to landowners required in connection with bay dredging), *and* Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 87-88 (1913) (no compensation for oyster beds damaged by channel dredging), *and* South Carolina v. Georgia, 93 U.S. 4, 10-12 (1876) (no injunction issued where navigability is destroyed in one place in order to promote it in another), *with* United States v. River Rouge Improvement Co., 269 U.S. 411 (1926) (measure of condemnation payment in connection with straightening a winding channel must include value to riparian owners).

[70] *Compare* United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (compensation required for loss of farmland due to construction of lock and dam), *with* United States v. Chicago, Milwaukee, St. Paul & Pac. R.R., 312 U.S. 592, 596-97 (1941) (no compensation to riparian owner for damage below high water mark caused by navigational improvements), *and* Franklin v. United States, 101 F.2d 459, 461 (6th Cir.), *aff'd per curiam*, 308 U.S. 516 (1939) (no compensation required for construction of dikes to alter river current). *See also* United States v. Pennsylvania Salt Mfg. Co., 30 F.2d 332 (3d Cir. 1929) (Government cannot preclude abutting owner's access to navigational improvements including bulkhead).

[71] *See* Arizona v. California, 283 U.S. 423, 455-63 (1931).

[72] *See, e.g.*, United States v. Grand River Dam Auth., 363 U.S. 229 (1960); United States v. Chicago, Milwaukee, St. Paul & Pac. R.R., 312 U.S. 592, 597 (1941); Gibson v. United States, 166 U.S. 269, 275 (1897) (where Government constructed dike in Ohio River, "the damage . . . was not the result of the taking of any part of . . . [plaintiff's] property, whether upland or submerged, but the incidental consequence of the lawful and proper exercise of a governmental power").

[73] *See, e.g.*, United States v. Commodore Park, Inc., 324 U.S. 386 (1945); Gibson v. United States, 166 U.S. 269 (1897); Sherrill v. United States, 381 F.2d 744 (Ct. Cl. 1967).

[74] United States v. Twin City Power Co., 350 U.S. 222, 227-28 (1956); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

[75] Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913). *Cf.* Rocky Point Oyster Co. v. Standard Oil Co., 265 F. 379 (D.R.I. 1920) (government-approved private dredging pursuant to newly drawn harbor line does not infringe on rights of lessee to submerged lands used for oyster production).

[76] Bedford v. United States, 192 U.S. 217 (1904).

[77] United States v. Twin City Power Co., 350 U.S. 222, 227 (1956): "We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment."

qualifications not imposed on owners of lands removed from the reaches of the waterway.[78] The title and rights of riparian landowners were subordinate to the national interest in promoting public navigation and commercial activity.[79] Regulation and improvement to increase the utility of a waterway were conditions to which a riparian owner's rights were always subject. Any use or structure placed in a waterway was conditional and could not be protected in the event of governmental action.[80] When federal regulation or improvement did occur, the private owner had no claim that his rights were absolute or exclusive.[81] Thus, within the area of navigable waterways, there generally was no inviolable sphere of private property rights protected by the takings clause.[82]

Although a broad range of governmental activities corresponds with the scope of the navigational servitude, the privilege is not absolute nor identical with the scope of regulatory power. The established tests of navigability, although no longer necessary to confer initial regulatory power, still operate to determine the limits of navigational servitudes.[83]

The servitude has been applied to waters affected by the ebb and flow of the sea.[84] Other decisions have held that the servitude attaches to in-

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[78] United States v. Willow River Power Co., 324 U.S. 499, 510 (1945):

> Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict, they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

[79] Scranton v. Wheeler, 179 U.S. 141, 163 (1900):

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

[80] United States v. Chicago, Milwaukee, St. Paul & Pac. R.R., 312 U.S. 592, 599 (1941) ("any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed" by federal improvement of navigable capacity).

[81] United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950): "The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. . . . There thus has been ample notice over the years that such property is subject to a dominant public interest."

[82] *See generally* Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1 (1968); Powell, *Just Compensation and the Navigation Power*, 31 WASH. L. REV. 271 (1956).

[83] *See* United States v. Rands, 389 U.S. 121, 123 (1967); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 628-29 (1961); United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1955).

[84] *See, e.g.*, United States v. Commodore Park, Inc., 324 U.S. 386 (1945) (dredging of navigable tidewater bay); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 86 (1913) (deepening of channel across bay).

land waterways navigable in fact, but only as to subaqueous lands or lands below the high water mark.[85] Lands above the ordinary high water mark, known as fast lands, are not subject to the servitude.[86] Above the ordinary high water mark, private ownership rights are not qualified as are private rights in lands below that mark.[87]

Like fast land, frontage on nonnavigable tributaries is exempt from the servitude.[88] Although the nonnavigable tributary may be regulated due to its potential effect on the navigability of the mainstream,[89] the servitude cannot extend as far as the power to regulate. Governmental activity that physically encroaches on such property and goes beyond ordinary regulation or improvement for navigation becomes a taking of private property rights.[90] Therefore, compensation would be required for damage to pri-

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[85] The high water mark as applied to the sea or a tidal river is marked by the normal tide, but inland rivers and streams are judged by the water line at it highest flow up the sides of the banks, not just an overflow of water into lands beyond the banks, nor swamp lands. The mark is made by the almost constant presence and abrasion of waters against the banks. Howard v. Ingersoll, 54 U.S. (13 How.) 381, 423-24 (1851) (Nelson, J., concurring). *See generally* Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L. REV. 465 (1978). With respect to marine waters, the limits of the Engineers' shoreward authority are determined by the mean high water or mean of the higher high waters. 33 C.F.R. § 329.12(a)(2) (1980). When the precise location of the tidal line becomes relevant, the mark is determined by a survey and collection of data for 18.6 years. For a look into the complexity of such a calculation, see Maloney, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185 (1974).

[86] Fast lands are those dry lands above the ordinary high water mark for which compensation must be made when flooded or damaged by the actions of the federal government. United States v. Virginia Elec. & Power Co., 365 U.S. 624, 628 (1961); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (percolation destroying agricultural value of farmlands is compensable damage); United States v. Willow River Power Co., 324 U.S. 499, 509 (1945); Tri-State Materials Corp. v. United States, 550 F.2d 1, 6 (Ct. Cl. 1977).

[87] *See* note 79 *supra*.

[88] United States v. Cress, 243 U.S. 316 (1917) (compensation paid to owner of land fronting nonnavigable tributary when Government constructed a dam which caused flooding). *Cf.* United States v. Kansas City Life Ins. Co., 339 U.S. 799, 802-03 (1950) (dam raised water level of river and tributary causing saturation of petitioner's farmland "substantially as destructive as if the land had been submerged"). *But cf.* the view of state courts when deciding the extent of public rights in artificially increased state waters, Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951) (flooding of waterway extends reaches of public boating); Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 (1935) (public right to fish in waters resulting from dam of river not navigable in fact); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970) (seasonal flooding caused by artificial raising of water level correspondingly increases the extent of public passage allowed on expanding waters); Haase v. Kingston Co-operative Creamery Ass'n, 212 Wis. 585, 250 N.W. 444 (1933) (pond formed by a dam may be used by public at owner's discretion and permitted use over time may ripen into public dedication). *See also* Note, *Public Recreation and Subdivisions on Lakes and Reservoirs in California*, 23 STAN. L. REV. 811 (1971).

[89] *See* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

[90] United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Cress, 243 U.S. 316 (1917); United States v. Lynah, 188 U.S. 445 (1903).

vately held fast lands or land adjacent to nonnavigable tributaries. The measure of damages, however, does not include "the value arising from . . . [the] fact of riparian location."[91]

Kaiser Aetna established another situation where the navigational servitude is not applicable, based on the strength of Kaiser Aetna's leasehold property interests and expectations of exclusivity.[92] In short, ensuring public access to the Hawaii Kai Marina would constitute a government regulation amounting to a taking of Kaiser Aetna's property.[93]

C. *Compensability of "Private" Property*

There is little doubt that when the federal government undertakes to improve navigability the navigational servitude applies and all members of the public are entitled to enjoy the benefits that accrue from the project.[94] In *Kaiser Aetna* the problem arose when *private* improvement projects conducted in waters flowing over privately owned lands were to be opened to the public, free of charge, despite the fact that the private landowner had no intention of sharing the benefits of the improvement with the public. In this context, the Court focused on the following three factors to determine the strength of Kaiser Aetna's private property rights: (1) The natural propensity of Kuapa Pond (the marina) for public use, (2) a continous history of exclusive private ownership, and (3) the degree of Kaiser Aetna's expectations that the marina would continue to be exclusive private property.

1. Natural Public Quality.— In addressing the issue of free public access to the waters of the Hawaii Kai Marina, the United States Government argued that because the marina was presently navigable for regulatory purposes, it acquired a public nature which the Government could control on behalf of the public.[95] The majority approached the Government's argument with an analysis of the various waterways which are

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[91] United States v. Rands, 389 U.S. 121, 123 (1967). See note 128 *infra*.

[92] 444 U.S. at 180: "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."

[93] *Id.* at 178: "Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)." In *Pennsylvania Coal Co.*, the Supreme Court held that a state law prohibiting anthracite coal mining in a manner that would cause the plaintiff's house and foundation to subside exceeded police powers and became a taking because the plaintiff's deed contained an express mining reservation covering the risk of loss that the state law sought to eliminate.

[94] United States v. Pennsylvania Salt Mfg. Co., 30 F.2d 332 (3d Cir. 1929).

[95] 444 U.S. at 176.

amenable to free public use[96] and concluded that the Hawaii Kai Marina is not one of them.

Justice Rehnquist laid down the first qualification that a "public" waterway must be capable of supporting navigation in its *natural* condition.[97] In its pre-marina condition as an ancient Hawaiian fishpond, Kuapa Pond did not evoke the type of federal interest or public quality which the Government was now asserting.[98] The use of Kuapa Pond for commercial navigation was marginal at best:

> It is clear that prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. Its maximum depth at high tide was a mere two feet, it was separated from the adjacent bay and ocean by a natural barrier beach, and its principal commercial value was limited to fishing. It consequently is not the sort of "great navigable stream" that this Court has previously recognized as being "[incapable] of private ownership."[99]

Because of its nonutility as a medium for interstate commerce or public transportation, ownership of Kuapa Pond was never qualified by an inherent, underlying public right of access and use.

2. *History of Exclusive, Private Ownership.*— In addition to the natural nonutility of the marina for interstate commerce, a long and continuous history of private use and possession foreclosed the possibility of free public access. In its original state, Kuapa Pond had been considered exclusive private property under traditional Hawaiian law.[100] One of the

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[96] *Id.* at 176-78.

[97] *Id.* at 175 (emphasis added): "The navigational servitude is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their *natural* condition are in fact capable of supporting public navigation."

[98] *Id.* at 178-79 n.10: "While it was still a fishpond, a few flat-bottomed shallow draft boats were operated by the fishermen in their work. There is no evidence, however, that even these boats could acquire access to the adjacent bay and ocean from the pond."

[99] *Id.* at 178-79 (footnote omitted) (quoting United States v. Chandler-Dunbar Power Co., 229 U.S. 53, 69 (1913)).

[100] *See* 408 F. Supp. at 46-47. "Kuapā Pond, therefore, was never subject to any 'common right of piscary,' and was never servient to any 'navigation servitude;' it was always the legal equivalent of fast land for property and 'navigation' purposes." *Id.* at 52. *See also In re* Kamakana, 58 Hawaii 632, 574 P.2d 1346 (1978) (fishponds were considered part of the *ahupua'a* in which they were located and therefore were property of the chief); Territory v. Hoy Chong, 21 Hawaii 39, 43-44 (1912).

The Hawaii Organic Act abolished private fishing rights but specifically exempted fishponds or any other artificial enclosure. Act of Apr. 30, 1900, ch. 339, § 95, 31 Stat. 141. *See* HAWAII CONST. art. XI, § 6. Section 96 of the Act provided for payment of compensation for the abrogation of registered traditional fishing rights not already exempted. The main difference between the Organic Act and the Government's attempt to secure public access to the Hawaii Kai Marina is that Congress provided for the amortization of vested property rights and lawful proceedings in condemnation under the Act. *See, e.g.*, State v. Hawaiian Dredging Co., 48 Hawaii 152, 397 P.2d 593 (1964); Bishop v. Mahiko, 35 Hawaii 608 (1940).

fundamental features of private fishpond ownership was the right to prevent unpermitted use of the pond.[101] The original right of exclusion apparently transferred with the leasehold interest to Kaiser Aetna.[102]

Although the transformation of Kuapa Pond into a marina made it subject to federal regulation, the right of exclusion was not lost in the process. The majority agreed that "[a]n essential element of individual property is the legal right to exclude others from enjoying it."[103] So fundamental is this right that it "falls within this category of interests that the Government cannot take without compensation."[104] Kaiser Aetna's right to exclude the public from the marina was one of "the most essential sticks in the bundle of rights" included as property.[105]

The majority only briefly mentioned that Kuapa Pond always had been considered private property under Hawaiian law and found the ownership rights in the marina analogous to fast lands.[106] The precise significance of the fact that Kaiser Aetna had a vested private property right under state law was not explained, but to emphasize that factor would contradict the weight of relevant precedent.[107]

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[101] The private nature of fishponds in Hawaii is discussed in the following cases: Palama v. Sheehan, 50 Hawaii 298, 440 P.2d 95 (1968); State v. Hawaiian Dredging Co., 48 Hawaii 152, 397 P.2d 593 (1964); Bishop v. Mahiko, 35 Hawaii 608 (1940); Murphy v. Hitchcock, 22 Hawaii 665, 669-70 (1915). In McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 187, 504 P.2d 1330, 1339 (1973), *cert. denied*, 417 U.S. 976 (1974), *appeal dismissed sub nom.* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974), the Hawaii Supreme Court held that "ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good." The federal district court concluded that this holding did not apply to claims of ownership to fishponds, including Kuapa Pond, 408 F. Supp. at 51 n.23, and later invalidated the *McBryde* decision through a collateral constitutional attack, Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *appeal docketed*, Civ. No. 78-2264 (9th Cir. Nov. 28, 1978), *discussed in* Chang, *Unraveling* Robinson v. Ariyoshi: *Can Courts "Take" Property?*, 2 U. HAWAII L. REV. 57 (1979).

[102]. *See* 408 F. Supp. at 51-52 (describing private property status of Kuapa Pond from the monarchy period to contemporary times).

[103] 444 U.S. at 180 n.11 (quoting International News Serv. v. Associated Press, 248 U.S. 215, 280 (1918) (Brandeis, J., dissenting)).

[104] 444 U.S. at 180. *But cf.* Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035, 2041-42 (1980) (state constitutional requirement that shopping center which is open to public at no charge must allow free expression and speech by members of the public on its premises does not constitute a taking); Laguna Publishing Co. v. Golden West Publishing Corp., 110 Cal. App. 3d 43, 167 Cal. Rptr. 687 (1980) (nonprofit corporation owning all common property in private residential community cannot deny access to publisher for newspaper distribution where access had been permitted for distribution of another unsolicited newspaper).

[105] 444 U.S. at 176. *See* First Victoria Nat'l Bank v. United States, 620 F.2d 1096, 1103 & n.14 (5th Cir. 1980).

[106] 444 U.S. at 179. See note 100 *supra*.

[107] United States v. Rands, 389 U.S. 121, 126 (1967); United States v. Twin City Power Co., 350 U.S. 222, 227 (1956); *see* Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 86 (1913). *But cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (failure to prove vested riparian rights under state law). The majority in *Kaiser Aetna* left open the possibility that any one of the several factors influencing its decision may "in some circumstances . . . be dispositive." 444 U.S. at 178 n.9. A year later, the Court described the

3. Expectations of Exclusivity.— A third unique factor which reinforced Kaiser Aetna's position involved the conduct of the Corps of Engineers in the early stages of the development of Kuapa Pond into the Hawaii Kai Marina. On at least two occasions, the corps failed to assert its regulatory jurisdiction over the marina, which led to Kaiser Aetna's reasonable belief that it had the right to preclude use of the marina by nonpaying members of the public.

In 1961, Kaiser Aetna informed the Engineers of its plan to convert the fishpond into a marina and was told that a development permit from the corps would not be necessary.[108] When Kaiser Aetna was ready to commence work in dredging a channel to the sea, the Engineers acquiesced to the construction plans, making only nominal comments.[109] For eleven years thereafter, without further communication with the Engineers, Kaiser Aetna maintained the marina, constructed houses along the waterfront, and charged an annual fee for access to and use of the waterway. In 1972, the Engineers unexpectedly informed Kaiser Aetna that it considered the Hawaii Kai Marina a navigable water of the United States,[110] subject to federal regulatory control and the right of public use without compensation.[111]

Unable to find against the United States Government on the ground of equitable estoppel,[112] the majority nevertheless achieved the same effect by finding that the Corps of Engineers' acquiescence led "to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property."[113] One of these expectancies was the continuing right to exclude others and to retain use of the marina for purely private purposes. In reliance on the Corps of Engineers' suspension of the permit requirement and subsequent acquiescence to the dredging, Kaiser Aetna invested millions of dollars in private improvement, believing the property to be wholly under its control.[114]

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appropriate inquiry required to balance public and private interests in determining every takings issue as a three-factor test including "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035, 2041-42 (1980).

[108] 444 U.S. at 167; 408 F. Supp. at 47 n.4.

[109] 444 U.S. at 167.

[110] *See* note 13 *supra*.

[111] The Court did not explain the sudden assertion of regulatory jurisdiction, but the Government's brief attributes the source of the dispute to Kaiser Aetna's inconsistent position in applying to the corps for a permit to construct a fueling facility for boats in the marina while denying that the marina was navigable for jurisdictional purposes. Respondent's Brief at 5.

[112] 444 U.S. at 179. *See* 408 F. Supp. at 55.

[113] 444 U.S. at 179.

[114] The impression that the decision was heavily influenced by the equities of the case arising from the Corps of Engineers' acquiescence to the dredging of the canal is supported

4. Requirement of Compensation.— The combination of historical and factual circumstances which led the Court to deny the Government's petition for free public use established the longstanding, and heretofore unchallenged, private property status of the Hawaii Kai Marina. The Corps of Engineers was attempting to impose a public right of way where it had never existed. Thus, the majority held that the Government's action exceeded mere regulation and became a taking of private property, subject to the fifth amendment requirement of fair compensation.[115]

The doctrine of navigational servitude would not be extended to a privately owned waterway rendered navigable after massive private expense was incurred in reliance upon the Government's acquiescence. A privately improved waterway with no prior history of public use or commercial utility would be exempt from the servitude, just as fast lands and nonnavigable tributaries are exempt.[116] If the Government insisted on imposing a public right of access to the marina, it would have to exert its power of eminent domain.[117]

No issue of damages was raised, but the majority did indicate what the measure of damages would be if free public use were imposed. The Court analogized the imposition of a public right of way to a "taking of fee interests"[118] or at least an "easement in property."[119] Therefore, those "reasonable investment backed expectations"[120] which Kaiser Aetna could derive from the exclusive control of the marina, such as the loss of the annual use and maintenance fee which Kaiser Aetna charged boaters,[121] would be included in determining the amount of just compensation.

D. Dissenting Opinion

The dissent regarded regulation, public access, and noncompensability as different manifestations of the exercise of a single federal power and therefore coextensive.[122] This basic conceptual disagreement with the majority accounted for the vast dissimilarity between the rationales of the dissenting and majority opinions.

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by Justice Rehnquist's emphasis on the huge expenditures made in reliance on corps inaction, *see id.* at 169.

[115] *See* note 93 *supra.*

[116] *See* notes 84-91 *supra* and accompanying text.

[117] 444 U.S. at 180.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 175. *But cf.* Agins v. City of Tiburon, 100 S. Ct. 2138, 2142 (1980) (upholding facial validity of zoning ordinance limiting development which does not thereby constitute inverse condemnation).

[121] 444 U.S. at 180 ($72 annual fee charged to customers).

[122] "[T]he power we describe by the term 'navigational servitude' extends to the limits of interstate commerce by water; accordingly, I would hold that it is coextensive with the 'navigable waters of the United States.'" *Id.* at 186 (Blackmun, J., dissenting).

Although Kuapa Pond was not navigable in fact in its natural state, under the ebb-and-flow test of navigability, the dissent would have held the marina to be a navigable water even prior to improvement, as "an arm of the sea,"[123] subject to tidal changes. According to the dissent, the finding of navigability triggered the doctrine of navigational servitudes, which was a symbolic way of upholding federal regulatory authority.[124] Thus, a finding of navigability for regulatory purposes was synonymous with public accessibility.

Consequently, the dissent would have denied Kaiser Aetna's claim to a compensable taking on the strength of precedents applying the navigational servitude.[125] The common denominator underlying the earlier cases was the relationship of the alleged private loss to the "riparian owner's 'access to, and use of, navigable waters.' "[126] The special value and utility that a landowner derived from the presence of navigable waters on or adjacent to his land was attributable to the existence of a resource which belonged to the public.[127] Private improvement to enhance this value and utility did not create a new value which could be called private property.[128] The dissent reasoned that the inherent value of the Hawaii Kai Marina lay in its accessibility to the open sea,[129] and access to and from the sea was not a private value or property right which Kaiser Aetna could appropriate for its own exclusive profit and use. In other words, the dissent concluded that the public interest outweighed any private claims; Kaiser Aetna had no expectation of exclusivity[130] and was not entitled to

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[123] *Id.* at 183.

[124] *Id.* at 186.

[125] United States v. Rands, 389 U.S. 121 (1967); United States v. Twin City Power Co., 350 U.S. 222 (1955); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

[126] 444 U.S. at 189 (quoting United States v. Rands, 389 U.S. 121, 124-25 (1967)).

[127] United States v. Willow River Power Co., 324 U.S. 499, 507 (1945).

[128] In United States v. Rands, 389 U.S. 121 (1967), the Court responded to a landowner's claim that condemnation damages included the value of the land as a potential port site.

> [I]t was recognized that state law may give the riparian owner valuable rights of access to navigable waters good against other riparian owners or against the State itself. But under *Twin City* and like cases, these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States. Thus, when only part of the property is taken and the market value of the remainder is enhanced by reason of the improvement to navigable waters, reducing the award by the amount of the increase in value simply applies in another context the principle that special values arising from access to a navigable stream are allocable to the public, and not to private interest. Otherwise the private owner would receive a windfall to which he is not entitled.

Id. at 126 (citations omitted).

[129] 444 U.S. at 190 (Blackmun, J., dissenting).

[130] Justice Blackmun disagreed with the inference drawn from the majority opinion that the amount of private investment influenced the legal result. "I would think that the consequences would be the same whether the developer invested $100 or, as the Court stresses

compensation.

Finally, the dissent disagreed with the application of Hawaiian property law to substantiate the majority's preservation of the marina's private property status. Any private rights of exclusivity Kaiser Aetna might have had if Kuapa Pond had remained an inaccessible fishpond were forfeited when Kaiser Aetna dredged a channel to the sea and converted the fishpond into a navigable marina.[131] Artificial improvement at private expense did not alter the priority of national interests over private property rights and necessarily made the imposition of public accessibility a consequence of improving navigability. No state or private developer through local law could defeat the federal navigational servitude by transforming navigable water into "private" property.[132]

The dissent also pointed out a flaw in the majority opinion that may present difficulties in the future. The scope of regulatory authority of the Corps of Engineers still will require corps approval of permit applications prior to private improvement of waterways. The Engineers then would be able to solve the dilemma of subsequent public access by conditioning the grant of the permit upon the landowner's prior consent to allow free public use.[133] Only future litigation and the conduct of the Corps of Engineers will reveal if such a loophole truly exists and whether the Court will permit the corps to impose such a condition. In all likelihood, if consent to future public access is required as a condition to obtaining a development permit, private development and improvement of waterways will be greatly inhibited. The desirability of this deterrent effect seems better left to the judgment of Congress, rather than the courts.

IV. Conclusion

The impact of *Kaiser Aetna* on the law of navigable waters is difficult to ascertain. The Court did remove whatever obstacles the historical tests

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. . . 'millions of dollars.'" *Id.* at 183-84 n.2.

[131] *Id.* at 190-91. Even the Government recognized that an enclosed fishpond must remain unavailable to the public in order to maintain economic productivity. "Fishponds thus contained cultivated crops, and it is understandable that Hawaii law recognized the exclusive right of the cultivators to reap their harvests by excluding the public from such ponds and treated fishponds as improvements appurtenant to the land . . . ." Respondent's Brief at 29.

[132] 444 U.S. at 187.

[133] *Id.* at 191. The majority also referred to the Government's power to attach conditions to the approval of a dredging permit prior to private development of a waterway. "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation." *Id.* at 179. Whether the "promotion of navigation" encompasses a public right of access is questionable, *see* note 93 *supra*, but this potential loophole exists to defeat applicability of the majority's ultimate conclusion in future cases.

of navigability presented to the assertion of federal regulation over the nation's waterways pursuant to the commerce clause. But the dichotomous treatment of regulatory authority and public rights of access is the significant aspect of the decision, which established a new limitation on the scope of the navigational servitude.

The test for regulatory authority now encompasses the "affect commerce" standard, while the rights of public use must take into account the *natural* propensity of a waterway to support navigation. Although regulatory authority may be extended to an artificially created waterway, the public right of access is not necessarily coextensive and depends on individual facts and circumstances. The majority's use of a multi-factor approach did not provide clear guidance for future cases involving the taking issue under the fifth amendment.

The companion case to *Kaiser Aetna* did clarify somewhat the majority's analysis. *Vaughn v. Vermilion Corp.*[134] involved an action by fishermen seeking access to an artificially created network of canals in Louisiana, owned by Exxon Corporation and leased to the Vermilion Corporation. The canals ultimately connected to naturally navigable waters. Petitioners claimed a federal right to enter the canals for commercial fishing and shrimping activities. The majority found *Kaiser Aetna* dispositive in holding that public access could not be premised only on the fact that the canals were connected with navigable waterways already open to free public use.

But the majority in *Vermilion* conceded that a navigational servitude may be operative if the canal construction destroyed naturally navigable waterways to which the public already had a right of access. The Court remanded the case for a factual determination on this issue.[135] Therefore, it may be inferred that the fact of private improvement, even coupled with a history of exclusive use, would not impair the public's right of access, either on the theory that channels of commerce cannot be privately appropriated or on the theory that *continued* public access is guaranteed even when the original waterways are converted to artificially created canals.

Together, *Vermilion* and *Kaiser Aetna* demonstrate the sharp philosophical division of the Court when private property rights are at stake.[136]

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[134] 444 U.S. 206 (1979).

[135] On remand, Vermilion Corp. v. Vaughn, _ La. App. _, 387 So. 2d 698 (1980), the court assumed that public access to the canals would be mandatory if their construction displaced publicly navigable waterways but avoided the question with a procedural ruling. The court held that the issue had not been properly pleaded and therefore could not now be raised.

[136] *But cf.* Agins v. City of Tiburon, 100 S. Ct. 2138 (1980) (rejecting *Kaiser Aetna* as authority for invalidating a zoning ordinance limiting but not prohibiting all development); Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035 (1980) (no expectation of exclusivity requiring compensation under fifth amendment where shopping center was open to public and state constitutional provision, more protective of free speech than the first amendment, required shopping center to allow customers to exercise speech and petition rights).

Perhaps nothing better illustrates the willingness of the majority in *Kaiser Aetna* to protect property interests than its reliance on the rationale of a 1922 decision that did not even involve the doctrine of navigational servitudes.[137] The decision may burden the Corps of Engineers with the primary responsibility of timely protecting the public interest in free navigability of artificial waterways.[138] The Engineers must be vigilant in exercising this responsibility, for *Kaiser Aetna* teaches that the courts will not intervene on the public's behalf by invoking the doctrine of navigational servitudes where government action or inaction has given landowners legitimate expectations of exclusive private ownership.

Dorothy A. Tom

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[137] *See* note 93 *supra*.
[138] *See* note 133 *supra*.