University of Hawai'i Law Review

Volume 30 / Number 2 / Summer 2008

SYMPOSIUM: *Doe v. Kamehameha Schools*: A "Discrete and Insular Minority" in Hawai'i Seventy Years After *Carolene Products*?

ARTICLE

COMMENT

CASENOTE

RECENT DEVELOPMENTS

Doe v. Kamehameha Schools: A "Discrete and Insular Minority" in Hawai'i Seventy Years After *Carolene Products*?

Judge David Alan Ezra*

I. INTRODUCTION

In 1938, Justice Harlan Fiske Stone laid the groundwork for much of the Supreme Court's later elaboration on the Equal Protection Clause in the now-famous footnote four of *United States v. Carolene Products Co.*,[1] observing that a more searching equal protection review might be appropriate when "legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."[2] Similarly, the Supreme Court might want to take a closer look at "statutes directed at particular religious or national or racial minorities."[3] The theory behind this approach was that the judicial branch might need to step in when the ordinary political process was inadequate to ensure justice, either because the

---

* United States District Judge for the District of Hawai'i, Chief Judge Emeritus; University of Hawai'i at Mānoa, William S. Richardson School of Law Adjunct Professor. I would like to express my gratitude to J. Blaine Rogers, my law clerk and 2006 graduate of the William S. Richardson School of Law, for his invaluable assistance in the preparation of this Article.

[1] 304 U.S. 144 (1938). *Carolene Products* involved an attack on an old federal law forbidding the interstate shipment of "filled milk." *Id.* at 145-46.

[2] *Id.* at 153 n.4. Footnote four reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, *see Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73 . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (some citations omitted).

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

legislation interfered with rights that were central to that process or because it discriminated against "discrete and insular minorities"[4] who were likely to be victims of prejudice and lacked sufficient power to protect their rights in the political arena.[5]

"*Carolene Products* conceptualized the judicial role in cases not involving specific prohibitions of the Constitution as one of correcting flaws in the political process rather than defining substantive moral rights."[6] Footnote four has generated substantial debate. "Early on, it was interpreted to mean that 'personal rights' were to be preferred to economic rights, but in recent years, . . . it has been interpreted more narrowly, justifying judicial [intervention] only when the majoritarian democracy does not work . . . ."[7]

Nearly seventy years later, in *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate* (*Doe III*),[8] the Ninth Circuit, sitting en banc, held that Kamehameha Schools, a private, nonsectarian K-12 school in Hawai'i created under a charitable testamentary trust established by the will of Ke Ali'i Bernice Pauahi Bishop ("Princess Pauahi"), may continue its policy of granting preferential admission to students with Native Hawaiian[9] ancestry (the "Policy").[10] While the Ninth Circuit did not address whether Native Hawaiians constituted a "discrete and insular minority," the court based its analysis on an assumption that the term "Native Hawaiian" was a racial classification.[11]

Judge Fletcher's concurring opinion (the "concurrence"), however, found the Policy legal but opted for a mode of analysis premised not on race but rather on the special, political relationship between Native Hawaiians and the

---

[4] *Id.*

[5] Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely v. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (1995).

[6] Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 691 (1991) (internal quotations omitted).

[7] Linzer, *supra* note 5, at 277-78.

[8] (*Doe III*), 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007). The parties subsequently settled the case prior to an appeal to the United States Supreme Court. *See* Dennis Camire, *Officials Say Settlement Strengthens Bid for Akaka Bill*, HONOLULU ADVERTISER, May 14, 2007, http://the.honoluluadvertiser.com/article/2007/May/14/br/br4590278361.html.

[9] The author recognizes that the usage of the term "Native Hawaiian" carries with it implications that are beyond the scope of this Article. The term as used here, for sake of clarity, mirrors the en banc court's use of the term.

[10] *Doe III*, 470 F.3d at 849.

[11] *Id.* at 837 n.9.

United States government.[12] Approximately ten years before *Doe*,[13] I had occasion, in my role as District Court Judge for the District of Hawai'i, to analyze and apply this same "special relationship doctrine," which is set forth in the seminal Supreme Court case of *Morton v. Mancari*,[14] to a Native Hawaiian voting preference. In *Rice v. Cayetano* (*Rice I*), which was subsequently affirmed by the Ninth Circuit (*Rice II*) but overturned by the Supreme Court (*Rice III*),[15] I held that a voting regime established by the Hawai'i Constitution and Hawai'i law that prohibited non-Native Hawaiians from participating in elections for the Board of Trustees for the Office of Hawaiian Affairs ("OHA") did not violate the Fourteenth or Fifteenth Amendments to the United States Constitution because the preference for "Native Hawaiians" was a political, rather than a racial, classification.[16]

Similarly, Justice Stevens, dissenting from the majority in *Rice* and with whose reasoning Justice Ginsburg joined, found that the OHA voting preference was valid because legislation targeting Native Hawaiians must be evaluated pursuant to the same understanding of equal protection that the Supreme Court has long applied to Native Americans—that is, the "special treatment . . . [must] be tied rationally to the fulfillment of Congress' unique obligation" to the native people.[17]

While the *Doe* decision may have temporarily ended the legal battle over Kamehameha Schools' Policy, it in no way quieted the long simmering and historically complex controversy involving Native Hawaiian preferences. In fact, the result and closeness of the 8-7 majority decision, along with its one concurring and three dissenting opinions, can be said to have fanned the flames of the underlying argument, while also exposing the range of viewpoints on the method of legal analysis and degree of judicial intervention appropriate to such preferences. While *Doe*, *Rice*, and *Carolene Products* are separated by many years and factual dissimilarities, they each address slightly different versions of the same question: what is the appropriate level of judicial intervention, and the proper standard of review, for analyzing race-based classifications when the group to whom the classification is directed is a traditionally disfavored racial minority for whom the political process

---

[12] *Id.* at 850 (Fletcher, J., concurring).

[13] This Article will refer to the three Doe opinions, collectively, as "*Doe*." The same principle applies to the three *Rice* opinions.

[14] 417 U.S. 535 (1974).

[15] (*Rice I*), 963 F. Supp. 1547 (D. Haw. 1997), *aff'd*, (*Rice II*), 146 F.3d 1075 (9th Cir. 1998), *rev'd*, (*Rice III*), 528 U.S. 495 (2000).

[16] *Rice I*, 963 F. Supp. at 1554.

[17] *Rice III*, 528 U.S. at 534 (Stevens, J., dissenting) (ellipsis in original) (internal quotations omitted).

presents limited opportunity for redressing past injustices and asserting present rights?

This Article analyzes the various *Doe* holdings, the different methodologies utilized to arrive at them, and the alternative "special relationship" approach to analyzing policies favoring Native Hawaiians. Part II contains a brief factual history of *Doe* and Kamehameha Schools' Policy. Part III analyzes the three published *Doe* decisions, focusing specifically on their reliance on and interpretation of Title VII's substantive standards to arrive at their unique holdings. Part IV analyzes the concurrence in *Doe III*, my opinion in *Rice I*, and Justice Stevens' dissent in *Rice III*, with emphasis on the context and application of the "special relationship" doctrine as an alternative to the majority *Doe* decision. Part V concludes that the question of whether the judiciary will acknowledge the existence of a "special relationship" between Native Hawaiians and the United States is at least as significant for purposes of judicial review of preferences for Native Hawaiians as the question of whether Native Hawaiians should be considered a "discrete and insular minority."

II. *DOE V. KAMEHAMEHA SCHOOLS* BACKGROUND[18]

Plaintiff John Doe, a student with no Native Hawaiian ancestry, applied for admission to Kamehameha Schools, which receives no federal funds.[19] Kamehameha Schools was created under a charitable testamentary trust established by the will of Princess Pauahi for the purpose of providing "'a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women.'"[20] In addition to setting forth the general purpose of the charitable trust, Princess Pauahi's will bestowed upon the trustees "'full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils.'"[21]

---

[18] Due to space considerations, this part is limited to a very brief recitation of the facts immediately pertinent to *Doe*. This is not intended to minimize the relevant historical, political, and social context underlying the case. For a more thorough exploration of this context, such as the history and overthrow of the Hawaiian Monarchy, the effect of western influence on Native Hawaiians, and the current social, economic, and educational status of Native Hawaiians, please refer to the three published opinions.

[19] *Doe III*, 470 F.3d 827, 829 (9th Cir. 2006) (en banc), *cert. dismissed*, U.S. , 127 S. Ct. 2160 (2007).

[20] *Id.* at 831 (quoting Will of Bernice Pauahi Bishop, *in* WILLS AND DEEDS OF TRUST 17-18 (3d ed., Printshop of Hawaii Co. 1957) (1898)).

[21] *Id.*

"Under the direction of the original trustees, chaired by [Princess Pauahi's] widower, Charles Reed Bishop, . . . Kamehameha Schools opened in the late nineteenth century."[22] In a speech in December 1888, Bishop stated that Princess Pauahi had created Kamehameha Schools, "'in which Hawaiians have the preference,' so that 'her own people' could once again thrive."[23]

Kamehameha Schools maintains a preference in its Policy for children of Native Hawaiian ancestry, defined as those who are descendants of the aboriginal peoples inhabiting the Hawaiian Islands in 1778,[24] the year that Westerners first arrived on the Islands. The Policy operates to admit non-Native Hawaiian students only after all qualified applicants with Native Hawaiian ancestry have been admitted.[25] Because there are usually many more qualified applicants that meet this criteria than there are spaces available, it is very rare that a student with no Hawaiian ancestry is admitted to Kamehameha Schools.[26] The Policy is not intended as an absolute bar to non-Native Hawaiians but is instead intended to last only as long as Native Hawaiians suffer educational disadvantages.[27]

Presently, Kamehameha Schools operates and maintains three K-12 campuses: Kapālama on O'ahu, Pukalani on Maui, and Kea'au on Hawai'i Island.[28] There are approximately 70,000 school-aged children in Hawai'i who meet Kamehameha Schools' definition of Native Hawaiian, but total enrollment capacity is only 4856.[29] Kamehameha Schools subsidizes much of the tuition cost for all students, requiring payment of less than $2000 per year, whereas the cost of educating a student amounts to approximately $20,000 annually.[30] In addition, sixty-five percent of enrollees receive some form of financial aid to help cover the $2000 tuition.[31] Although Kamehameha Schools deemed Doe a competitive applicant and placed him on the waiting list, he was repeatedly denied admission.[32] Kamehameha Schools

---

[22] *Id.*

[23] *Id.* (quoting Charles R. Bishop, *The Purpose of the Schools*, HANDICRAFT, Jan. 1889, at 3).

[24] *Id.* at 832.

[25] *Id.*

[26] *Id.* The Policy contains no requirement for a minimum blood quantum of Hawaiian ancestry. The only requirement is that a student have at least one Native Hawaiian ancestor. *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 834.

acknowledged that Doe "likely would have been admitted had he possessed Hawaiian ancestry."[33]

III. OVERVIEW OF THE *DOE V. KAMEHAMEHA SCHOOLS* OPINIONS

On June 25, 2003, Doe, by and through his mother and next friend Jane Doe, filed a complaint against Kamehameha Schools[34] in the Hawai'i District Court seeking damages and injunctive relief (*Doe I*).[35] Doe asserted that he was denied admission because of his race in violation of 42 U.S.C. section 1981, which states, in pertinent part, that "'[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.'"[36] Kamehameha Schools countered that the Policy comprised a valid, race-conscious remedial affirmative action plan, which served a legitimate purpose and, thus, did not violate section 1981.[37]

The district court agreed with Kamehameha Schools and granted summary judgment in its favor.[38] Doe appealed the district court's ruling to a panel of the Ninth Circuit, which overturned the district court's decision, holding that the Policy violated section 1981 because it operated as an absolute bar for admission to Kamehameha Schools to non-Native Hawaiians (*Doe II*).[39] Finally, the en banc court granted rehearing and held that the Policy, under a revised Title VII framework applicable only to the private educational context, was a viable attempt to address societal imbalances and was therefore valid under section 1981.[40]

While the prevailing opinions differed in their results and reasoning, they shared a common characteristic: all three were premised upon an application

---

[33] *Id.*

[34] Other named defendants were Bishop Estate trustees Constance Lau, Nainoa Thompson, Dianne J. Plotts, Robert K.U. Kihune, and J. Douglas Ing. As the central issue of the case is the legality of the preferential admissions Policy, this Article will use "Kamehameha Schools" to refer to the collective defendants.

[35] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate (*Doe I*), 295 F. Supp. 2d 1141, 1147 (D. Haw. 2003), *aff'd en banc*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[36] *Doe III*, 470 F.3d at 835 (quoting 42 U.S.C. § 1981 (2000)). Again, due to space considerations, this Article only touches upon the complex history of section 1981. For a more in-depth examination of section 1981, refer to the three published opinions.

[37] *Doe I*, 295 F. Supp. 2d at 1145.

[38] *Id.* at 1175.

[39] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate (*Doe II*), 416 F.3d 1025, 1048 (9th Cir. 2005), *rev'd en banc*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[40] *Doe III*, 470 F.3d at 849.

of established Title VII standards to Doe's section 1981 challenge. A brief review of the opinions follows.

A. The District Court Opinion

The district court first undertook an extensive review of the historical background and context of the case.[41] Specifically, the court examined Native Hawaiian society prior to western contact, the end of the Hawaiian monarchy (and the United States' role in it), the effects of western influence on Native Hawaiians, and congressional recognition of the need for reconciliation.[42] The court also provided background on Kamehameha Schools and its Policy.[43]

The court, emphasizing context, noted that "[n]o reported case addresse[d] whether [section] 1981 permits the remedial use of race by a private school that receives no federal funding, especially one involving an educational preference for descendants of an indigenous people who have been disadvantaged by past history."[44] The court held, pursuant to *Patterson v. McLean Credit Union*,[45] "that claims of racial discrimination under [section] 1981 are subject to the same [burden shifting] scheme of proof as applicable to Title VII cases" involving racially discriminatory disparate treatment by private employers.[46] The court noted, however, that the cases it relied on to reach this result involved incidents of employment discrimination and, as such, were not "entirely analogous to a private school's race-conscious remedial admissions policy[.]"[47] The court further determined that section 1981, a law which was triggered by the Nation's concern over centuries of racial injustice and which intended to improve the lot of those who had been excluded from the "American Dream," should not be interpreted as a

---

[41] In so doing, the court noted Justice O'Connor's admonition in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that "'context matters,' even 'when reviewing race-based governmental action under the Equal Protection Clause.'" *Doe I*, 295 F. Supp. 2d at 1148 n.4 (quoting *Grutter*, 539 U.S. at 327). While the district court determined that strict scrutiny was inapplicable in *Doe* for reasons described *infra*, the court found that the Supreme Court's emphasis on the important role context plays in strict scrutiny review accentuated the importance of context for less stringent forms of review. *Id.*

[42] *Id.* at 1148-54.

[43] *Id.* at 1154-57.

[44] *Id.* at 1146.

[45] 491 U.S. 164 (1989).

[46] *Doe I*, 295 F. Supp. 2d at 1146 (citing *Patterson*, 491 U.S. at 186). The court found that "[c]ourts . . . do not apply the Equal Protection standard to . . . private actors because the Equal Protection and Due Process guarantees of the Fifth and Fourteenth Amendments apply only to government action." *Id.* at 1164 (citing Single Moms, Inc. v. Mont. Power Co., 331 F.3d 743 (9th Cir. 2003), Farese v. Scherer, 342 F.3d 1223, 1233 n.13 (11th Cir. 2003), and Med. Inst. v. Nat'l Ass'n of Trade & Technical Sch., 817 F.2d 1310, 1312 (8th Cir. 1987)).

[47] *Id.* at 1164; see *id.* at 1164 n.23.

legislative prohibition of voluntary, private, race-conscious efforts to abolish racial segregation and hierarchy.[48]

Under the Title VII "burden shifting" framework employed by the district court, a plaintiff must first establish a prima facie case of disparate treatment due to race.[49] The burden then falls upon the defendant to articulate a nondiscriminatory rationale for the decision; if the defendant does so, then the burden shifts back to the plaintiff to prove that the defendant's justification is pretextual.[50]

The existence of an affirmative action plan can provide the defendant with a legitimate nondiscriminatory reason, provided that the plan (1) is a response to a conspicuous racial imbalance and is remedial, and (2) is reasonably related to the plan's remedial purpose.[51] According to the court, the Title VII standard is not a rigid one,[52] and there "'is no bright line distinction between permissible and impermissible affirmative action plans.'"[53]

In granting summary judgment for Kamehameha Schools, the court found that Kamehameha Schools had a legitimate justification for its Policy, which served a legitimate remedial purpose, and that the Policy was reasonably related to this purpose.[54] The court based this holding, in part, on the intent of Princess Pauahi, finding that her vision was to "save her people through education."[55] The court further found that the preference provided by the Policy was neither perpetual nor an absolute bar to the admittance of other races to Kamehameha Schools.[56] In support, the court found that Kamehameha Schools periodically reviewed its admissions policy to ensure its consistency with its mission and objectives in obtaining the goals of Princess Pauahi.[57] Furthermore, the court found that the preference was envisioned to last only as long as it takes Kamehameha Schools to overcome the "manifest imbalance resulting from socioeconomic and educational disadvantages, or at such earlier date when the Schools has the capacity to also admit non-Native Hawaiians."[58]

---

[48] *Id.* at 1164-65 (citing United Steelworkers of Am. v. Weber, 443 U.S. 193, 204 (1979)).

[49] *Id.* at 1165 (citing Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987)).

[50] *Id.*

[51] *Id.* (citing Setser v. Novack Inv. Co., 657 F.2d 962, 968 (8th Cir. 1981)).

[52] *Id.* at 1166 (citing *Weber*, 443 U.S. at 208).

[53] *Id.* (quoting *Setser*, 657 F.2d at 969-70). The district court relied on *Weber* and *Setser*, an Eighth Circuit case, to arrive at this flexible framework for analyzing race-conscious remedial programs. As will be discussed *infra*, this differs significantly from the panel's interpretation of *Weber* and its own in-jurisdiction decisions.

[54] *Id.* at 1172.

[55] *Id.* at 1146.

[56] *Id.*

[57] *Id.* The most recent review of the Policy occurred in 2002. *Id.*

[58] *Id.*

In further support of its holding, the district court found that "Congress ha[d] made repeated findings . . . declaring that the Hawaiian Monarchy [had been] unlawfully overthrown with the aid of the United States" and that Congress had made legislative findings that, as a result of this situation, "the United States has a special trust obligation and political relationship to Native Hawaiians[.]"[59] The court found Congress' re-enactment of the Native Hawaiian Education Act ("NHEA") particularly compelling. The NHEA granted preferences to Native Hawaiians in the field of education and made findings of Native Hawaiian socioeconomic and educational disadvantages similar to those identified by Kamehameha Schools.[60] Furthermore, the court found that Congress had acknowledged that, "notwithstanding its prior efforts to fulfill its special trust relationship with Native Hawaiians[,] there is a continuing substantial need for educational assistance and that the parallel trust of Princess Pauahi establishing the Kamehameha Schools is a significant resource in meeting this need."[61] Finally, the court determined that section 1981 "should be read in harmony with Congress's many findings regarding the needs of Native Hawaiians and with the laws Congress has enacted giving a preference to Native Hawaiians."[62]

B. The Ninth Circuit Panel Decision[63]

The panel overturned the district court's ruling, holding that, while the lower court correctly applied the Title VII framework, the Policy, with its preference for Native Hawaiians, constituted unlawful race discrimination under section 1981 because it effectively operated as an absolute bar to admission of non-Hawaiians.[64]

After following the district court's lead with an exploration of the history and context of the case, the panel turned to the history of section 1981. The panel held, similarly to the district court, that a "[section] 1981 suit against a purely private school is governed by the substantive standards applicable to race-based challenges brought pursuant to Title VII[.]"[65] The panel went on

---

[59] *Id.*

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

[61] *Id.* at 1147.

[62] *Id.*

[63] The panel consisted of Judges Beezer, Graber, and Bybee. *See Doe II*, 416 F.3d 1025, 1027 (9th Cir. 2005), *rev'd en banc*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[64] *Id.* at 1027, 1038-39, 1048.

[65] *Id.* at 1038-39. The panel summed up the Title VII standard as follows:

> [O]nce the [section] 1981 plaintiff establishes a prima facie case of intentional race discrimination, the defendant must come forward with a legitimate nondiscriminatory reason justifying the challenged practice; if such a reason is offered the plaintiff may still

to find that a private, voluntary, race-conscious affirmative action plan can form the basis of a legitimate nondiscriminatory rationale, thus exempting the challenged race-based decision from liability under section 1981.[66]

The panel took a different approach from the district court, however, in finding that the reasoning in *United Steelworkers of America v. Weber*, as recently distilled by the Ninth Circuit in *Rudebusch v. Hughes*,[67] established three explicit requirements for affirmative action plans to be valid.[68] First, the plan must "respond to a manifest imbalance" in the workforce.[69] Second, the plan must "not create an absolute bar to the advancement of the non-preferred race or unnecessarily trammel their rights."[70] Third, the plan must "do no more than is necessary to achieve a balance."[71]

The panel held that the second element was fatal to Kamehameha Schools' position because the Policy operated as "an absolute bar to admission for non-Hawaiians."[72] According to the panel, Kamehameha Schools' "unconditional refusal to admit non-Hawaiians so long as there are [N]ative Hawaiian applicants categorically trammel[ed] the rights of non-Hawaiians."[73] Finally, the panel noted that the Supreme Court's decision in *Runyon v. McCrary*[74] "made clear that an admissions policy that consciously and conspicuously denie[d] admission to all members of the non-preferred race on account of their race [constituted] a classic violation of [section] 1981."[75]

The panel went on to state its disagreement with the district court that congressional intent and action should shape the court's interpretation of section 1981.[76] "We have located no authority for the proposition that congressional intent, as manifested by scattered statutes adopted specifically

---

attempt to show that the reason is a pretext for unlawful race discrimination. *Id.* at 1039.

[66] *Id.* at 1040. The court assumed, absent objection from the parties, that the same principle applied to a section 1981 suit against a purely private school. *Id.*

[67] Rudebusch v. Hughes, 313 F.3d 506, 520-24 (9th Cir. 2002) (citing United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979)).

[68] *Doe II*, 416 F.3d at 1041 (citing *Rudebusch*, 313 F.3d at 520-21).

[69] *Id.*

[70] *Id.* (internal quotations omitted).

[71] *Id.* The court noted that "[w]hile 'the *Weber* Court did not establish a rigid formula for testing the validity of an affirmative action plan,' later cases have used *Weber* as a general guide for assessing the legality of affirmative action plans challenged pursuant to Title VII." *Id.* (internal citations omitted). In the seminal United States Supreme Court case of *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Court formally established this three part test. Accordingly, this test will be refered to, *infra*, as the "*Johnson* test."

[72] *Doe II*, 416 F.3d at 1041.

[73] *Id.* (internal quotations omitted).

[74] 427 U.S. 160 (1976).

[75] *Doe II*, 416 F.3d at 1041 (citing *Runyon*, 427 U.S. at 172) (internal quotations omitted).

[76] *Id.* at 1042.

for the benefit of native Hawaiians, is sufficient to modify the standards embodied in a statute of general applicability."[77] Furthermore, the panel found no evidence that Congress either explicitly or implicitly exempted Kamehameha Schools from the substantive commands of section 1981.[78]

The panel also held that the "special relationship doctrine" of *Morton v. Mancari*, which is typically advanced to support preferences accorded members of federally recognized Indian tribes, did not allow Kamehameha Schools to exclusively restrict admission on the basis of an express racial classification.[79] Rather, the panel found, the Supreme Court's decisions in this arena "emphasized the nonracial nature of classifications held to withstand scrutiny under modern civil rights laws."[80]

C. The Ninth Circuit En Banc Opinion

Like the district court and the panel before, the en banc court conducted an extensive review of the factual background and historical context of Kamehameha Schools' admissions policy.[81] After a review of section 1981's history, the en banc court, in keeping with the decisions of both the district court and the panel, found that Title VII's scheme of proof was applicable to section 1981 claims.[82] Similarly, the en banc court found that the existence of an affirmative action plan could provide a legitimate rationale for countering a prima facie case of discrimination.[83]

The en banc court relied heavily on the Eighth Circuit's decision in *Setser v. Novack Investment Co.*,[84] a "leading case, on which all the others rely," for the appropriate application of Title VII's standards to private affirmative action plans, finding that: (1) affirmative action plans were not barred under

---

[77] *Id.*

[78] *Id.* at 1043-48.

[79] *Id.* at 1047-48 (citing Morton v. Mancari, 417 U.S. 435, 553 n.24 (1974)). The panel looked to *Rice* for guidance, finding that the Supreme Court was unwilling to hold that Congress had "determined that native Hawaiians have a status like that of Indians in organized tribes." *Id.* at 1047 (citing Rice v. Cayetano (*Rice III*), 528 U.S. 495, 518 (2000)). The panel concluded that "it remains unclear whether the United States government enjoys a trust relationship with native Hawaiians similar to that enjoyed by organized tribes[,]" but, under the current circumstances, it is advisable to "'stay far off that difficult terrain.'" *Id.* (quoting *Rice III*, 528 U.S. at 519).

[80] *Id.* at 1048.

[81] *Doe III*, 470 F.3d 827, 830-35 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[82] *Id.* at 839.

[83] *Id.* at 838 (citing Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987)).

[84] 657 F.2d 962 (8th Cir. 1981) (en banc).

section 1981; and (2) the affirmative action standards of Title VII also applied to section 1981.[85]

The en banc court then briefly examined decisions from other circuits, as well as the Supreme Court's decisions in *Gratz v. Bollinger*[86] and *Grutter v. Bollinger*,[87] for further context.[88] The court concluded its discussion of Title VII's application to section 1981, and signaled its departure from the previous *Doe* decisions, with this statement: "[t]he question remains how best to adapt the Title VII employment framework to an educational context and to the unique historical circumstances of this case."[89]

After a brief review of *Weber* and *Rudebusch*, the en banc court determined that it should apply a modified methodology for section 1981 challenges in the private educational forum. This determination, according to the court, was based on the Supreme Court's recognition of the importance of deferring to the judgment and expertise of the relevant decisionmakers and the fact that schools perform a significantly broader function than do employers. Consequently, the court reasoned that it should apply "a standard for evaluating remedial racial preferences by wholly private primary and secondary schools that is akin to that used in Title VII employment cases, but that takes into account the inherently broad and societal focus of the educational endeavor."[90]

This new standard modified the three-part *Johnson v. Transportation Agency* test used by the panel to evaluate the Policy.[91] Whereas the first *Johnson* factor required a showing that an affirmative action plan responds to a manifest imbalance in the work force, the first *Doe* factor required a private school to show that "specific, significant imbalances in educational achievement presently affect the target population."[92] While the second *Johnson* factor mandated that an affirmative action plan must not create an absolute bar to the advancement of the non-preferred race or unnecessarily trammel their rights, the second *Doe* factor required a private school to show that its admissions policy does not "'unnecessarily trammel' the rights of students in the non-preferred class or 'create an absolute bar' to their advancement."[93] Finally, whereas the third *Johnson* factor required employer-

---

[85] *Doe III*, 470 F.3d at 838 (citing Setser v. Novack Investment Co., 657 F.2d 962, 966-67 (8th Cir. 1981)).

[86] 539 U.S. 244 (2003).

[87] 539 U.S. 306 (2003).

[88] *See Doe III*, 470 F.3d at 839.

[89] *Id.*

[90] *Id.* at 840-42.

[91] *Id.* (citing Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987)).

[92] *Id.*

[93] *Id.*

based affirmative action plans to do no more than necessary to achieve a racial balance, the third *Doe* factor required a private school to show that its "admissions policy [does] no more than is necessary to remedy the imbalance in the community as a whole[.]"[94]

The en banc court determined that the Policy satisfied these three criteria. First, it found that there were "significant imbalances in educational achievement" currently affecting Native Hawaiians and that Kamehameha Schools aimed to remedy that imbalance.[95] Second, the court held that the Policy "does not unnecessarily trammel the rights of non-Native Hawaiians or create an absolute bar to their advancement" because there was no evidence in the record that suggested that educational opportunities in Hawai'i were deficient for non-Native Hawaiian students, and Congress had recognized, within the unique context of Native Hawaiian history, that affirmative measures were necessary to address inequalities in educational achievement.[96] Finally, the court held that Kamehameha Schools satisfied the third factor because the Policy was limited in two distinct ways: first, the Policy allows non-Native Hawaiians to apply and gain admission should there be insufficient Native Hawaiians to fill the available spots and, second, preference for Native Hawaiians will only be given so long as necessary to remedy the current inequities.[97] Accordingly, the court held that Kamehameha Schools' admissions policy did not violate section 1981.[98]

IV. AN ALTERNATIVE METHOD FOR ANALYZING THE POLICY: *MANCARI'S* "SPECIAL RELATIONSHIP DOCTRINE" AND ITS APPLICABILITY TO NATIVE HAWAIIANS

As evidenced by the above discussion, the *Doe* opinions differed in numerous respects but not in their fundamental adherence to applying Title VII standards to section 1981. The en banc court even went so far as to create a new test for judging race-conscious admissions policies in the private educational context. While this end result benefited Kamehameha Schools and supporters of its Policy, it can be argued that the en banc court undertook reasoning that was simply unnecessary.

In contrast to the majority holding, the concurrence determined that the United States had a congressionally recognized "special relationship" with

---

[94] *Id.*

[95] *Id.* at 843-44.

[96] *Id.* at 844-45.

[97] *Id.* at 845-46.

[98] *Id.* at 849. The court found, alternatively and in addition to this holding, that Congress specifically intended to allow Kamehameha Schools to operate when it re-enacted section 1981 in 1991. *Id.* at 847.

Native Hawaiians and, as a result, Kamehameha Schools' admissions preference was subject to the rational basis standard of constitutional scrutiny.[99] This was the same line of reasoning I applied in my order granting summary judgment to the State in *Rice I*. In that case, I upheld a Native Hawaiian voting preference on similar grounds, finding that the "special relationship" doctrine was applicable to Native Hawaiians and, as a result, the voting preference at issue there should be reviewed under the less rigorous rational basis standard.[100]

I believe the most salient point to take from the analysis to follow, in light of the ultimate holding in *Doe* and the continued controversy over federal recognition for Native Hawaiians, is that the rigid application of Title VII's employment-based standards, or the modification of these standards, is perhaps unnecessary in light of Congress' repeated recognition of the "special relationship" between the United States and Native Hawaiians.[101]

A. Judge Fletcher's Concurrence in Doe

The concurrence agreed with the majority that the central question of *Doe* was whether section 1981 forbade Kamehameha Schools from giving Native Hawaiians a conclusive preference for admission into its K-12 programs, but found the majority's assumption that "Native Hawaiian" was strictly a racial classification problematic.[102] Instead, the concurrence proposed a narrower ground for sustaining the Policy—namely that "Native Hawaiian" is not merely a racial classification but a political classification as well.[103] Thus, the concurrence reasoned, the central question of *Doe* should be divided into two sub-questions.[104] "First, can Congress constitutionally provide special benefits, including educational benefits, to descendants of Native Hawaiians because 'Native Hawaiian' is a political classification?[105] Second, if the answer to [the first] question is yes, has Congress done so in [section] 1981?"[106]

Turning to the first question, the concurrence stated that Native Hawaiians constitute a unique population that has a "special trust relationship" with the

---

[99] *Id.* at 850-57 (Fletcher, J., concurring).

[100] Rice v. Cayetano (*Rice I*), 963 F. Supp. 1547, 1554 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

[101] While this paper does not extensively analyze the similarities and differences between the concurrence and *Rice I*, it does review the underlying rationale behind them.

[102] *Doe III*, 470 F.3d at 850 (Fletcher, J., concurring).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

United States based on the fact that "Congress has repeatedly 'affirmed,' 'acknowledged,' 'reaffirmed,' and 'recognized' that relationship."[107] "Congress has enacted more than 150 laws that 'extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities.'"[108] In support of such statutes, Congress has stated that:

> "[T]he political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives,"[109] and that "[t]he authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."[110]

According to the concurrence, "Congress has emphasized that it 'does not extend services to Native Hawaiians because of their race, but because of their unique status as indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.'"[111]

The concurrence next examined *Mancari*, the seminal case establishing the "special relationship" doctrine, in which the Supreme Court held that the Bureau of Indian Affairs' hiring preference favoring Native Americans was constitutional because the tribal Indian classification was "political rather than racial in nature."[112] "Benefits were 'granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.'"[113] Citing this "special relationship," the Supreme Court held that the tribal Indian classification did not trigger heightened scrutiny.[114]

The concurrence then recognized that, in *Rice III*, the Supreme Court struck down a statute granting preferential voting rights to Native Hawaiians.[115] The concurrence found, however, that Rice was *sui generis*, meaning that its holding was limited to the arena of voting rights under the Fifteenth Amendment.[116] The preference at issue there, and the level of scrutiny applicable to

---

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

[108] *Id.* (quoting 42 U.S.C. § 11701(19) (2000)) (additional citations omitted).

[109] *Id.* (quoting 20 U.S.C. § 7512(12)(D) (2000)).

[110] *Id.* (quoting 42 U.S.C. § 11701(17) (2000)).

[111] *Id.* (quoting 20 U.S.C. § 7512(12)(B) (2000)).

[112] *Id.* at 850-51 (quoting Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974)) (internal quotations omitted).

[113] *Id.* at 851 (quoting *Mancari*, 417 U.S. at 554). The concurrence also reviewed Supreme Court cases and congressional action for the proposition that neither continuous tribal membership nor explicit federal recognition is mandatory to qualify for special treatment. *Id.*

[114] *Id.*

[115] *Id.* at 852. The factual details of *Rice* will be discussed in more depth in Part IV.B.

[116] *Id.*

it, was therefore distinguishable from Kamehameha Schools' Policy.[117] Thus, "Congress may, if it wishes, permit Kamehameha Schools to give preferential admissions treatment to Native Hawaiians."[118]

With respect to the second question—whether Congress has in fact provided special benefits to descendants of Native Hawaiians based on a political classification under section 1981—the concurrence noted that, when Congress first enacted section 1981 in 1866, and reenacted it four years later, the Hawaiian Islands were still a sovereign kingdom.[119] From 1826 until 1893, the year of the overthrow of the monarchy, the United States recognized the independence of this kingdom and extended full diplomatic recognition to it.[120] For many years after the 1893 overthrow and even after the State of Hawai'i was admitted to the Union in 1959, section 1981 posed no threat to the Policy.[121] In 1976, however, *Runyon v. McCrary*[122] and *McDonald v. Santa Fe Trail Transportation Co.*[123] intimated that section 1981 might prohibit private school admissions policies that excluded whites.[124]

By the time Congress reenacted section 1981 in 1991, the concurrence noted, Congress had already enacted numerous statutes providing exclusive benefit programs to Native Hawaiians or which included them in benefit programs for other native peoples.[125] Just a few years before section 1981's reenactment, Congress passed many laws that gave exclusive contractual or grant benefits to Native Hawaiians and Native Hawaiian organizations.[126] In

---

[117] *Id.* at 852-53.

[118] *Id.* at 853.

[119] *Id.* (citing the Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, and the Enforcement Act of 1870, Act of May 31, 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144).

[120] *Id.* (citing Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993)).

[121] *Id.*

[122] 427 U.S. 160 (1976) (holding that section 1981 reaches admissions programs at private schools that categorically exclude African-Americans).

[123] 427 U.S. 273 (1976) (holding that section 1981 reaches racial discrimination in private employment against whites as well as non-whites).

[124] *Doe III*, 470 F.3d at 853 (Fletcher, J., concurring).

[125] *Id.*

[126] *Id.* at 853 n.2.

> Native American Programs Act Amendments of [1987], Pub. L. No. 100-175, § 506, 101 Stat. 973, 976-78 (1987) (establishing 'Revolving Loan Fund for Native Hawaiians' to promote economic and social self-sufficiency of Native Hawaiians); Jacob K. Javits Gifted and Talented Students Education Act of 1988, Pub. L. No. 100-297, tit. I, § 4104, 102 Stat. 237, 238 [(1988)] (authorizing grants or contracts with institutions (including Indian tribes and Native Hawaiian organizations) to carry out programs or projects designed to meet the educational needs of gifted and talented children); Drug-Free Schools and Communities Act of 1986, Pub. L. No. 100-297, tit. I, § 5134, 102 Stat. 252, 261 (1988) (authorizing education grants, cooperative agreements, or contracts with organizations that primarily serve and represent Native Hawaiians); Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amend-

addition, just before section 1981's reenactment, "two recently passed laws directed Kamehameha Schools—by name—to provide educational benefits to Native Hawaiians, and *only* Native Hawaiians."[127] In noting that it was not until the 1991 amendments to section 1981 that Congress specified that it intended courts to apply the statute to discrimination by private actors, the concurrence concluded that, to rule for Doe, "we would have to conclude that Congress intended this provision to invalidate, *sub silentio*, the recently enacted legislation that provided loans and scholarships exclusively to Native Hawaiians at Kamehameha Schools."[128] Such a ruling would require ignoring *Mancari*, in which the Supreme Court emphatically rejected the argument for *sub silentio* repeal by the 1972 amendment to section 1981.[129]

The concurrence concluded that such an adjudication of repeal by implication was not appropriate because: (1) section 1981 does not lend itself to a strict, text-based interpretation;[130] and (2) Congress' provision of educational benefits to Native Hawaiians continues to this day.[131] In light of the general rule that less, not more, demanding scrutiny applies to private discrimination, the concurrence found that "[i]t would be deeply ironic for us to hold that

---

ments of 1988 ('Hawkins-Stafford Amendments'), Pub. L. No. 100-297, tit. IV, §§ 4001 [-4009] ('Education for Native Hawaiians'), 102 Stat. 130, 358-63 (repealed 1994) (authorizing and developing supplemental educational programs to benefit Native Hawaiians); Native Hawaiian Health Care Act of 1988, Pub. L. No. 100-579, 102 Stat. 2916 [(1988)] (authorizing programs to improve the health status of Native Hawaiians); Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, § 102, 102 Stat. 3289, 3296 [(1988)] (amending the Education of the Handicapped Act to provide handicapped Native Hawaiian (and other native Pacific basin) children with a free appropriate public education); Business Opportunity and Development Reform Act of 1988, Pub. L. No. 100-656, § 207, 102 Stat. 3853, 3861-62 [(1988)] (amending the Small Business Act by including economically disadvantaged Native Hawaiian organizations as socially and economically disadvantaged small business concerns); Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 106, 102 Stat. 4784, 4787-88 [(1988)] (amending the Public Health Service Act by creating a Native Hawaiian Health Professions Scholarship program).

Id.

[127] *Id.* at 854 (citing Hawkins-Stafford Amendments, § 4005(a), 102 Stat. at 360 and Public Health Service Act of Nov. 29, 1990, Pub. L. No. 101-644, § 401, 104 Stat. 4662, 4668 (codified as amended at 42 U.S.C. § 254s (2000)).

[128] *Id.*

[129] *Id.* at 854-55 (citing Morton v. Mancari, 417 U.S. 535, 548-51 (1974)).

[130] *Id.* at 856.

[131] *Id.* (citing the Native Hawaiian Education Act ("NHEA"), Pub. L. No. 103-382, §§ 9201-9212, 108 Stat. 3794 (1994) (formerly codified at 20 U.S.C. §§ 7901-7912) (repealed 2002)). The NHEA was later reenacted as part of the No Child Left Behind Act of 2001, 20 U.S.C. §§ 7511-7517 (Supp. 2005). A congressional committee reviewing the legislation urged Kamehameha Schools to "redouble its efforts to educate Native Hawaiian children." *Doe III*, 470 F.3d at 856 (quoting H.R. Rep. No. 107-63(I), at 333 (2001) (internal quotations omitted)).

[section] 1981 forbids private institutions from giving Native Hawaiians educational benefits when, at the same time, Congress itself provides such benefits and provides public funds for private organizations to do the same."[132] Thus, the concurrence concluded that Congress has invariably treated "Native Hawaiian" as a political classification and, under the "special relationship" doctrine, has the power to do so.[133] The concurrence saw "nothing in [section] 1981 to indicate that Congress intended to impose upon private institutions a more restrictive standard for the provision of benefits to Native Hawaiians than it has imposed upon itself."[134]

B. Rice v. Cayetano: *My Take on the Application of the "Special Relationship" Doctrine*

In 1996, Harold F. Rice, a Caucasian, brought suit against the State of Hawai'i, alleging that a policy allowing only Native Hawaiians to vote in the OHA Trustees elections was impermissibly based on race and, as such, violated the Fourteenth and Fifteenth Amendments.[135] The State of Hawai'i, relying heavily on *Mancari*, countered that legislation singling out aboriginal peoples for particularized treatment should be evaluated using the rational basis test.[136] The parties filed cross motions for summary judgment and I ruled in favor of the State, holding that: (1) the rational basis test applied; (2) a rational connection existed between Hawai'i's execution of its trust obligation to Native Hawaiians and the voting requirement; and (3) OHA and its trustees did not exercise general governmental powers as to invoke strict demands of one-person, one-vote principle of the Equal Protection Clause.[137] While the Ninth Circuit essentially upheld my ruling, the Supreme Court overturned the Ninth Circuit, holding, *inter alia*, that limiting voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated the Fifteenth Amendment by using ancestry as proxy for race, and thereby enacted a race-based voting qualification.[138]

My *Rice* analysis began with the finding that "legislation based upon racial classifications is constitutionally suspect under the Equal Protection Clause

---

[132] *Id.*

[133] *Id.* at 856-57.

[134] *Id.* at 857.

[135] Rice v. Cayetano (*Rice I*), 963 F. Supp. 1547, 1548 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

[136] *Id.* at 1549.

[137] *Id.* at 1554, 1556, 1557-58.

[138] Rice v. Cayetano (*Rice III*), 528 U.S. 495, 499 (2000).

and should be reviewed under strict scrutiny."[139] Based on relevant Supreme Court precedent regarding Native American Indians, however, I found that "seemingly race-conscious legislation [may be] valid utilizing the less stringent, rational basis test."[140]

After a brief review of the origins of the Native Hawaiian preference at issue in *Rice*, I set about applying the Court's analysis of the "special relationship" doctrine in *Mancari* to the facts at hand. I found that "[t]he cases following [*Mancari*] repeatedly focus[ed] upon the special relationship between the Indians and the federal Government, specifically the Government's 'unique obligation' toward Indians."[141] In *Mancari*, the Court stated that "the origin of this relationship arises from the fact that the Indians were left helpless and dispossessed due to the United States' exercise of its war and treaty powers."[142]

I found it notable that almost identical expressions were used by Congress in describing Native Hawaiians during committee discussion of the Hawaiian Homes Commission Act ("HHCA"), which Congress enacted in 1920 in response to the fact that the number of Native Hawaiians was decreasing.[143] Furthermore, I found that Section 5(f) of the Admission Act, which admitted Hawai'i to the United States in 1959, provided further evidence of a special relationship in that it created both a federal right enforceable under 42 U.S.C. section 1983 and a trust obligation that constituted a compact with the United States.[144] Moreover, I found it compelling that, "unlike typical provisions of state law, the trust obligation imposed by § 5(f) [was] protected from amendment by the state legislature unless the United States ha[d] consented to those amendments."[145]

After acknowledging that Native Hawaiians could not claim formal or informal recognition, I determined that this fact was not controlling for purposes of determining the proper standard of review.[146] A historical review revealed that "Native Hawaiians were incorporated into the United States twenty years after the treaty making era with Native Americans was finished."[147] This review also indicated that "[i]t was not until 1934, . . . in the

---

[139] *Rice I*, 963 F. Supp. at 1550 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)).

[140] *Id.* (citing Morton v. Mancari, 417 U.S. 535 (1974)).

[141] *Id.* at 1552 (footnote omitted).

[142] *Id.* (citing *Mancari*, 417 U.S. at 552).

[143] *Id.* (citing H.R. Rep. No. 839, 66th Cong., 2nd Sess. 4 (1920)) (additional citations omitted).

[144] *Id.* (citing Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1472 (9th Cir. 1984) and Price v. Hawaii, 764 F.2d 623, 628 (9th Cir. 1985)).

[145] *Id.*

[146] *Id.* at 1553.

[147] *Id.* (citing 25 U.S.C. § 71 (2000)).

Indian Reorganization Act, that the term 'recognition' was used in a jurisdictional sense; only Indian tribes that were acknowledged would be provided with services and dealt with in trust relationships."[148]

> Moreover, it was not until the 1970's, after two circuit court cases conditioning important tribal rights on federal acknowledgment, *United States v. Washington*[149] and *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*,[150] that the number of petitions for federal acknowledgment rose dramatically, leading to the Department of Interior's decision to formalize the petition and acknowledgment process.[151]

I further opined:

> Throughout this entire process, Native Hawaiians were omitted from the acknowledgment system, perhaps in part because Native Hawaiians had already developed their own trust relationship with the Federal Government as demonstrated by the passage of the HHCA and because Native Hawaiians were not being excluded from beneficial legislation in the same manner as unacknowledged mainland United States Indian tribes.[152]

Furthermore, I found that the inclusion of Native Hawaiians in legislation promulgated primarily for the benefit of Native American Indians[153] and the promulgation of legislation solely for the benefit of Native Hawaiians[154]

---

[148] *Id.* (citing William W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 347 (1990)).

[149] 520 F.2d 676 (9th Cir. 1975).

[150] 528 F.2d 370 (1st Cir. 1975).

[151] *Rice I*, 963 F. Supp. at 1553.

[152] *Id.*

[153] *Id.* (citing Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2994d (2000) and American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982) and National Museum of the American Indian Act, 20 U.S.C. §§ 80q-80q-15 (2000) and Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) and National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000) and Native American Languages Act, 25 U.S.C. §§ 2901-2906 (2000) and Indian Health Care Amendments of 1988, 25 U.S.C. §§ 1601-1683 (2000) and 15 U.S.C. § 637a (repealed 1966) (Aid to Small Business) and 20 U.S.C. § 1106b (repealed 1998) (Teacher Corps preferences) and Native American Veteran Housing Loan Pilot Program, 38 U.S.C. §§ 3761-3764 (2000) and 42 U.S.C. § 3011 (2000) (establishing Office for American Indian, Alaska Native, and Native Hawaiian Programs on Aging)).

[154] *Id.* at 1553-54 (citing congressional enactments of numerous special provisions for the benefit of Native Hawaiians in the areas of health, education, labor, and housing, e.g., Native Hawaiian Education Act, 20 U.S.C. §§ 7901-7912 (repealed 2002) and Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701-11714 (2000) and Program for Native Hawaiian and Alaska Native Culture and Arts Development, 20 U.S.C. § 4441 (2000) and 20 U.S.C. § 7118 (2000) (allotting money for drug and violence prevention programs that benefit Native Hawaiians) and 42 U.S.C. § 254s (2000) (Native Hawaiian Health Scholarships) and 42 U.S.C. § 3057g-3057k (2000) (Native Hawaiian Health Program)).

"constitut[ed] further compelling evidence of the continuing guardian-ward relationship between Native Hawaiians and the Federal Government."[155]

I determined that the *Mancari* decision hinged upon the existence of this same guardian-ward relationship, and the requirement that the indigenous people be part of a recognized tribe, while important evidence of this continuing relationship, was not determinative. I found that there was abundant evidence that the guardian-ward relationship existed between the federal Government and Native Hawaiians and between the State of Hawai'i and Native Hawaiians.[156] As the unique guardian-ward relationship was paramount, not formal recognition, I determined that *Mancari* was equally applicable to Native Hawaiians as to formally recognized Native Americans.[157] Accordingly, I held that:

> [T]he requirements of the Fourteenth and Fifteenth Amendments [were] not violated because the restriction on the right to vote [at issue in *Rice* was] not based upon race, but upon a recognition of the unique status of Native Hawaiians. This classification derive[d] from the trust obligations owed and directed by Congress and the State of Hawaii. Consequently, the legislation [giving rise to the voting preference should] be upheld if it [could] be tied rationally to the fulfillment of the unique obligation to Native Hawaiians.[158]

Finally, I held that the OHA voting scheme was rationally related to the State of Hawai'i's responsibility under the Admission Act to utilize a portion of the proceeds from the section 5(b) lands for the betterment of Native Hawaiians.[159]

C. Justice Stevens' Dissent in Rice

In his *Rice* dissent,[160] Justice Stevens arrived at a similar conclusion, finding that the OHA voting provision violated neither the Fourteenth nor the

---

[155] *Id.* (citing Heckman v. United States, 224 U.S. 413 (1912) (holding that when the federal government enters into a treaty or enacts a statute on behalf of an Indian tribe, Government commits itself to a guardian ward relationship with that tribe) and United States v. Kagama, 118 U.S. 375 (1886) and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

[156] *Id.*

[157] *Id.* (citing Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1168-69 (1982) ("Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.")) (additional citations omitted).

[158] *Id.* (citing Morton v. Mancari, 417 U.S. 535, 555 (1974)).

[159] *Id.* at 1555. While the successive *Rice* opinions are beyond the scope of this Article, it is again worth noting that the Supreme Court held, *inter alia*, that the voting preference violated the Fifteenth Amendment because it utilized ancestry as a "proxy" for race. Rice v. Cayetano (*Rice III*), 528 U.S. 495, 514 (2000).

[160] Justice Ginsburg filed a separate dissent agreeing with Justice Stevens's reasoning. *See Rice III*, 528 U.S. at 547-48 (Ginsburg, J., dissenting).

Fifteenth Amendment because, *inter alia*, the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the "special relationship" it has with aboriginal peoples, a category that includes Native Hawaiians, "whose lands are now a part of the territory of the United States."[161] Throughout the Nation's history, Justice Stevens stated, the Supreme Court has recognized "both the plenary power of Congress over the affairs of native Americans and the fiduciary character of the special federal relationship with descendants of those once sovereign peoples."[162] Neither the extent of Congress's power nor the character of the trust relationship with indigenous peoples has depended on "the ancient racial origins of the people, the allotment of tribal lands, the coherence or existence of tribal self-government, or the varying definitions of 'Indian' Congress has chosen to adopt."[163]

Justice Stevens then examined, as both the concurrence and my *Rice* opinion did, the history and rationale for recognizing a similar trust relationship with Native Hawaiians.[164] Particularly compelling to Justice Stevens was, first, the language of the Joint Resolution adopted by Congress in 1993 that officially apologized to Native Hawaiians for the United States' role in the overthrow of the Hawaiian Monarchy and, second, the "more than 150" laws passed by Congress expressly including Native Hawaiians as part of the class of Native Americans benefitted.[165] Accordingly, Justice Stevens concluded that legislation targeting Native Hawaiians "must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States: that 'special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation' toward the native peoples."[166]

V. CONCLUSION

Just as *Carolene Products* stirred years of debate regarding the appropriate level and method of judicial intervention for "discrete and insular minorities," so too has *Doe* incited much discussion as to both the legality of the Policy and preferences for Native Hawaiians in general. As the foregoing discussion indicates, however, the debate is not limited to the penultimate legal issue. Rather, there is much disagreement as to the appropriate analytic approach that the judiciary should take with regard to these preferences.

The three *Doe* opinions differ in result but share two assumptions: (1) the term "Native Hawaiian" is, at least for purposes of judicial review, strictly a racial classification, and (2) Title VII standards, which are rooted in employment law, apply to race-based section 1981 challenges. Even though

---

[161] *Id.* at 529 (Stevens, J., dissenting).

[162] *Id.* at 529-30 (footnotes omitted).

[163] *Id.* at 531 (footnotes omitted).

[164] *See id.* at 534-35.

[165] *Id.* at 533.

[166] *Id.* at 534 (ellipsis in original).

the majority in *Doe III* made no mention of the "discrete and insular" terminology made famous by footnote four, it recognized that the context of the relationship between Native Hawaiians and the United States was critical to formulating the standard by which the Policy should be reviewed.

The concurrence, my *Rice* opinion, and Justice Stevens' *Rice* dissent, while not completely dismissing the question of race, take an alternative approach. With a sharp focus on context, these opinions demonstrate that Native Hawaiian preferences may be examined pursuant to the congressionally-recognized "special relationship" first described in *Mancari* and, as a result, may be subject to a less searching level of judicial scrutiny.

While some would argue that the Supreme Court's ruling in *Rice* precludes such an interpretation, the concurrence, and the fact that a total of five judges from the Ninth Circuit joined in it, along with Justice Stevens' dissent in *Rice*, prove, if nothing else, that discussion of this issue is far from over. If the concurrence's assertion that *Rice*'s holding was *sui generis* to the arena of voting rights is taken as true, then it is within reason to suggest that *Rice* is inapposite to *Doe*.

The closeness of the decision and the foregoing analysis indicate that this question is far from conclusively answered. Whether the spirit of footnote four, Title VII, the "special relationship" doctrine, or some new judicial formulation dictates the eventual resolution of the controversy surrounding Native Hawaiian preferences remains to be seen.

The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence

David M. Forman*

---

* David M. Forman, Harvard College (A.B. 1988), University of Hawai'i at Mānoa, William S. Richardson School of Law (J.D. 1993); Enforcement Attorney, Hawai'i Civil Rights Commission; Adjunct Professor, University of Hawai'i at Mānoa, William S. Richardson School of Law. Former law clerk (1994-1996), Hawai'i Supreme Court Associate Justice Robert G. Klein (retired).

'A'ole au he Hawai'i a 'a'ole ho'i i pa'a pono ia'u nā 'ike o nā kūpuna Hawai'i. No laila, e kala mai inā ua komo mai kahi hemahema a kuhihewa paha (e pili ana no ka 'ike o nā Hawai'i) i loko o kēia palapala. Inā he wahi hemahema a 'ō'ili mai ma loko o neia palapala, na'u ho'okahi nō ia. A inā na'e he mana'o na'auao, mahalo nui i ka'u kumu, iā 'Anakē Olga Kalama i hala aku nei i ke ala ho'i 'ole mai, lāua ho'i me ku'u makuakāne, Michael L. Forman. Na lāua mai nō ia na'auao.

'O ka po'e i kama'āina 'ole i ku'u makuakāne, e mana'o ho'ohalahala wale mai auane'i he Haole wale nō ia e hana nei ma ke kulanui. He Haole kūpono nō na'e ia i ko'u mana'o, a ma ona lā e 'ike 'ia ai nā 'ao'ao maika'i o ka po'e 'Amelika. He mau hana kāna i hana ai no ka pono o ka po'e Hawai'i e la'a me ka ho'opa'a 'ana i ka 'Ōlelo Hawai'i i mea e hiki ai iā ia ke noho i Luna Ho'omalu no ke kōmike nāna i 'āpono aku nei i ka pepa nui a Laiana Wong i kākau ai no kona palapala lae'ula ma ka māhele Kālai'ōlelo o ke Kulanui o Hawai'i. 'O ia ihola ka pepa lae'ula mua loa i kākau 'ia ma ka 'Ōlelo Hawai'i wale nō a i kapa 'ia "Kuhi aku, kuhi mai, kuhi hewa ē: He mau loina kuhikuhi 'ākena no ka 'Ōlelo Hawai'i" ('Apelila 2006).

I. INTRODUCTION

On behalf of the unanimous United States Supreme Court in *Damon v. Territory of Hawaii*, the esteemed Justice Oliver Wendell Holmes wrote the following statement about a claim based on Hawaiian custom and usage:

> A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, . . . [t]he plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit.[1]

In *Branca v. Makuakane*, the Supreme Court of the Territory of Hawaii similarly acknowledged that:

> The New Englanders who early settled here did not come as a colony or take possession of these islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted until 1893 [sic] and then *subject to judicial precedents and Hawaiian national usage*.[2]

---

[1] 194 U.S. 154, 158 (1904) (reversing verdict for defendant and recognizing vested right to fishery abutting private property in action to quiet title brought within two year period required under provision of the Organic Act that confers exclusive fishing rights subject to vested rights); *see also* Carter v. Territory of Hawaii, 200 U.S. 255 (1906) (repeating the holding of *Damon v. Territory of Hawaii*, notwithstanding absence of any description of the fishery in royal land patent covering the abutting land).

[2] 13 Haw. 499, 504-05 (1901) (emphasis added) (vacating judgment for the defendants in a quiet title action concerning interpretation of a 1886 Hawaiian language deed, based on conclusion that the deed was clearly intended to convey fee simple title, and despite technical common law requirement to use the word "heirs" in order to accomplish such intent); *see also* O'Brien v. Walker, 35 Haw. 104, 131 n.18 (1939); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680-81 (1904); *In re* Guardianship of Parker, 14 Haw. 347, 350 (1902); Mossman v. Hawaiian Gov't, 10 Haw. 421, 434 (1896); *In re* Boundaries of Pulehunui, 4 Haw. 239, 241 (1879); Peck v. Bailey, 8 Haw. 658, 661 (1867); Keelikolani v. Robinson, 2 Haw. 514, 515-17, 518-20 (1862).

Although the Kingdom of Hawaii legislature actually adopted the statute referenced by the *Branca* court on November 25, 1892,[3] history reveals that these islands were "*governed until the year 1838, without other system than usage*, and with a few trifling exceptions, without legal enactments."[4]

The Kingdom of Hawaii subsequently preserved Hawaiian usage "in conjunction with the transition to a new system of land tenure,"[5] as a "kind of vaccine" or inoculation against the catastrophic consequences of likely colonization.[6] Accordingly, Hawaiian usage remained an important element of society in these islands "throughout the kingdom's legal history,"[7] under the Republic of Hawaii,[8] under the Territory of Hawaii (following the annexation of these islands to the United States in 1898),[9] and continuing after formal admission into the Union in 1959 of the State of Hawai'i.[10]

The Hawai'i Supreme Court has repeatedly recognized the ongoing applicability of Hawaiian usage in this jurisdiction.[11] Moreover:

---

[3] Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n (*PASH/ Kohanaiki*), 79 Hawai'i 425, 447 & n.39, 903 P.2d 1246, 1268 & n.39 (1995); *see also id.* at 437 n.21, 903 P.2d at 1258 n.2 (citing Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands, 1892, ch. LVII, § 5, 91 (King. Haw.)).

[4] *Id.* at 437 n.21, 903 P.2d at 1258 n.21 (quoting 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 3 (1845-46)).

[5] *Id.* at 446, 903 P.2d at 1267; *see also id.* at 437 n.21, 903 P.2d at 1258 n.21 (citing the Act of September 7, 1847, ch. I, § IV, 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands (1847)); *id.* at 445 n.33, 903 P.2d at 1266 n.33 (citing the Act of April 27, 1846, pt. I, ch. VII, art. IV, § 7, *reprinted in* 2 *Revised Laws of Hawaii* 2123 (1925)).

[6] Stuart Banner, *Preparing To Be Colonized: Land Tenure and Legal Strategy in Nineteenth Century Hawaii*, 39 LAW & SOC'Y REV. 273, 303 (2005).

[7] *PASH/Kohanaiki*, 79 Hawai'i at 446, 903 P.2d at 1267; *see also id.* at 437 n.21, 903 P.2d at 1258 n.21 (citing *The Civil Code of the Hawaiian Islands*, ch. III, §§ 14 & 823, at 7, 195 (1859)); *id.* at 449, 903 P.2d at 1270 (citing section 83 of the Organic Act, the Act of April 30, 1900, c. 339, 31 Stat. 141, 157, *reprinted in* 1 HAW. REV. STAT. 36, 74 (1985)).

[8] *See, e.g.*, Mossman v. Hawaiian Gov't, 10 Haw. 421, 434 (1896).

[9] *PASH/Kohanaiki*, 79 Hawai'i at 446, 903 P.2d at 1267. Although the Territorial legislature eventually deleted the term "national" from "Hawaiian national usage" in 1903, it nevertheless continued to recognize this long-standing, historical exception to the common law. *See* O'Brien v. Walker, 35 Haw. 104, 131 n.18 (1939).

[10] Hawaii Admission Act, Pub. L. No. 86-3, § 15, 73 Stat. 4, 11 (1959) [hereinafter Admission Act] (providing that all territorial laws shall continue in force in the State of Hawaii); *see also* HAW. CONST. art. XII, §7; HAW. REV. STAT. § 1-1 (1993). The Admission Act's severability clause (section 23) does not affect this analysis for the reasons set forth below. *See infra* notes 12-13 and accompanying text; *see also* Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005) [hereinafter Laughlin (2005)] ("*Ex proprio vigore* might not protect slavery but it could kill cultures.").

[11] *See* Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Hawai'i 31, 44, 48-49, 7 P.3d 1068, 1081-82, 1086-87 (2000); *In re* Water Use Permit Applications (*Waiāhole*), 94 Hawai'i 97, 130, 135-37, 9 P.3d 409, 442, 447-49 (2000); *PASH/Kohanaiki*, 79 Hawai'i at 438-47, 903 P.2d at

> It is clear from the historical events that led to statehood that protecting the special rights and claims of the Native Hawaiian People was an integral part of the statehood package and was an essential underpinning for the support that the Native Hawaiians gave to statehood. . . .
>
> In other words, Hawai'i would not have become a state if the people of Hawai'i had not agreed by vote to the requirement that the revenues from the Ceded Lands be used, in part, for "the betterment of the conditions of native Hawaiians."
>
> . . . It is significant that Congress reviewed this language [i.e., drafts of earlier statehood bills accepting any conditions of trust that Congress might put on the Public Lands transferred to the State of Hawai'i] (and the rest of the 1950 Constitution, which also accepted responsibility for administering the Hawaiian Homes Commission Act, 1920) and stated explicitly in Section 1 of the 1959 Admission Act that Hawai'i's Constitution "is hereby found to be republican in *form and in conformity with the Constitution of the United States* and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed."[12]

The express reference to "the betterment of the conditions of native Hawaiians" appears in Section 5(f) of the Admission Act.[13] Upon admission

---

1259-68; Pele Defense Fund v. Paty, 73 Haw. 578, 616-21, 837 P.2d 1247, 1269-72 (1992); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8-12, 656 P.2d 745, 748-52 (1982); Robinson v. Ariyoshi, 65 Haw. 641, 675-76, 658 P.2d 287, 310-11 (1982); State v. Zimring, 58 Haw. 106, 115-18, 566 P.2d 725, 731-33 (1977); County of Haw. v. Sotomura, 55 Haw. 176, 183, 517 P.2d 57, 62 (1973); State v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 204 (1970); *In re* Ashford, 50 Haw. 314, 315-16, 440 P.2d 76, 77-78 (1968); DeFreitas v. Coke, 46 Haw. 425, 429-30, 380 P.2d 762, 765-66 (1963).

[12] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I?, 302-03 (2006) (emphasis added).

> It cannot be doubted, therefore, that the State and the Federal Government entered into a bilateral compact regarding the revenues from these lands and that an essential part of that compact was that the State would transfer part of the revenues from these lands to the Native Hawaiian people in order to resolve, in part, the claims that Native Hawaiians have regarding these lands. Congress required the State and its people to agree to use lands and revenues for the Native Hawaiian People because of its recognition of the claims of the Native Hawaiian people and the need to make progress in resolving these claims.

Id. at 305; *see also* Eric Steven O'Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 535 (2001) ("If OHA violates the Fourteenth Amendment's Equal Protection Clause, does not the state constitution that led to its creation also violate Equal Protection?").

[13] Admission Act, § 5(f). In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Court abrogated the "equal footing" aspect of its prior decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), but reaffirmed the opinion to the extent it called for an inquiry into whether Congress intended for the prior rights of indigenous peoples to survive statehood. 526 U.S. at 176-85, 188-200, 201-02, 206-08 (distinguishing the Minnesota Admission Act's silence with respect to Indian treaty rights based upon close examination of the historical context). *Compare Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, *with Race Horse*, 163 U.S. at

of the State of Hawai'i into the Union,[14] the United States granted title to approximately 1.8 million acres that make up the "Ceded Lands Trust."[15] These lands are the subject of claims that both the federal and state governments recognize have not been relinquished by native Hawaiians.[16]

Thus, important differences in Hawaii's law and historical developments provide a crucial context for analyzing any claims involving the unique status of the Native Hawaiian people. For example, the relatively successful incorporation of diverse racial groups into the Kingdom of Hawaii's

---

505 (observing that Wyoming's admission act "contains no exception or reservation in favor of or for the benefit of Indians"); *see also Race Horse*, 163 U.S. at 514 (concluding that prior treaty rights were intended to be extinguished upon Wyoming's admission to the Union). Nevertheless, in *Race Horse*, the Court acknowledged that:

> Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory *it would be also within the power of Congress to continue them in the State, on its admission into the Union.* Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission.

Id. at 515 (emphasis added). The Hawai'i Admission Act is clearly distinguishable.

[14] Admission Act, §§ 5(b)-5(e); *see also* HAW. CONST. art. XVI, § 7 ("Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII."); *id.*, art. XII, § 4 (providing that the public lands granted to the State under section 5(b) of the Admission Act "shall be held by the State as a public trust for native Hawaiians and the general public").

[15] *See, e.g.*, Office of Hawaiian Affairs v. Housing & Cmty. Dev. Corp. of Haw. (*HCDCH*), 117 Hawai'i 174, 180-81, 177 P.3d 884, 890-91 (Haw. Jan. 31, 2008) (summarizing the historical background of the ceded lands and the public lands trust); Melody K. MacKenzie, *The Ceded Lands Trust*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 26-40 (Melody Kapilialoha MacKenzie, ed., 1991) (discussing the nearly 1.75 million acres of former Government and Crown Lands ceded to the United States by the Republic of Hawaii upon annexation in 1898).

[16] *See HCDCH*, 117 Hawai'i at 182-83, 177 P.3d at 890-91. The Hawai'i Supreme Court held that the State of Hawai'i has a fiduciary duty as trustee to "preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." *Id.* at 183, 177 P.3d at 893; *see also id.* at 187-89, 192, 177 P.3d at 897-99, 902. During deliberations concerning the proposed admission of Hawai'i into the Union, Delegate Joseph R. Farrington (Hawaii) explained that Native Hawaiians "have something of a prior consideration as to the use of the receipts of the land," and United States Senator Guy Cordon (Oregon) expressed his agreement that "the Hawaiians have not been wholly justly dealt with here . . . those lands are in no sense public lands as that term is understood in the United States." VAN DYKE, *supra* note 12, at 304 n.163 (quoting *Hearings on H.R. 49, S. 156, and S. 1782 Before the S. Comm. on Interior and Insular Affairs*, 81st Cong., 2d Sess. 354 (1950) (noting the legislative intent "to provide revenues for two separable beneficiaries," i.e., the general public and Native Hawaiians)).

multicultural society,[17] at least until the so-called "Bayonet Constitution of 1887,"[18] contrasts starkly with the treatment of minorities under the Republic of Hawaii[19] and in the United States as a whole.[20] These facts suggest a

---

[17] SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAII 411-12 (1991) ("The Hawaiian people welcome the stranger freely; rich and poor, high and low give what they can. The strangers call this love ignorance and think it good for nothing. The love upon which they depend is . . . based upon bargaining, good for nothing but rubbish blown upon the wind."); *see also id.* at 101 (praising *haole* efforts at establishing a democratic government); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 93 (2002) (describing the normalization of government service "as a bilingual, multiethnic activity into which Hawaiians sought to incorporate foreigners as well as their ideas"). A legislature that included no foreign representatives adopted denizen laws granting rights of citizenship to aliens, and Hawaiians repeatedly voted for non-Hawaiians based on their individual qualities. OSORIO, *supra*, at 63, 65, 68, 70, 73; *see also* KINGDOM OF HAWAII CONST., art. 78 (1852) (extending suffrage rights to all male subjects over twenty years of age, "whether native or naturalized, and every *denizen* of the Kingdom" who paid taxes and resided in the Kingdom for one year immediately preceding the election) (emphasis added).

Although the 1864 Constitution removed the reference to "equal" rights under Article 1 of the 1852 Constitution, King Lota Kapuāiwa (Kamehameha V) responded to Reverend J. Porter Green's contention that reinstatement of this language would be necessary to "safeguard against the encroachments of the white against the native race," by asserting that "[t]he *laws* and not this amendment will protect the native race against the white. . . . and as the words convey no political rights, they are useless." OSORIO, *supra*, at 132-33. The changes reflected in the 1864 constitution made political power an issue of class, not race. *Id.* at 144; KINGDOM OF HAWAII CONST., art. 62 (1864) (inserting property and literacy requirements for voting). Notwithstanding the apparent discriminatory character of such requirements from a modern perspective, it is important to remember that the United States Congress did not definitively prohibit voting qualifications based on literacy and property until the Voting Rights Act of 1965. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[18] The first time that democratic rights were determined by race in any Hawaiian constitution occurred when a group of predominantly white subjects (along with "a few members of part Hawaiian ancestry" with no identifiable Hawaiian names) forced the so-called Bayonet Constitution upon King Kalākaua in an 1887 *coup d'etat*. OSORIO, *supra* note 17, at 237, 244 (quoting 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 348 (1967)). Asian citizens of the Kingdom were subsequently disenfranchised as a result of this bloodless revolution. *Id.* at 243; *see also* KINGDOM OF HAWAII CONST., art. 59 (1887) (limiting the franchise to Hawaiian, European and American males over twenty years of age, who owned at least $3000 worth of property or earned at least $600 the previous year, paid their taxes, resided in the Kingdom for at least three years, and were able to read either "Hawaiian, English or some other European language"). *But see* OSORIO, *supra* note 17, at 143 (stating that "it was race that determined political legitimacy"); *id.* at 144 ("Native voters and representatives began to insist that the real struggle for the nation was defined by race."). The overthrow of the kingdom ostensibly resulted from Queen Lili'uokalani's intention to promulgate an amended constitution limiting the vote to Hawaiian-born or naturalized citizens. Melody K. MacKenzie, *Historical Background*, *in*, NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 15, at 11.

[19] The constitutional convention convened by the Provisional Government that led to the establishment of the Republic included "voting qualifications so stringent that few Hawaiians and no Asians could vote." Chris K. Iijima, *Race Over Rice: Binary Analytical Boxes and a*

further basis for understanding Native Hawaiians' ongoing claims for justice, which stem "from the racial and cultural subordination inherent in their colonization and the longstanding assault on their sovereignty."[21]

Native Hawaiians may indeed constitute a "discrete and insular minority"[22] consistent with the doctrine discussed in greater detail by other symposium participants. However, in light of: (1) past, unsuccessful attempts to invoke the doctrine here in Hawai'i;[23] (2) similar failures with regard to at least one

---

Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano, 53 RUTGERS L. REV. 91, 106 (2000); MacKenzie, *supra* note 18, at 13 n.89.

[20] Ratification of the Thirteenth Amendment in 1865 represented progress away from the embarrassingly explicit adverse treatment of slaves in the United States constitution; however, the broken promises of the First and Second Reconstructions reveal that legal acceptance of discrimination continues to represent a substantial barrier to equal opportunity in America. Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 531-54 (2001); *see also* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth Century Race Law*, 88 CAL. L. REV. 1923, 1943-44 (2000) (discussing the Chinese Exclusion Act of 1882); *id.* at 1947 (describing the federal naturalization act of 1790's limitation to "free white persons"); *see also* Ozawa v. United States, 260 U.S. 178, 195 (1922) (denying citizenship petition filed by individual of Japanese descent residing in the Territory of Hawaii); United States v. Thind, 261 U.S. 204 (1923) (concluding that high-caste Hindu of full Indian blood was ineligible for naturalization). To add insult to injury, the United States Supreme Court repeatedly upheld laws prohibiting "aliens ineligible for citizenship" from owning property. *See generally* Keith Aoki, *No Right To Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 37-38 & nn.4-5 (1998); *id.* at 56-71 (explicating the lessons of the alien land laws).

[21] Iijima, *supra* note 19, at 97; *see also*, Susan K. Serrano et al., *Restorative Justice For Hawai'i's First People: Selected Amicus Curiae Briefs In* Doe v. Kamehameha Schools, 14 ASIAN AM. L.J. 205, 210-11 (2007) (discussing Amicus Brief of the Japanese American Citizens League of Hawai'i-Honolulu Chapter, Centro Legal de la Raza, and the Equal Justice Society In Support Of Defendants-Appellees' Petition For Rehearing En Banc, arguing that the court's inquiry must incorporate the context of colonization and its resulting "devastation" of the native people).

[22] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *See generally*, Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163 (2004).

[23] United States District Court Judge Harold Fong decried the "absurdity" of claims by a group of property owners, including the Bishop Estate, that the group constituted "'discrete and insular minorities' who deserve special judicial protection because they lack access to the political system." Small Landowners of Oahu v. City & County of Honolulu, 832 F. Supp. 1404, 1409 (D. Haw. 1993) (upholding city ordinance providing for lease-to-fee conversion of condominium units). Judge Fong explained that the "*power of the Bishop Estate in Hawaii* belies any claim that it lacks access to the political system." *Id.* (emphasis added).

In addition, United States District Judge David Alan Ezra cited *Carolene Products* to support his ruling *against* a class of visually impaired persons who use guide dogs seeking exemption from a 120-day quarantine requirement, based on the state's compelling interest in remaining rabies free. Crowder v. Kitagawa, 842 F. Supp. 1257, 1263 (D. Haw. 1993), *rev'd and remanded*, 81 F.3d 1480 (9th Cir. 1996) (instructing the trial court to determine whether

Indian tribe;[24] (3) questions regarding the durability of the protections provided under this doctrine;[25] and (4) perceptions concerning shifts in judicial politics,[26] this article focuses instead upon the Hawaiian usage exception to the adoption of English and American common law.[27]

> [W]hile the argument for special consideration for laws protecting indigenous cultures . . . is certainly plausible, it is by no means a certain winner. It would

---

plaintiffs' proposed modifications were reasonable under the Americans with Disabilities Act, and declining to address their constitutional claims).

[24] *See* Miccosukee Tribe of Indians of Florida v. United States, 980 F. Supp. 448, 465-66 (S.D. Fla. 1997) (rejecting claim by an Indian tribe for *Carolene Products* status).

[25] *See* Gilman, *supra* note 22, at 240-41 ("[O]nce a group is protected, it remains a protected class until the courts are willing to say that it is no longer suspect."). *Compare* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."), *with* The Civil Rights Cases, 109 U.S. 3, 25 (1883) (invalidating 1875 Civil Rights Act a mere eight years after its enactment). In *The Civil Rights Cases*, the United States Supreme Court stated as follows:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

Id. at 25.

[26] *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

[27] HAW. REV. STAT. § 1-1 (1993); *see also supra* notes 1-11 and accompanying text. In *PASH/Kohanaiki*, the Hawai'i Supreme Court applied Hawaiian custom and usage to "conclude that the western concept of exclusivity is not universally applicable in Hawai'i." 79 Hawai'i 425, 438-47, 903 P.2d 1246, 1259-68 (1995). Predictably strong reactions to this decision prompted restrictive responses by the State legislature and at least one county planning agency. Kapua D. Sproat, Comment, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, 350 n.220, 369 (1998); David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 Hawai'i B.J. 1, 2-5 (1998). The court subsequently issued *unpublished* summary disposition orders in July 2008 that affirmed trespass convictions in two cases involving reams of evidence to support the defendants' respective claims based on Hawaiian usage, as introduced by highly experienced legal practitioner (and former Assistant as well as Acting Federal Public Defender) Hayden Aluli. State v. Fergerstrom, 88 Hawai'i 371, 966 P.2d 1097 (1998); State v. Keliikoa, 88 Hawai'i 371, 966 P.2d 1097 (1998). Approximately four months later, in *State v. Hanapi*, 89 Hawai'i 177, 970 P.2d 485 (1998), the court affirmed an *unrepresented* defendant's trespass conviction despite repeated interruptions by the trial court judge sustaining the prosecutor's objections to attempts by the defendant to introduce evidence supporting his claim of Hawaiian usage. The court's unexplained decision to publish an opinion under the latter circumstances, but not the former, raises the question whether expectations regarding the potential promise of relying on Hawaiian usage claims may need to be tempered based upon the political climate. *See supra* note 26.

> seem to me to be safer to follow the [*Wabol v. Villacrusis*[28]] route, that is, to argue that a different . . . standard is applicable . . . .[29]

The main focus of this article is an examination of how *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*[30] fits into the broader context of Native Hawaiian law, history and society. Part II sets the stage for this inquiry by identifying the contextual nature of the racial discrimination analysis undertaken in *Wabol v. Villacrusis*,[31] and highlighting the conclusion that the United States Constitution was not intended to enforce homogeneity. Part III introduces the admissions policy preference for Native Hawaiians at Kamehameha Schools, using brief remarks by Judge Ezra about "ancient Hawaiian law" and "the law of the kingdom"[32] as a launching point for further discussion. A cautionary tale is then presented in Part III with respect to the inherent complexities of asserting and analyzing Hawaiian usage claims.

Drawing initially from a decision with indirect Hollywood connections, Part IV scrutinizes the Hawaiian custom and usage of adoption and establishes its roots in a succinct 1871 opinion by the Supreme Court of the Kingdom of Hawaii. After emphasizing the importance of recognizing that Hawaiian usage allegations must be analyzed on a case-by-case basis, this part concludes by acknowledging the continued relevance of Hawaiian usage despite the passage of time and evolving language practices.

In Part V, the *ali'i* tradition of caring and providing for others supplies the context for exploring potential implications of the Hawaiian usage exception for Kamehameha Schools' admissions policy preference. Building upon the cautionary tale woven in Part IV, the article briefly describes educational developments in Hawai'i, then identifies further judicial and scholarly support for applying the Hawaiian usage exception. With this foundation in place, the article returns full-circle to the humanitarian principles underlying the *Wabol*

---

[28] 958 F.2d 1450 (9th Cir. 1992) (rejecting Equal Protection challenge to a "racial" restriction on alienation of land in the Commonwealth of the Northern Marianas Islands).

[29] Laughlin (2005), *supra* note 10, at 345-46.

[30] 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd in part and rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[31] *Wabol*, 958 F.2d at 1458-60; *see also infra* notes 36-42, 46, 49-50 and accompanying text.

[32] Vicki Viotti & Mike Gordon, *Kamehameha Settlement Ok'd*, HONOLULU ADVERTISER, Dec. 5, 2003, at B1, *available at* http://the.honoluluadvertiser.com/article/2003/Dec/05/ln/ln20a.html. Although Judge Ezra's remarks were apparently transcribed by the court, the author has not been able to verify the accuracy of his reported statements.

decision, as distinguished from the (at least unconsciously)[33] racist attitudes that are sometimes couched in "color-blind" rhetoric.[34]

Finally, the article closes in Part VI by suggesting that some of the "hardest questions about law and social justice"[35] associated with Native Hawaiian claims (as well as counterarguments raised by their opponents) may best be addressed by looking to the Hawaiian usage exception as a means for protecting cultural values and resources.

II. PLACING RACIAL DISCRIMINATION CLAIMS IN CONTEXT: THE "IMPRACTICAL AND ANOMALOUS" APPLICATION OF EQUAL PROTECTION THEORY

The racial discrimination claim in *Wabol*[36] failed because "[i]n the territorial context, the definition of a basic and integral freedom must narrow to *incorporate the shared beliefs of diverse cultures*. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this

---

[33] *See, e.g.*, Charles A. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation With John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1379-81 (2005) [hereinafter Lawrence, *Forbidden Conversations*]; *see also* Charles A. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Professor Lawrence reports that Ely agreed with his argument that unconscious racism was also likely to distort legislative judgment upon reading an early draft of the article Lawrence eventually published in 1987. Lawrence, *Forbidden Conversations*, *supra*, at 1380 n.51.

[34] *See, e.g.*, Danielle Conway-Jones, *The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in* Rice v. Cayetano, 3 ASIAN-PAC. L. & POL'Y J. 371, 372 n.3 (2002) ("Color-blindness is a convenient tool of the privileged. It lies dormant for some issues and alive for others."); Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 263 (2000) (calling for greater attention to the "sometimes unpleasant" lessons that can be learned by examining decisions that "serve as an important corrective against some of the more cheerleading views of constitutional history (and the Supreme Court) as necessarily progressive in its thrust"); *see also* Chris K. Iijima, *Swimming from the Island of the Colorblind: Deserting an Ill-Conceived Constitutional Metaphor*, 17 LOY. L.A. ENT. L. REV. 583, 590 n.43, 591 nn.52-54 (2004).

[35] Christopher W. Schmidt, Doe v. Kamehameha*:* *Section 1981 and the Future of Racial Preferences in Private Schools*, 42 HARV. C.R.-C.L. L. REV. 557, 557 (2007).

[36] 958 F.2d 1450 (9th Cir. 1992). Under a Trusteeship Agreement entered into with the United Nations in 1947, the United States obligated itself to promote independence and self-government for the Northern Marianas islands' inhabitants, to protect against the loss of lands and resources, and to "protect the rights and fundamental freedoms of *all elements of the population without discrimination*." *Id.* at 1458 (emphasis added) (quoting Trusteeship Agreement for the Former Japanese Mandated Islands, art. VI, §§ 2-3, July 18, 1947, 61 Stat. 3301); *see also id.* at 1459 n.15 (observing that the non-native lessee did not argue violation of this non-discrimination provision).

international sense."[37] In the course of resolving this question of first impression, the *Wabol* court observed that extension of fundamental rights to the territories does not mean that strict scrutiny automatically applies.[38] Rather, judicial inquiries in this area must be undertaken with due regard for the "unique social and cultural conditions and values" of the place.[39]

Thus, in *Wabol*, a "solid understanding of present conditions"[40] revealed both the scarce and precious nature of land and the vital role it played in family identity.[41] The relevant legal history further established that the political union between the Northern Marianas Islands and the United States could not have been accomplished without the challenged policy.[42] Similar considerations arguably apply in Hawai'i.[43]

Although Hawai'i is no longer a territory, the analysis in *Wabol* arguably retains relevance here due to the fact that these islands were listed on the United Nations' list of non-self governing territories (from 1946 through 1959),[44] along with the other Pacific Island territories:[45]

---

[37] *Id.* at 1460 (second emphasis added); *see also id.* (distinguishing fundamental rights necessary under "an Anglo-American regime of ordered liberty" pursuant to the Equal Protection clause, from fundamental rights under the territory clause which are "the basis of all free government" in the "international sense") (quoting Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968), and Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984)).

[38] *Id.* at 1460 n.19 ("It is the specific right of equality that must be considered . . . rather than the broad general guarantee of equal protection.").

[39] *Id.* at 1460.

[40] *Id.* at 1461 (internal brackets omitted).

[41] *Id.*

[42] *Id.* (stressing further that, "the preservation of local culture and land is more than mere desideratum—it is a solemn and binding undertaking memorialized in the Trusteeship Agreement"); *see also id.* at 1458 (summarizing the United States' obligations as trustee). Fifteen years after the lawsuit began, the matter was still pending before the trial court as of at least 2000. Wabol v. Villacrusis, 2000 N. Mar. I. LEXIS 17 (N. Mar. I. 2000) (vacating order dismissing the lawsuit for failure to prosecute).

[43] *See supra* notes 12-16, 21 and accompanying text.

[44] David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1, 33 (2006); *see also* S. James Anaya, The *Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 334 & n.67 (1994) (citing Communication from the Government of the United States of America, U.N. GAOR, 14th Sess., Annexes, Agenda Item 36, at 2, U.N. Doc. A/4226 (1959)).

[45] *See, e.g.*, Barnard, *supra* note 44, at 33-34. David Barnard argues that the United States' obligations as trustee under international law were not fulfilled by virtue of the statehood plebiscite, which was deficient for two reasons: (1) it did not provide independence as an option; and (2) it allowed the majority settler population to vote. *Id.*; *see also* Anaya, *supra* note 44, at 334-36.

> The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a *genocide pact for diverse native cultures*. . . . Its bold purpose was to *protect minority rights, not to enforce homogeneity*.[46]

Of particular relevance to the Kamehameha Schools, therefore, is the emerging (if not already established) principle of customary international law which recognizes that

> [i]ndigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.[47]

Consistent with such rights, Professors Robert Seto (Retired Judge, United States Court of Federal Claims) and Lynne Krohm observed more specifically that Ke Ali'i Bernice Pauahi Bishop's deep commitment to education stems from centuries of Native Hawaiian tradition and values, which regard knowledge as sacred.[48]

Given that the restriction on alienation of land in *Wabol* represented an admittedly "paternalistic" attempt to protect local culture and values,[49] it would be even more "impractical and anomalous"[50] to rely upon Equal

---

[46] *Wabol*, 958 F.2d at 1462 (emphasis added) (citing Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 386-88 (1991)).

[47] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, at art. 14(1) (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/drip.html. Although the United States joined Australia, Canada, and New Zealand in registering the only four negative votes (143-4-11), our federal government nevertheless argued that it promotes the autonomy of its indigenous peoples regarding inherent powers of self-government including education. *See* S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment*, JURIST (2007), http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php (last visited Feb. 23, 2008).

[48] Judge Robert Mahealani M. Seto & Lynne Marie Krohm, *Of Princesses, Charities, Trustees and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 U. HAW. L. REV. 393, 399 (1999) (citing GEORGE HUE'EU SANFORD KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY 36 (1986)). *See generally id.* at 397-404. For a contrary (albeit demeaning) view of Ke Ali'i Bernice Pauahi Bishop's wishes, see Paul D. Carrington, *Testamentary Incorrectness: A Review Essay*, 54 BUFF. L. REV. 693, 699, 713 (2006) (concluding, rather summarily, that her aims were "integrationist" rather than to "perpetuate . . . the often oppressive ancient culture").

[49] 958 F.2d at 1461.

[50] *Id.* at 1461-62 (considering "the particular local setting, the practical necessities, and the possible alternatives" pursuant to Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).

Protection as a basis for invalidating the act of self-determination that is reflected in Kamehameha Schools' admission policy.[51]

III. PAST AND FUTURE CHALLENGES TO KAMEHAMEHA SCHOOLS' ADMISSIONS POLICY PREFERENCE FOR NATIVE HAWAIIANS

The approximately twelve decades-old admissions policy at Kamehameha Schools provides a "preference to Hawaiians of pure or part aboriginal blood."[52] Non-Hawaiians only rarely have been admitted to these schools, including perhaps two in 1930,[53] numerous children of faculty members between 1946-1966,[54] Kalani Rosell in 2002[55] and, most recently, Brayden Mohica-Cummings in 2003.[56] Reminiscent of the protests that took place following the 1930 admissions decisions,[57] the more recent actions in 2002 and 2003 also generated substantial controversy within Native Hawaiian communities.[58]

---

[51] *See supra* Part II for a short introduction to the history behind this policy. For an explanation why "Native Hawaiians" is not a racial classification, see Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998); *see also* Laughlin (2005), *supra* note 10, at 346 n.73 (stating "[t]here is, however, no reason why the two approaches could not be used together. One could argue that the Constitution does not apply, but that if it does, the [*Morton v. Mancari*, 417 U.S. 535 (1974), or 'political status'] standard should as well").

[52] Will of Bernice Pauahi Bishop (Oct. 31, 1883), *available at* http://www.ksbe.edu/pauahi/will.php. Pauahi's will directed her trustees to educate orphans and other indigents, giving preference to pure or part-Hawaiians, and also gave the trustees broad powers to develop Kamehameha Schools' admissions policy. *See, e.g.*, Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1154-57 (D. Haw. 2003), *aff'd in part and rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[53] Vicki Viotti, *Kamehameha Standards Debated*, HONOLULU ADVERTISER, Nov. 17, 2003, at B1, *available at* http://the.honoluluadvertiser.com/article/2003/Nov/17/ln/ln15a.html; *see also* Jennifer Hiller, *Kamehameha Policy Awakens Emotional Issue*, HONOLULU ADVERTISER, July 13, 2002, http://the.honoluluadvertiser.com/article/2002/Jul/13/ln/ln02a.html.

[54] Viotti, *supra* note 53; Hiller, *supra* note 53.

[55] Brent Suyama, *Kamehameha Schools to Admit Non-Hawaiian*, KITV News, July 11, 2002, http://www.kitv.com/education/1555150/detail.html (last visited Feb. 23, 2008); *see also* Crystal K. Glendon, *A Political Solution for a Legacy Under Attack: The Akaka Bill's Potential Effect on the Kamehameha Schools*, 26 U. HAW. L. REV. 69, 70 n.7 (2003).

[56] *Student Challenges Kamehameha Schools Policy*, KITV News, Aug. 18, 2003, http://www.kitv.com/education/2414385/detail.html (last visited Feb. 23, 2008); *see also* Glendon, *supra* note 55, at 70 n.6.

[57] Viotti, *supra* note 53.

[58] Adam Liptak, *School Set Aside for Hawaiians Ends Exclusion to Cries of Protest*, N.Y. TIMES, July 27, 2002, http://query.nytimes.com/gst/fullpage.html?res=9C06EEDF163BF934A15754C0A9649C8B63&sec=&spon=&pagewanted=all (quoting University of Hawai'i Professor Haunani-Kay Trask's observation that "the pain was so palpable you could almost

Kamehameha Schools later rescinded Mohica-Cummings' invitation after discovering misleading and inaccurate documentation about his purported Native Hawaiian ancestry—i.e., by virtue of his mother (Kalena Santos) having been adopted and raised by Melvin Cummings, who is part-Hawaiian.[59] The Honorable David Alan Ezra, at that time Chief Judge of the United States District Court for the District of Hawai'i, granted a temporary injunction ordering Kamehameha Schools to admit Mohica-Cummings.[60] Four months later, the parties entered into a voluntary settlement allowing the boy to matriculate.[61] In an oral ruling approving the settlement, Chief Judge Ezra reportedly stated that "ancient Hawaiian law" supports the conclusion that Brayden's mother is Hawaiian (and, therefore, so is her son).[62] Emphasizing "the law of the kingdom" as reflected in a decision by the Supreme Court for

---

smell people's anger"); *see also* Rick Daysog, *Angry Ohana Grills Trustees*, HONOLULU STAR BULL., July 16, 2002, at A1, *available at* http://starbulletin.com/2002/07/16/news/story1.html; Rick Daysog, *7,000 Call on Trustees to Alter Policy*, HONOLULU STAR BULL., July 26, 2002, at B1, *available at* http://starbulletin.com/2002/07/26/news/story5.html; Glendon, *supra* note 55, at 69-70 & nn.5-7 (citing Rosemarie Bernardo, *50 Protest Ezra Ruling at Kamehameha Gate*, HONOLULU STAR BULL., Aug. 21, 2003, at A1, A12).

[59] Brent Suyama, *Judge Delays Ruling on Kamehameha Admissions Policy*, KITV News, Aug. 19, 2003, http://www.kitv.com/education/2419748/detail.html (last visited Feb. 23, 2008).

[60] Mohica-Cummings v. Kamehameha Schools/Bernice Pauahi Bishop Estate, CV NO. 03-00441 DAE-BMK (D. Haw. 2003) (unpublished Order Granting Plaintiff's Application for Temporary Restraining Order and Preliminary Injunction). Judge Ezra concluded that the evidence did not establish that Brayden's mother committed "subterfuge," nor that she intended to perpetuate the schools' reliance on inaccurate information. *Id.* at 10-11. He added that Kamehameha Schools should have completed its investigation more than three weeks before Plaintiff was to matriculate, and that rescinding his acceptance two days before he was to board an airplane to attend the orientation was simply too late. *Id.* at 11; *see also id.* at 13 (observing that Plaintiff had already "missed almost three weeks" of public school "and likely lost the opportunity to participate in other activities because of his reliance on his admission to [Kamehameha Schools]"); *id.* at 16 (stressing the "unique factual circumstances" including the "overall disruption" to Plaintiff's "emotional, academic, and social well-being"). Among other things, Judge Ezra cited the irreparable harm Mohica-Cummings would suffer if not admitted, since he had already missed three weeks of school at Kapa'a Middle School on Kaua'i. *Id.* at 7, 13, 16.

[61] Mohica-Cummings v. Kamehameha Schools/Bernice Pauahi Bishop Estate, CV NO. 03-00441 DAE-BMK (*Stipulation to Dismiss*) (D. Haw. 2003) (unpublished Stipulation and Order for Dismissal with Prejudice). Without admitting liability, Kamehameha Schools agreed to allow Brayden to continue attending its Kapālama campus, subject to generally applicable standards of conduct, and to remove from its website all references to the facts and circumstances of his application. *Id.* at 5.

[62] Viotti & Gordon, *supra* note 32; *see also* Board of Trustees, Kamehameha Schools, Trustee Message: *Kamehameha Schools and "John Doe" Settle Admissions Lawsuit* (May 14, 2007), http://www.ksbe.edu/article.php?story+20070514073144797 (last visited Feb. 23, 2008).

the Territory of Hawaii one year before statehood,[63] the distinguished judge invoked the terms *keiki hānai* and *keiki ho'okama* in use at the time of Pauahi's will.[64] Chief Judge Ezra ultimately approved the settlement,[65] at least in part because the school's admissions policy faced further legal review in *Doe v. Kamehameha Schools*.[66]

U.S. District Judge Alan Kay issued an order upholding Kamehameha Schools' admissions policy less than three weeks before the Mohica-Cummings settlement.[67] Judge Kay rejected claims by an anonymous, non-Native Hawaiian minor alleging that the decision to deny him admission to Kamehameha Schools because of his race violated 42 U.S.C. section 1981 (i.e., the Civil Rights Act of 1866).[68] A three-judge panel of the United States Court of Appeals for the Ninth Circuit later reversed that decision by a 2-to-1 vote,[69] but an 8-to-7 vote by an en banc panel held that the schools' admissions policy preference for students of Native Hawaiian ancestry did not violate the Civil Rights Act of 1866.[70] While a petition for certiorari was pending before the United States Supreme Court, the parties announced that they had reached a voluntary out-of-court settlement and subsequently terminated the proceedings on May 11, 2007.[71]

---

[63] Viotti & Gordon, *supra* note 32 (presumably relying upon *In re* Farrington, 42 Haw. 640 (1958))

[64] *Id.* Judge Ezra appears to have relied upon the following excerpt from *In re Farrington*: "The two types of children taken by foster parents were the *keiki hanai*, who were not truly adopted but merely reared in the home, and the *keiki hookama*, the latter being regarded the same as actual children of the blood." 42 Haw. 640, 650 (1958). This sentence follows a quote from *In re Estate of Nakuapa (Nakuapa I)*, 3 Haw. 342 (1872), which is discussed in greater detail below. *See infra* Part IV.B.

[65] *See generally Stipulation to Dismiss*, CV No. 03-00441 DAE-BMK.

[66] Viotti & Gordon, *supra* note 32 ("U.S. District Judge David Ezra ruled that the settlement is in the best interest of the plaintiff, 12-year-old Brayden Mohica-Cummings, and does not interfere with the public interest because the legal review of the schools' admission policy will continue through an appeal of a similar case."); *see also infra* notes 67-71 and accompanying text (discussing the prior decision in, and subsequent appeals of, *Doe v. Kamehameha Schools*).

[67] Rick Daysog, *Federal Judge Upholds Hawaiians-Only School*, HONOLULU STAR BULL., Nov. 18, 2003, http://starbulletin.com/2003/11/18/news/story1.html.

[68] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd in part and rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[69] *Kamehameha Schools/Bernice Pauahi Bishop Estate*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[70] *Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[71] Ken Kobayashi, *Suit on Kamehameha Admissions Settled*, HONOLULU ADVERTISER, May 14, 2007, http://the.honoluluadvertiser.com/article/2007/May/14/br/br2179083645.html; Adam

No less than a day after this announcement, at least one effort commenced to solicit plaintiffs for a future lawsuit challenging Kamehameha Schools' admissions policy.[72] Honolulu attorney David Rosen explained that his opposition to the policy stemmed from "concern about the misuse of race and origin in Hawaii" including claims for "'entitlements' based on events that occurred during the time of our great-grandparents or their great-grandparents."[73] Earlier, others asserted that they were "likely to file other suits, if necessary, until the U.S. Constitution's promise of Equal Protection of the laws is once again the law of the land in Hawaii."[74]

Liptak, *Prestigious Private Schools Settle Rights Suit By Non-Hawaiian*, N.Y. TIMES, May 15, 2007, http://nytimes.com/2007/05/15/us/15hawaii.html?_r=1&oref=slogin. One commentator quickly suggested a parallel to the $400,000 settlement funded by civil rights organizations following *Piscataway School Board v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), in which the court reportedly "held that the school board violated the law by giving an African American teacher extra seniority over a white teacher hired the same time for purposes of a lay off." Gail Heriot, *Doe v. Kamehameha Schools Settles*, May 12, 2007, http://rightcoast.typepad.com/rightcoast/2007/05 (last visited Feb. 23, 2008).

One of John Doe's attorneys revealed that Kamehameha Schools settled the case for seven million dollars. Ken Kobayashi, *$7M: An Attorney Involved in a Challenge to Kamehameha Schools' Hawaiians-Only Policy Reveals the Amount of a Settlement*, HONOLULU STAR BULL., Feb. 9, 2008, *available at* http://starbulletin.com/2008/02/09/news/story02.html [hereinafter $7M Settlement]; Jim Dooley, *School's $7M Deal Raises Ire, Eyebrows*, HONOLULU ADVERTISER, Feb. 9, 2008, http://the.honoluluadvertiser.com/article/2008/Feb/09/ln/hawaii802090332.html; Robert Shikina, *Amount of Settlement Raises Critical Concern*, HONOLULU STAR BULL., Feb. 9, 2008, http://starbulletin.com/2008/02/09/news/story03.html.

[72] *Attorney Solicits Plaintiffs for Kamehameha Schools Lawsuit*, KITV News, May 22, 2007, http://www.kitv.com/news/13370001/detail.html (last visited Feb. 23, 2008); *see also* http://supportkamehameha.org/2007/05/23/attorney-fishes-forplaintiffs-in-doe-redux (last visited Feb. 23, 2008) (posting a copy of Honolulu attorney David Rosen's May 15, 2007 email to H. William Burgess and Richard Rowland); $7M Settlement, *supra* note 71 (reporting Rosen's claim that he now has plaintiffs for a lawsuit and expects to file suit in 2008).

[73] David B. Rosen, Commentary, *Why I Want to Sue Kamehameha, or, Who is this #$@!*%$ Haole?*, HONOLULU STAR BULL., May 27, 2007, http://starbulletin.com/2007/05/27/editorial/commentary1.html. Attenuation arguments like Rosen's ignore the privileged status that all non-native residents of Hawai'i, myself included, benefit from as a result of the loss of Hawaiian sovereignty and the demise of Hawaiian land ownership (in addition to the presumptions of inferiority that contributed to these past wrongs). *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 379-80 (1987).

[74] *See, e.g.*, Brief for Earl F. Arakaki et al. as Amici Curiae Supporting Petitioner at 2, Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, ___ U.S. ____, 127 S. Ct. 2160 (2007) (No. 06-1202), 2007 WL 1023080.

IV. BACK TO THE FUTURE:[75] THE CONTINUING RELEVANCE OF NATIVE HAWAIIAN CUSTOM AND USAGE

Chief Judge Ezra acknowledged that Brayden Mohica-Cummings' challenge to Kamehameha Schools' admission policy did not raise issues relating to his mother's link to a Hawaiian family.[76] The judge nevertheless brought tears of joy to Brayden's mother eyes by arguing that she is Hawaiian under kingdom law.[77] Supporters of the Kamehameha Schools had a somewhat different reaction:

> "How dare he?" asked Kaho'onei Panoke, vice president of the [Hawaiian political-action group] 'Ilio'ulaokalani Coalition. "It does not mean that the child inherits your bloodline. His incorrect definition is very, very disrespectful. . . . It tells me that he (Ezra) did not live among Native Hawaiians and if he did, he did not learn well."
>
> The group's president, Vicky Holt Takamine, added that Bishop herself was the hanai sister of Queen Lili'uokalani.
>
> "Neither of them claimed the genealogy of the other," she said.[78]

Statements by other Hawaiians suggested that the issue may be more complex. For example:

> Kawaikapuokalani Hewett, a kumu hula and hanai father of three grown children, said he believes hanai relationship is equivalent to blood.
>
> "If that Hawaiian family stands up and says, 'This is my hanai daughter,' that's the beginning and the end for me" Hewett said. "If Hawaiians are not honoring our traditions, then are we Hawaiians?"[79]

---

[75] *See, e.g.*, LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 321 (1992) ("History must be more than a simple telling of a story. Our ancestors recounted histories to learn valuable lessons from wise decisions or foolish mistakes made in the past, in order that the *hewa* or 'wrong' might never be repeated again.").

[76] Viotti & Gordon, *supra* note 32; *see also supra* notes 61-69 and accompanying text.

[77] Viotti & Gordon, *supra* note 32.

[78] *Id.* Dr. Kekuni Blaisdell, a prominent Hawaiian sovereignty activist and Kamehameha Schools graduate, stated that Mohica-Cummings has no *hānai* claim but agreed that it would have been harmful to take Mohica-Cummings out of school out after he had already been accepted. *Id.* Although Blaisdell's biological daughter is also a graduate, he did not seek admission for his own Japanese-born *hānai* son because he lacked Hawaiian ancestry. *Id.*

[79] *Id.* According to Patience Namaka Bacon, Hawaiian language expert and Bishop Museum cultural specialist (also, *hānai* daughter of the late Hawaiian scholar Mary Kawena Pukui—to whom Kamehameha Schools said that Hawaiian ancestry is required in response to her request that Pat be admitted), the term *hānai* means the adoption of an infant or very young child, whereas *ho'okama* refers to the adoption of an adult or older child no longer needing nurturing. *Id.*

Indeed, Hawaiian usage and customs continue to be an integral part of the law, history and society of these islands.[80] However, the divergent views expressed immediately following Judge Ezra's oral ruling reveal the need for further inquiry and analysis.

A. Judicial Recognition of the Hawaiian Custom and Usage of Adoptions, Including the Distinct Rights of Keiki Hānai *and* Keiki Ho'okama

Almost two decades prior to *In re Farrington*,[81] the Supreme Court of the Territory of Hawaii decided the "Mamo Clark case,"[82] which contained a more thorough discussion of the distinction between *keiki hānai* and *keiki ho'okama*. Looking to Hawaiian dictionaries published in 1836, 1865 and 1887, the *O'Brien v. Walker* court explained that "*e hookama*" means to "adopt" while "*keiki hanai*" simply means "a foster child or a ward."[83] The court then looked to Hawaiian customs and usage in an effort to ascertain the intent behind the term "lawful issue" in an 1896 deed of trust.[84]

The trust provided in pertinent part that, upon the death of the last of John A. Cummins' four surviving children, his estate and all its property would be distributed to the lawful issue of his children.[85] Cummins died in January 1913; his last surviving child died in November 1937.[86] The trustee for the estate then sought instructions whether to include Mamo Clark in the distribution of trust assets because she had been adopted (as an infant) by one of Cummins' daughters in December 1914.[87]

Absent any indication of Cummins' intent within the trust document itself,[88] the court looked to the surrounding circumstances of his life beginning near "the close of the era of unwritten law ending in 1841 and therefore nurtured

---

[80] *See supra* notes 1-16 and accompanying text.

[81] 42 Haw. 640 (1958).

[82] *Id.* at 656 (discussing the "Mamo Clark case"). *See* O'Brien v. Walker, 35 Haw. 104 (1939), *aff'd*, 115 F.2d 956 (9th Cir. 1940) (recognizing an adopted child, Mamo Clark, as the "lawful issue" of the testator's daughter). Mamo Clark made her film debut as an actress in the 1935 film, *Mutiny on the Bounty*. Mamo Clark—Biography, http://movies.yahoo.com/movie/contributor/1800098197/bio.

[83] *O'Brien*, 35 Haw. at 128-29 (emphasis added); *see also id.* at 119 (recognizing the distinction).

[84] *Id.* at 116-32.

[85] *Id.* at 106-07.

[86] *Id.* at 107.

[87] *Id.* at 105, 107. In his dissenting opinion, Chief Justice Coke argued that there had never before been an adoption in the Cummins family, and that his daughter did not adopt Mamo Clark until almost "twenty years after he had executed his deed and in fact not until after his death." *Id.* at 142, 145 (Coke, C.J., dissenting in part).

[88] *Id.* at 127.

by a generation reverently familiar with the ancient Hawaiian customs and usage of adoptions as the law of the land."[89] The court further acknowledged the genealogical traditions of these islands,[90] noting Cummins' background both as an *ali'i* descendant as well as his service in both legislative and administrative positions under the monarchy,[91] which led to a presumption of his awareness of decisions by the Supreme Court of the Kingdom of Hawai'i recognizing the ancient Hawaiian custom and usage of adoptions.[92]

Thus, the *O'Brien* court harmonized Cummins' unstated intent with Hawaiian usage rather than applying "the *reverse blood-preference presumption* of the less familiar and more distantly removed common law of England."[93] According to custom, Mamo Clark became the "lawful issue" of Cummins' daughter upon her lawful adoption (i.e., as *keiki ho'okama*), and therefore entitled to a rightful share in the trust estate.[94]

Indeed, *keiki hānai* and *keiki ho'okama* did *not* enjoy the same legal protections under kingdom law. For example, *keiki hānai* did not have a right of inheritance pursuant to the first written laws of the kingdom.[95] However,

---

[89] *Id.*; *see also id.* at 129 (observing that at the time Cummins executed his trust deed in 1896, he "had lived all of his natural life . . . in an atmosphere where adopted children were known by the people and considered blood children").

[90] *Id.* at 127 (stating "[i]t is also reasonable that he absorbed the atmosphere of this generation and that knowledge thereof was imparted to him according to the habit of Hawaiians to relay from one generation to another their folklore and pedigrees").

[91] *Id.* at 128 n.15 (listing positions held by Cummins including, *inter alia*, Member of the Privy Council, House of Representatives, House of Nobles, and Minister of Foreign Affairs).

[92] *Id.* at 118 n.7 (citing *In re* Estate of Hakau, 1 Haw. 263 (1856) and *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864) and Mellish v. Bal, 3 Haw. 123 (1869) and *In re* Estate of Maughan, 3 Haw. 262 (1871) and Kiaiaina v. Kahanu, 3 Haw. 368 (1871) and *In re* Estate of Nakuapa (*Nakuapa I*), 3 Haw. 342, 410 (1872) and Souza v. Sao Martinho Soc'y, 24 Haw. 643 (1919) and *In re* Estate of Kamauoha, 26 Haw. 439 (1922)); *see also id.* at 131 nn.17-18 (citing Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands, 1892, ch. LVII, § 5 (King. Haw.) and L. 1903, Act 32, § 2, codifying the Hawaiian usage exception to the common law under both kingdom and territorial law).

[93] *Id.* at 132 (emphasis added). In his dissenting opinion, Chief Justice Coke fails to mention *Kiaiaina v. Kahanu*, 3 Haw. 368 (1871), then contends that he could "find no basis whatsoever for the statement made and reiterated in the opinion of the majority of this court 'that there were ancient customs (or usage) of adoptions which made an adopted child into one's own or blood child.'" *Id.* at 140 (Coke, C.J., dissenting in part) (distinguishing other cases discussed by the majority on the unconvincing ground that they involved circumstances of intestacy as opposed to testamentary intent); *see also infra* note 97 and accompanying text (quoting *O'Brien*).

[94] *O'Brien*, 35 Haw. at 132.

[95] Mellish v. Bal, 3 Haw. 123, 126-27 (1869), *cited with approval in* Maui Land & Pineapple Co. v. Naiapaakai Heirs of Makeelani, 69 Haw. 565, 568, 75 P.2d 1020, 1021-22 (1988) (declining to adopt the doctrine of equitable adoptions); *see also Nakuapa I*, 3 Haw. 342, 347 (1872) ("By their first written laws, there was a provision that the act of adoption must be done in writing and before an officer to witness the transaction, otherwise 'the child could not

keiki ho'okama did enjoy this right consistent with ancient Hawaiian usage and custom, as recognized by the Supreme Court of the Kingdom of Hawai'i in *Kiaiaina v. Kahanu*.[96] The substance of the court's concise opinion provided as follows:

> Action to recover possession of a lot of land claimed by descent. Jury waived and cause heard by the full Court. Answer a general denial.
> The evidence was that one Kahale died in 1849 seized of the land, under an award of the Land Commission, devising all his property to his widow, Kaumehameha. *The defendant was adopted by Kahele and Kaumehameha in 1837, as their son and heir, and was always treated by them as such.* Kaumehameha died intestate in 1850 or 1860, leaving as her kindred the plaintiff Loe, sister of her father, and the plaintiff Kaawalauole, son of a brother of her father. After Kahele's death the widow married Kahoinea, who survived her, and left issue the plaintiff Kiaiaina, by a subsequent wife. *The defendant has held possession since Kaumehameha's death*, but there was no direct evidence of the receipt of rents and profits.
> It was decided by the Court in the case of Keahi, appellant, vs. Kaaoaopa, appellee, that an adoption of a child as heir, according to Hawaiian custom and usage, made prior to the written law, is valid under existing laws, and as *we are of opinion that the defendant Kahanu was legally adopted in conformity to said custom and usage, he has rights of inheritance*. And as it appears that he is now in possession of the property, he is entitled to judgment in this case.
> Let judgment therefore be ordered for the defendant.[97]

Thus, absent a will to the contrary, Kahanu prevailed over all other claimants[98] as *keiki ho'okama* to his mother pursuant to Hawaiian custom and usage.

---

be transferred.'"); 3 Haw. at 348 ("The law of 1846 provides how adoptions may be legalized, and so do the laws now in force . . . although the specific term is not used in the law of descents.").

Thus, the question becomes whether a particular type of Hawaiian usage has been expressly abrogated by statute because "[t]he 1839 Declaration of Rights, which was incorporated into the 1840 Constitution, provided that 'nothing whatever shall be taken from any individual except by *express* provision of the laws.'" Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n (*PASH/Kohanaiki*), 79 Hawai'i 425, 443, 903 P.2d 1246, 1264 (1995) (citing LORRIN A. THURSTON, FUNDAMENTAL LAW OF HAWAII 1 (1904) and Kekiekie v. Dennis, 1 Haw. 42, 43 (1851)); *see also* Forman & Knight, *supra* note 27, at 8-13 (relying on the principle of constitutional narrowing, *inter alia*, to support the conclusion that *Oni v. Meek*, 2 Haw. 87 (1858), did not recognize the abolishment of an entire body of custom under the Kuleana Act of 1850 by simply rejecting a particular claim based upon a non-traditional practice, which had not achieved customary status in the area where the right was being asserted).

[96] 3 Haw. 368 (1871), *cited with approval in O'Brien*, 35 Haw. at 118 n.7.

[97] *Id.* at 368 (emphasis added).

[98] In addition to Kiaiaina (i.e., Kahanu's stepsister) and her husband, these claimants included at least Loe (Kahanu's great-aunt) and Kaawalauole (Kahanu's second cousin), if not also Kahoinea (Kahanu's stepfather). *See id.*

B. Case-By-Case Analysis of Hawaiian Usage: The Tortured Resolution of Kaaoaopa's Claim to Her Adoptive Mother's Estate

The *Kiaiaina* court's invocation of "Keahi, appellant, vs. Kaaoaopa, appellee" presumably referred to the parties in *In re Estate of Nakuapa (Nakuapa I)*.[99] Although the decedent's cousin Keahi eventually prevailed over the decedent's adopted daughter Kaaoaopa in the latter dispute,[100] both the Chief Justice[101] and Second Associate Justice Widemann[102] expressly acknowledged the existence of a Hawaiian custom and usage of adoption prior to the kingdom's first written laws. For his part, First Associate Justice Hartwell acknowledged the "well known fact that agreements of this kind were once common among the natives of this kingdom,"[103] but dissented based upon his belief that this practice had been repealed by implication as "inconsistent with the present Hawaiian statute of descents."[104]

While sitting in probate, Chief Justice Allen rejected Kaaoaopa's claim; however, on appeal, a jury subsequently determined she was *keiki hānai* to Nakuapa.[105] Justice Widemann later joined the Chief Justice in setting aside

---

[99] 3 Haw. 342 (1872).

[100] *Id.* at 342. Making her appearance to contest a petition by Nakuapa's cousin Keahi (who sought Letters of Administration for the estate), Kaaoaopa alleged that Nakuapa adopted her by verbal agreement before the law required such adoptions to be performed in writing.

[101] *Id.* at 343 (adding that "it is necessary that the relation should be clearly defined by competent evidence in relation to the precise terms of the original contract"); *id.* at 347 (emphasizing that such intent must be "clearly defined in the contract, by which the child adopted might be an heir to the property of the adopter").

[102] *Id.* at 348 (stating that "[t]he adoption of a child as heir, clearly and definitely made according to Hawaiian custom and usages prior to the written law, I hold to be valid under existing laws").

[103] *Id.* at 349.

[104] *Id.* at 351; *see also id.* at 354-55 ("I am compelled to deny the power of this Court to read this statute according to native ideas and usages which prevailed before the establishment of the present system of government, and which are inconsistent with the simple, unambiguous and consistent meaning of the entire wording of the statute."). Justice Hartwell initially argued that absent a claim concerning a will, "adoption of an heir by ancient custom is not triable by jury" under the statute providing for jury trials in probate appeals. *Id.* at 349; *see also* O'Brien v. Walker, 35 Haw. 104, 138 (1939) (Coke, C.J., concurring in part and dissenting in part) (arguing that the majority failed "to distinguish between an estate of intestacy which is controlled by the statutes of descent and distribution and *an estate created by a trust deed in which event the intent of the trustor, as expressed in the trust document, must prevail*") (emphasis added).

[105] *Nakuapa I*, 3 Haw. at 342. The *ali'i* Puhalahua adopted Kaaoaopa as his child in 1827 or 1828 prior to marrying his former servant Nakuapa (who later joined in the adoption). *See* Estate of Nakuapa (*Nakuapa III*), 3 Haw. 410, 414 (1873) (Widemann, J.). Kaaoaopa lived with her adoptive parents until they died. *Id.* Puhalahua died in 1866, leaving his entire estate to Nakuapa by will dated 1854. *Id.* at 414-15; *In re* Estate of Nakuapa (*Nakuapa II*), 3 Haw. 400, 402 (1872) (Hartwell, J., dissenting) (stating "[h]e died testate, devising his property to his widow, Nakuapa"). Although the evidence established that Nakuapa had conversed with her

the verdict and remanding for a new trial, explaining that the jury's verdict was not responsive to the question whether Kaaoaopa was adopted as an heir (i.e., as a *keiki ho'okama*).[106]

As Judge Ezra correctly noted,[107] the Kingdom's highest court previously recognized adoption as "a sacred relation" to Hawaiians, "having all the rights, duties and obligations of a child of the blood."[108] However, the general custom more specifically distinguished between the rights afforded to *keiki hānai* and *keiki ho'okama*:

> Some were mere foster children, taken to nurse and to exercise a parental care over, and for a temporary purpose; others were adopted as one's own children to be cared for, to live with the adopter as such . . . .
>
> . . . The Court is fully aware that children often lived under the charge of those acting in the relation of parents, so far as food and clothing were concerned, who were not entitled to inheritance.[109]

Thus, the precise nature and scope of Hawaiian custom and usage depends upon the particular circumstances of each case.[110]

---

attorney about making a will (without specifically naming Kaaoaopa as intended devisee), when he finally arrived at the house Nakuapa was too weak to act and died intestate in 1869. *Nakuapa III*, 3 Haw. at 414.

[106] *Nakuapa I*, 3 Haw. at 348 (stating "the evidence as to the right of the *keiki hanai* to inherit, is somewhat conflicting, and the Court are [sic] uncertain what the intention of the jury was in rendering the verdict, by the terms used"); *see also id.* (Widemann, J., concurring) ("[A]s far as the verdict of the jury is clearly not responsive to this issue, a new trial should be granted.").

[107] Viotti & Gordon, *supra* note 32 ("Quoting from a 1958 state Supreme Court decision that in turn invoked 'kingdom law,' Ezra cited two kinds of Hawaiian adoption, which he called a '*sacred relationship*': keiki hanai and keiki hookama.") (emphasis added).

[108] *Nakuapa I*, 3 Haw. at 347.

[109] *Id.* at 343. A similar misinterpretation of Kingdom of Hawaii precedent—namely, *Brunz v. Smith*, 3 Haw. 783 (1877)—also took place in *Pai 'Ohana v. United States*, 875 F. Supp. 680 (D. Haw. 1995), *aff'd*, 76 F.3d 280 (9th Cir. 1996). *See* Forman & Knight, *supra* note 27, at 15 ("The federal court's rationale not only merges—and thereby loses—the unique historical difference between occupancy and non-exclusive rights in land, but further distorts the context of the dispute in *Brunz*."). *See generally, id.* at 13-17 (concluding that the federal courts should have certified the underlying question to the Hawai'i Supreme Court for determination based upon the unique background principles of property law that apply in this state).

[110] *See* Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n (*PASH/Kohanaiki*), 79 Hawai'i 425, 438, 440 & n.24, 903 P.2d 1246, 1259, 1261 & n.24 (1995); Pele Defense Fund v. Paty (*Pele I*), 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992), *cert. denied*, 113 S. Ct. 1277 (1993); Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 12, 646 P.2d 745, 752 (1982); *see also* Forman & Knight, *supra* note 27, at 7-8 (comparing the "insufficient basis" for the claim in *Kalipi* to the eventually successful assertion in *Pele Defense Fund*). Five years after remand from *Pele I*, Judge Riki May Amano formally recognized the existence of customary gathering rights in *Pele Defense Fund v. Estate of James Campbell (Pele II)*, No. 89-089, 2002 WL 34205861 (Haw. Cir. Ct. Aug. 26, 2002). *See, e.g., Pele II*, (Findings of Fact Nos. 39, 40, 83, 114-16 & 119; Conclusions of Law Nos. 51, 64 & 65).

Writing for the majority in *Nakuapa I*, Chief Justice Allen noted the "great difficulty in adjudicating" cases involving the ancient Hawaiian custom and usage of adoptions "after the lapse of so many years."[111] Accordingly, he looked for guidance to four prior opinions. First, an unpublished decision that resolved a June 1856 claim in favor of a child adopted pursuant to Hawaiian custom and usage.[112] Then, three published decisions: *In re Estate of Hakau*,[113] *Abenela v. Kailikole*,[114] and *Estate of His Majesty Kamehameha IV*.[115] These opinions were deemed to be particularly persuasive because:

> Chief Justice Lee and Mr. Justice Robertson . . . were familiar with the people, and their experience on the Land Commission, and their examinations of cases touching native rights, enabled them to form very correct opinions on all questions involving Hawaiian usages and customs.

---

[111] *Nakuapa I*, 3 Haw. at 343.

[112] *See id.* at 344 (recounting a court order that half of the decedent's estate be given to his wife's brother's son, based upon evidence that the child lived with the couple following his adoption before a tax collector, and before the child left for the seminary).

[113] 1 Haw. 263 (1856), *cited in Nakuapa I*, 3 Haw. at 344. This is the first published case in Hawai'i to examine the distinction between *keiki hānai* and *keiki ho'okama* (although the opinion does not actually mention these two terms). Pursuant to "a statute regulating the descent of property, passed in 1850," the court held that a putative male heir unrelated to the decedent does not inherit from the decedent's estate absent evidence of a formal adoption or intent that the adopted child share in the deceased's property. *Id.* at 263-64. However, the facts showed that the child was "merely connected in some way with her first husband" despite having lived with the decedent's family "for a great length of time." *Id.* at 264. The court nevertheless advised that if the putative heir had been legally adopted, "he would have been sole heir to her estate, upon her dying intestate." *Id.*

[114] 2 Haw. 660, 661-62 (1863) (dismissing ejectment action brought by the purported hānai son of former landowners "in the absence of the necessary legal evidence of his having been adopted, as alleged"—i.e., that the plaintiff was a *keiki ho'okama* under Hawaiian usage and custom), *cited in Nakuapa I*, 3 Haw. at 344-45. The *Abenela* court discredited claims relating to a purported written agreement between the plaintiff's uncle and aunt—i.e., the former landowners, with whom he lived for several years—and the plaintiff's father, which some witnesses claimed had been signed in the presence of a magistrate although it was not produced at trial. *Id.* (citing a statute enacted in 1846—i.e., before the transaction that took place sometime after the plaintiff's uncle became ill in 1847, and later died in 1848—which rendered the agreement void, in any event, for failure to record the document with a Notary Public). In other words, the only evidence presented did not relate to claims based upon Hawaiian usage or custom. Curiously, however, there is no substantive discussion of the defendant's right of possession to the land in question beyond an observation that it "has been in the possession of the defendant for *a number of years*." *Id.* at 661 (emphasis added).

[115] 2 Haw. 715, 726 (1864) (acknowledging the right of Kamehameha III's adopted son to inherit his private lands not otherwise devised, subject to dower—consistent with both the king's will and the relevant statutory provision), *cited in Nakuapa I*, 3 Haw. at 345; *see also id.* at 718 (conceding the need to consider Hawaiian history and custom).

> *This question must be decided upon our own usages and customs, and written laws, and none other.*[116]

Following remand to the probate court (Justice Widemann presiding), the jury rendered a verdict against Kaaoaopa.[117] On appeal in *In re Estate of Nakuapa (Nakuapa II)*, Chief Justice Allen, Justice Hartwell, and Justice Widemann unanimously granted Kaaoaopa's motion for a new trial because the probate court erroneously admitted an unverified statement by King Kamehameha that Kaaoaopa in fact had no claim as *keiki hānai*, explaining that she did not have notice and an opportunity to present cross-interrogatories in connection with the statement taken from the King.[118]

After a *third* trial, four years after Chief Justice Allen initially rejected Kaaoaopa's claims in 1869, the same three justices ruled against Kaaoaopa in *Estate of Nakuapa (Nakuapa III)*.[119] Writing for the majority, Justice Widemann discredited testimony from two specific witnesses in support of Kaaoaopa's claims,[120] as well as other evidence submitted in her favor.[121] In his concurring opinion, Justice Hartwell likewise discredited testimony concerning alleged references to Kaaoaopa by her adoptive parents as their "*hooilina*"—i.e., heir or devisee.[122] Instead, Justice Hartwell chose to credit testimony admitted over Kaaoaopa's "negative hearsay" objection, that "many persons connected by blood and marriage, or on intimate terms with the parties . . . had never been aware of the child's adoption as heir, or that she was regarded by the adopters as their heir."[123] Finally, Chief Justice Allen concurred by simply reiterating his original decision as probate judge and stating his agreement with his colleagues' description of the testimony.[124]

---

[116] *Nakuapa I*, 3 Haw. at 345 (emphasis added).

[117] *In re* Estate of Nakuapa (*Nakuapa II*), 3 Haw. 400, 400 (1872).

[118] *Id.* at 401, 402-03, 406.

[119] 3 Haw. 410 (1873).

[120] *Id.* at 412-13 ("Kapu . . . states that both Puhalahua and Nakuapa, at the time of the adoption, declared that they adopted claimant as their heir. . . . Had the witness given this evidence at the first hearing, it would have carried great weight; its coming at this late day materially detracts from its weight."). Justice Widemann observed that another witness' vague recollections about the circumstances under which Kaaoaopa's adoptive parents purportedly told him about the adoption conflicted with Kapu's testimony. *Id.* at 412 (dismissing Kukahiko's testimony because Kapu presumably would have had the best recollection, despite having already concluded that Kapu's testimony was unreliable).

[121] *Id.* (acknowledging that Kaaoaopa's adoptive parents repeatedly referred to her as *kaikamahine hanai*—i.e., adopted daughter—and that Nakuapa "frequently held out hopes of inheritance"; but declining to infer that it was a "foregone conclusion" Kaaoaopa would actually be given that right).

[122] *Id.* at 414 (Hartwell, J., concurring).

[123] *Id.* at 414-15.

[124] *Id.* at 416 (Allen, J., concurring) ("I see no reason, from any additional testimony introduced in the subsequent hearings, to change my opinion[.]").

Thus, after giving lip service to the difficulties that the justices' own errors caused for Kaaoaopa,[125] the Court ultimately chose to weigh the conflicting evidence against her (and in favor of other, seemingly-interested parties).[126] *Nakuapa I* nevertheless provided an important foundation for the concise recognition of Hawaiian usage by these same three justices a mere *four months* later in *Kiaiaina*.[127] The differing contexts provided in these decisions further highlight the necessity of analyzing claims involving Hawaiian custom and usage on a case-by-case basis.

C. The Passage of Time and Evolving Language Practices Have Not Diminished the Continuing Relevance of Hawaiian Usage in This State

Following annexation of these islands to the United States, an early attempt to undermine the Court's prior recognition of Hawaiian usage (not long after annexation of these islands to the United States)[128] did not prevent the

---

[125] *In re* Estate of Nakuapa (*Nakuapa II*), 3 Haw. 400, 406 (1872) ("The delay of another trial is to be regretted, since evidence in this class of cases daily becomes more difficult to find, as aged witnesses die.").

[126] *Id.* at 403.

[127] *Cf. supra* text accompanying notes 93-94; Kiaiaina v. Kahanu, 3 Haw. 368, 368 (1871).

[128] *See, e.g.*, *In re* Estate of Wilhelm, 13 Haw. 206, 209-11 (1900) (affirming lower court judgment that a legally adopted child is *not* entitled to inherit from his adoptive mother, after characterizing contrary language in *Hakau*, *Abenela* and *Kamehameha IV* as dicta, and further suggesting that *Kiaiaina* "simply followed the decision in [*Nakuapa I*]"). The court appears to have given undue weight to Justice Hartwell's *dissenting* opinion in *Nakuapa I* based upon a misinterpretation of the court's earlier decision in *In re Estate of Maughan*, 3 Haw. 262 (1871).

In re Estate of Wilhelm mistakenly characterizes the plurality opinion in *Maughan* as having decided the question of Hawaiian usage adversely to claims by legally adopted persons seeking recognition of their rights as heirs. *Id.* Justice Hartwell's opinion in *Maughan* acknowledges that the putative heir *did not make any allegations based on custom*, then suggests that even "if alleged, it could have no force in the face of explicit statute provisions." 3 Haw. at 268. Justice Hartwell's colleagues apparently did not share this conclusion.

Justice Widemann's concurrence in *Maughan* relies on the absence of any evidence concerning the adopter's intentions beyond the written articles of adoption. *Id.* at 270 (rejecting claim of adopted child in favor of the decedent's sister). Chief Justice Allen's dissent in *Maughan* (albeit presented at the start of the opinion) counters that "adopted child" (i.e., *keiki ho'okama*) is legally synonymous with "child" under Hawaiian usage and custom, adding that neither the decedent nor the legislature could have intended that a child formally adopted as her own should be left "houseless and homeless" the moment her adoptive mother died. *Id.* at 264; *see also O'Brien*, 35 Haw. 104, 121-22 (1939) ("The statements were uncontradicted by the majority opinion which confined its decision to the written agreement before it and the recognition made in the dissenting opinion is in harmony with a later finding of the supreme court [presumably *Kiaiaina*] upon evidence before it.").

Wilhelm further misstates the law by suggesting that the Supreme Court of the Kingdom of Hawaii subsequently affirmed Justice Hartwell's views in *Wei See v. Young Sheong*, 3 Haw. 489 (1873). 13 Haw. at 208-09. In *Wei See*, the Chinese wife and mother of a Chinese man

Supreme Court of the Territory of Hawaii from later acknowledging the continuing vitality of Hawaiian custom and usage in *O'Brien*,[129] and *Estate of Farrington*.[130] Indeed, modern decisions continue to affirm these Native Hawaiian traditions notwithstanding changes in language use over time. In *Leong v. Takasaki*,[131] for example, the Hawai'i Supreme Court observed as follows:

> As adoption under the statute replaced ancient Hawaiian custom and usage, *the term* ho'okama *has fallen into disuse and the term* hanai *has since been used to refer to all types of adoption.* Nevertheless the custom of giving children to grandparents, near relatives, and friends to raise whether legally or informally remains a strong one.[132]

Moreover, in *Young v. State Farm Mutual Automobile Insurance Co.*,[133] the Hawai'i Supreme Court later acknowledged the continuing vitality of Hawaiian custom and usage with respect to adoptions—more specifically, the distinction "between a person legally adopted, a '*hookama*' and a person merely cared for, a '*hanai*.'"[134] Indeed, the *Young* court expressly refused to water down this distinction under the circumstances presented in that case.[135]

---

named Achu prevailed against his Hawaiian wife and adopted daughter based on the *specific terms of a will* devising only a portion of his estate to the latter family (including real estate already owned by his Hawaiian wife "in her own right"). *Id.* at 489-90, 493, 495. *See also Maughan*, 3 Haw. at 269 ("In the Ah Chu [sic] case, there was a will."). An on-line search failed to uncover any published decision involving a person named "Ah Chu"; thus, it appears that the court in *Maughan* may have been referring to prior proceedings concerning the decedent referred to as "Achu" in the *Wei Sei* decision subsequently published in 1873.

[129] *See supra* notes 81-93 and accompanying text.

[130] *See supra* notes 63-64 and accompanying text, and notes 81, 107, 112.

[131] 55 Haw. 398, 520 P.2d 758 (1974).

[132] *Id.* at 411, 520 P.2d at 766 (emphasis added). The court reversed an order granting summary judgment against plaintiff seeking damages for mental distress suffered when he observed defendant strike and kill plaintiff's step-grandmother with defendant's automobile. *See id.* at 399, 412, 520 P.2d at 760, 767 (concluding that the plaintiff should be permitted to prove his relationship with his step-grandmother despite the absence of a blood relationship).

[133] 67 Haw. 544, 697 P.2d 40 (1985) (affirming summary judgment against the estate of a person who died in an automobile accident despite claim that decedent Homer Young should be covered as a "relative" under Kenneth Kekumu's insurance policy because decedent and insured regarded each other as father and son).

[134] *Id.* at 547, 544 P.2d at 42 (citing *O'Brien v. Walker*, 35 Haw. 104, 118-19 (1939)); *see also* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 10, 646 P.2d 745, 751 (1982) (citing *O'Brien* for the proposition that the Hawaiian usage exception under H.R.S. section 1-1 continues to protect "native understandings and practices which did not unreasonably interfere with the spirit of the common law").

[135] The relevant provision in Kekumu's insurance policy covered him, his spouse and their respective relatives "while *residents* of his household." *Young*, 67 Haw. at 546, 697 P.2d at 41. Homer's mother claimed he was hānai to Kekumu, with whom she had lived in the house for eighteen years and regarded as her husband (just as Kekumu regarded her as his wife). *Id.* at

It may seem strange at first blush that a Hawaiian custom or usage of inheritance could have developed prior to the establishment of private property rights.[136] However, history reveals that a limited right of inheritance existed subject to modification or dispossession by decree.[137] As explained by Professor Lilikalā Kame'eleihiwa, "one of the early examples of hereditary succession" can be traced back "about *ten generations* before Kamehameha."[138] In any event, Hawai'i law expressly contemplates the development of customs and traditions prior to November 25, 1892.[139] Thus, as of 1871, the Supreme Court of the Kingdom of Hawaii recognized a custom and usage of inheritance by lawfully adopted children (i.e., *keiki ho'okama*).[140]

Given the context discussed above, the views expressed by *kumu hula* Hewett[141] and Judge Ezra[142] are understandable but misplaced. Even if it were established that Brayden Mohica-Cummings possesses inheritance rights as the issue of his grandfather's *keiki ho'okama*, such facts would not necessarily confer rights upon him as an intended third-party beneficiary of Pauahi's will.

V. *MĀLAMA PONO*: HAWAIIAN CUSTOM AND USAGE AS FURTHER CONTEXT TO SUPPORT PAUAHI'S INTENT

United States District Judge Alan C. Kay summarized the "exceptionally unique historical circumstances" that surround Kamehameha Schools' admissions policy granting a preference to Native Hawaiians.[143] In doing so, he revealed crucial context for the policy by determining that Bernice Pauahi

---

545-46, 697 P.2d at 41. When Homer moved in with Kekumu and his mother eight years before the accident, he was over thirty years of age but had already known the insured "for several years" before then. *Id.* at 545, 697 P.2d at 41.

[136] *See, e.g.*, Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n (*PASH/Kohanaiki*), 79 Hawai'i 425, 442-51, 903 P.2d 1246, 1263-72 (1995). The refusal of foreigners to recognize Hawaiian custom and usage with respect to land management beginning after 1820 led to adoption of the Kingdom's first Constitution in 1840 and the Māhele of 1848, in an effort to preserve its "'political existence.'" *Id.* at 444, 903 P.2d at 1265.

[137] Keelikolani v. Robinson, 2 Haw. 514, 515-17, 518-20 (1862); *see also* KAME'ELEIHIWA, *supra* note 75, at 51-64 (Chapter 3, "Kalai'aina: The Politics of Traditional Land Tenure"); *id.* at 95-135 (Chapter 5, "Inheritance Patterns Among Ali'i Nui Prior to 1848").

[138] KAME'ELEIHIWA, *supra* note 75, at 53 (emphasis added).

[139] *See supra* notes 1-5, 7-11 and accompanying text.

[140] Kiaiaina v. Kahanu, 3 Haw. 368, 369 (1871); *see also supra* note 96 and accompanying text.

[141] *See supra* note 79 and accompanying text.

[142] *See supra* notes 62-64 and accompanying text.

[143] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1148 (D. Haw. 2003), *aff'd in part and rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

Bishop's "bequest of her vast estate to the foundation of Kamehameha Schools further reflected the *Ali'i* [i.e., Native Hawaiians Chiefs' and Chieftesses'] tradition of providing and caring for others."[144] In other words, as described by Professor Kame'eleihiwa, the "traditional duty" of *Ali'i Nui* "to *mālama* their people."[145]

King Lunalilo (Kamehameha IV) and his wife Queen Emma founded the Queen's hospital in 1860 "to provide free medical care for diseased and dying Hawaiians"[146] in the face of opposition from missionaries.[147] Likewise, upon his death in 1871, the will of Kamehameha V provided for a trust to care for elderly Hawaiians.[148] The dowager Queen Emma later died in 1884, leaving her property to The Queen's Hospital (now, Queen's Medical Center).[149] Queen Lili'uokalani similarly entrusted her estate in 1909 "for the benefit of orphaned children in the Hawaiian islands, the preference to be given to Hawaiian children of pure or part aboriginal blood."[150]

---

[144] *Id.* at 1154 & n.12 (citing Makanani Decl. ¶ 13 and Benham Decl. ¶ 19). The declarations of R. Kawika Makanani and Dr. Maenette K.P. Benham, among others, are attached to Kamehameha Schools' Concise Statement of Material Facts filed on Sept. 29, 2003 ("Kamehameha Schools' CSMF"). Kawika Makanani is the Hawai'i/Pacific Collections librarian at Kamehameha Schools' Kapālama Campus, and a Ph.D. candidate in Educational Foundations at the University of Hawai'i at Mānoa. Makanani Decl. ¶¶ 6-7 (on file with author). Dr. Benham has since been appointed Dean of the newly-established Hawai'inuiakea School of Hawaiian Knowledge. *See First Dean Appointed for UH School of Hawaiian Knowledge*, HONOLULU ADVERTISER, June 10, 2008, *available at* http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080610/BREAKING01/80610004/-1/LOCALNEWSFRONT. She received an ED.D. in Educational Administration from the University of Hawai'i at Mānoa (her "doctoral thesis addressed the impact of educational policies and practices on the lives of Native Hawaiians from ancient times (*wa kahiko*) to the 1970s"). Benham Decl. ¶¶ 6 & 10 (on file with author).

[145] KAME'ELEIHIWA, *supra* note 75, at 205 (citing Marshall D. Sahlins and Dorothy Barrere, eds., *William Richards on Hawaiian Culture and Political Conditions of the Islands in 1841*, *in* THE HAWAIIAN JOURNAL OF HISTORY 7:23-4 (1973)) (emphasis added).

[146] *Id.* at 312 (citing 2 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 69-72 (1953)).

[147] *Id.* at 312 n.131 (citing the PACIFIC COMMERCIAL ADVERTISER, Aug. 30, 1860, regarding Calvinist arguments "that Hawaiians deserved to die because they were immoral, and that free medical care would make prostitution safe" as compared with the King and Queen's belief that medicine rather than religion would save their people).

[148] Makanani Decl., *supra* note 144, ¶ 106.

[149] *Id.*

[150] *See* "Queen Lili'uokalani's Deed of Trust," *available at* http://www.onipaa.org/resources/deed_deed_1.pdf. Lili'uokalani further describes an organization for benevolent work called the Hooululahui established by King Kalākaua in 1886, and managed in divisions administered by Queen Kapi'olani, Lili'uokalani, as well as Princess Likelike (with assistance from Princesses Po'omaikalani and Kekaulike). LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 111-12 (Mutual Publishing LLC 1990) (1898). "The Liliuokalani Educational Society" for Hawaiian girls was also established in 1886. *Id.* at 113-14. In addition, Kalākaua carried on the custom of the chiefs to support the destitute and bury the dead, among other services provided by Hale Naua, or the Temple of Science. *Id.* at 114-15.

Consistent with the *ali'i* trusts created before and after hers, Ke Ali'i Bernice Pauahi Bishop left her property in trust for her people. As the great-granddaughter and last direct descendant of Kamehameha I, Pauahi bequeathed her vast estate to create and maintain schools "dedicated to the education and upbringing of Native Hawaiians."[151]

A. The Reemergence of Core Values Obscured by the Illusion of Progress[152]

Upon graduating in 2007, Kalani Rosell[153] credited Kamehameha Schools with instructing him in the Hawaiian values of respect and gratitude for people and the land, then extolled the "feeling of *ohana*, of family" where "[e]very teacher is like a parent or relative, and each student is like a brother or sister."[154] His experiences reflect the reemergence of an ancient Hawaiian custom and usage, described as follows:

> Education in early Hawaiian society centered around the family and community, relations with nature, an understanding of mythology, language and cultural proficiency, and physical and spiritual wellness.
>
> . . .
>
> The learning of Hawaiian values was an essential component of a young child's life. George Kanahele lists 25 values that were important for the Native Hawaiian to learn and live by: *aloha*, *ha'aha'a* (humility), *lokomaika'i* (generosity), *ho'okipa* (hospitality), *haipule* or *ho'omana* (spirituality), *wiwo* (obedience), *laulima* (cooperativeness), *ma'ema'e* (cleanliness), *'olu'olu*

---

[151] Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000); *see also* Richardson v. City & County of Honolulu, 124 F.3d 1150, 1154 (9th Cir. 1997) (describing the trust's purpose "to erect and maintain schools for indigents and orphans who are native Hawaiians").

[152] Continuous exercise is not required to establish a Hawaiian custom or usage. *See* Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n (*PASH/Kohanaiki*), 79 Hawai'i 425, 442 n.26, 903 P.2d 1246, 1262 n.26 (1995) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 76-78 (Sharwood ed. 1874)). "Hawaiian culture operating through time does not conform to the usual understandings of 'linear' time in the West, or 'cyclical' time elsewhere, but renews itself in waves or pulsations that are 'transformations.'" Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 YALE J.L. & HUMAN. 105, 141 (1996).

[153] *See supra* note 55 and accompanying text.

[154] *Kamehameha-Maui Grad is First Non-Hawaiian*, HONOLULU STAR BULL., May 20, 2007, *available at* http://starbulletin.com/2007/05/20/news/story02.html.

> Perhaps the greatest cultural change initiated by the Western system was that it took learning and teaching away from the family. The family was the foundation of a child's life and the source of stability for a community. The elimination of the family's central role in society further eroded Native Hawaiians' sense of being.

Benham Decl., *supra* note 144, ¶ 44(e) (citing M. BENHAM & R.J. HECK, CULTURE AND EDUCATIONAL POLICY IN HAWAI'I: THE SILENCING OF NATIVE VOICES 113 (1998)).

(graciousness), *pa'ahana* (industry, diligence), *ho'omanawanui* (patience), *le'ale'a* (playfulness), *ho'okuku* (competitiveness), *ho'ohiki* (keeping promises), *huikala* (forgiveness), *na'auao* (intelligence), *kuha'o* (self-reliance), *kela* (excellence), *koa* (courage), *kokua* (helpfulness), *lokahi* (balance, harmony, unity), *hanohano* (dignity), *alaka'i* (leadership), *ku i ka nu'u* (achievement), *kupono* (honesty). George H.S. Kanahele, *Ku Kanaka-Stand Tall*, at 19-20 (1986).

The education of Native Hawaiian children was grounded in the value of *'ohana* (family and extended family), *the connection to and care of the land* and the sea, the learning of language and living of cultural values that provided a clear and proud identity and connection to a rich heritage, and a commitment to community health and well-being.[155]

The informal approach of early Hawaiians to education began to evolve during the reign of King Kamehameha II (Liholiho) with the enactment of a law by the regent Ka'ahumanu in 1824, which required all of the Kingdom's subjects to learn to read and write.[156] In the early 1840's, Kamehameha III (Kauikeaouli) enacted laws "providing for a national system of common schools to be supported by the government."[157] "By 1853, the literacy rates rose to three-fourths of the native population."[158]

Toward the end of the nineteenth century, the literacy rate in the Kingdom of Hawaii was "greater than in any other country in the world except Scotland and New England."[159] However:

By the close of the 1800s, attendance at Hawaiian language common schools had decreased while attendance at the English-language select schools grew. Because of social pressures, Native Hawaiian children did not speak their mother tongue and were further distanced from Hawaiian traditions. Gradually, *the fragmented and often distorted knowledge of Hawaiian customs*, combined with societal reminders that practicing Hawaiian culture identified one as lower class, produced shame, denial, and resentment about being Hawaiian. Consistent reinforcement of this low social status resulted in destructive social behavior.[160]

---

[155] Benham Decl., *supra* note 144, ¶¶ 18, 29, 30 (numbering omitted, emphasis added).

[156] 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 118 (1938).

[157] *Id.* at 112; *see also id.* at 229-30, 347-49, 351-53.

[158] Benham Decl., *supra* note 144, ¶ 38.

[159] ALBERT J. SCHÜTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 174 (1994) (quoting LAURA FISH JUDD, HONOLULU: SKETCHES OF LIFE SOCIAL, POLITICAL, AND RELIGIOUS IN THE HAWAIIAN ISLANDS FROM 1828 TO 1861, at 78 (New York, Anson D. F. Randolph & Co. 1880)).

[160] Benham Decl., *supra* note 144, ¶ 45 (emphasis added). "Hawaiian children were disciplined and scoffed at if they spoke the Hawaiian language on school grounds or engaged in Hawaiian traditions." *Id.* ¶ 41.

Judge Kay's description of "the effect of western influence on the Native Hawaiians" draws heavily upon the scholarly and historical authorities presented by Kamehameha Schools:

> Western systems and values were also imposed on the Native Hawaiians. The implementation of a western-style school system focused on general world information and the development of basic math and literacy skills in an effort to westernize Native Hawaiian society. It did not account for the Native Hawaiian customary method of learning, nor for the unique Native Hawaiian culture and heritage. The use of the Hawaiian language as an instructional medium was banned in the schools from 1896 until 1986. The school system furthermore operated essentially as a dual-tracked system, with most Native Hawaiians receiving training suitable only for vocational and low paying jobs. Education thus operated to further marginalize Native Hawaiians.
>
> The net result of these and other forces and changes brought to bear on the Native Hawaiian society has been summarized in the following manner: "By virtually every measure of well being, Native Hawaiians are among the most disadvantaged ethnic groups in the State of Hawai'i."[161]

Kamehameha Schools is now working to "redress the under-representation of Native Hawaiians in contemporary society" as well as "preserve and perpetuate Native Hawaiian culture and identity."[162]

B. Sacred Knowledge: Honoring the Kamehameha Line for its Efforts to Preserve and Perpetuate Hawaiian Culture

"Hawai'i without Kamehameha, as it currently exists, would constitute blatant disregard for the testamentary wishes of a Princess who saw education

---

[161] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1150 (D. Haw. 2003) (citations omitted), *aff'd in part and rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc); *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007); *see also* KAMEHAMEHA SCHOOLS, HUAKA'I: 2005 NATIVE HAWAIIAN EDUCATIONAL ASSESSMENT, EXECUTIVE SUMMARY AND KEY FINDINGS 2 (2005) ("On the whole, there are few statistical gains in Native Hawaiian well-being."), *available at* http://www.ksbe.edu/pase/pdf/Ka_Huakai/KaHuakai_ExecSumm.pdf.

[162] *Kamehameha Schools/Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d at 1156 (citations omitted). In its zeal to produce industrious young men and women who could compete on western terms, the early leaders of Kamehameha Schools played a role in the marginalization of Native Hawaiian culture. For example, the first head of Kamehameha Schools (William B. Oleson), immediately forbade the use of Hawaiian on schools grounds in 1887. SCHÜTZ, *supra* note 159, at 351 (citing BENJAMIN O. WIST, A CENTURY OF PUBLIC EDUCATION IN HAWAII 112 (1940)). It was not until 1961 that Dorothy Kahananui implemented a three-year program of high school language study at Kamehameha Schools that would be accepted at the university level on par with other modern languages. *Id.* at 357-58 (citing HAROLD WINFIELD KENT, THE KAMEHAMEHA SCHOOLS, 1946-1962, at 31-32 (1976)). *But see id.* at 357 (regarding preliminary efforts to insert an appreciation for Native Hawaiian culture into the curriculum, shortly after the U.S. Congress recognized the deteriorating conditions of Native Hawaiians in enacting the Hawaiian Homes Commission Act).

as the salvation of her people."[163] Ke Ali'i Bernice Pauahi Bishop chose education as the vehicle to fulfill her traditional duty and responsibility to her people. This choice reflected her deep commitment to education based on centuries of Hawaiian tradition and values concerning the sacredness of knowledge.[164]

Instead of relying on American and/or English common law principles concerning the interpretation of Pauahi's charitable/eleemosynary trust,[165] therefore, her intent should be interpreted in light of Hawaiian custom and usage. The Princess founded the Kamehameha Schools "not to honor herself, but to honor the ideals and achievements [that Kamehameha I] and his successors represented."[166] One of the primary achievements of the Kamehameha line includes the 1840 constitution, which "reflected an attempt to deal with chiefs and foreigners who sought to vest land rights without the required consent of the King."[167]

The accompanying development of private property rights reflected an effort to preserve the "political existence" of the Kingdom in the face of threats to its sovereignty by outside forces.[168] We now face the challenge of addressing the unintended side effects of this attempt to inoculate the Native

---

[163] Glendon, *supra* note 55, at 98.

[164] Seto & Krohm, *supra* note 48, at 397-404.

[165] *See, e.g.*, Samuel P. King & Randall W. Roth, Transformations: Hawaii's Bishop Estate (Feb. 19, 2008) (unpublished manuscript, on file with author).

> [I]ncorporation would . . . neatly solve what is currently the charity's most disturbing legal dilemma. As a trust, Bishop Estate/Kamehameha Schools is subject to the centuries-old *cy pres* doctrine, which forbids trustees to change or expand a trust's charitable mission, unless the original mission becomes illegal, impossible, impracticable, or wasteful. . . . The charitable mission of a nonprofit corporation, however, is legally allowed to evolve with the times—as Bishop Estate/Kamehameha [S]chools has already been doing.
>
> Today, in addition to maintaining Kamehameha Schools (as the princess instructed more than a century ago), the trustees provide many "extras," such as scholarships to attend colleges and graduate schools, and special help to pre-school children and homeless families in native-Hawaiian communities. They also promote Hawaiian culture and provide culturally sensitive stewardship to 350,000 acres of non-income-producing trust land that native Hawaiians view as the sacred vestiges of the overthrown kingdom. Although the trust's founder almost certainly would have approved, the *cy pres* doctrine makes it difficult to justify legally, much less to expand, these salutary activities.

Id. at 9-10; *see also* SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST 164 (2006) (citing businessman Robert Midkiff for the proposition that "it would be in the trust's best interests . . . to re-structure itself into a nonprofit corporation").

[166] Glendon, *supra* note 55, at 75 n.30 (quoting GEORGE HUE'EU SANFORD KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY x-xi (1986)).

[167] Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n (*PASH/Kohanaiki*), 79 Hawai'i 425, 443, n.30, 903 P.2d 1246, 1264, n.30 (1995) (citing KUYKENDALL, *supra* note 156, at 137-38).

[168] *See supra* note 136.

Hawaiian people against the catastrophic consequences of likely colonization.[169] As explained by Professor Osorio:

> Despite an ongoing and historical experience with a Western legal system that continually denied the *Kānaka Maoli* the simple right to be *kānaka*, we Hawaiians continue to be manipulated by American laws and decisions whose ethics and values do not correspond with our own.[170]

To counter this manipulation, Professor Brophy envisions the development of an "aloha jurisprudence" that arguably could provide a useful vehicle for recognizing the continuing importance of Hawaiian usage in this jurisdiction.[171] "Courts and litigants are thus increasingly scrutinizing transactions of long ago. The Hawaiian courts are revisiting what caused land loss just as historians like Stuart Banner, Lilikalā Kame'eleihiwa, and Robert Stauffer are revisiting the process as well."[172]

A recent article by University of Hawai'i Professor Justin Levinson provides analogous support, by arguing that the greatest permanent potential for addressing bias in legal decision-making would be to embrace American cultural responsibility for the presence of negative racial stereotypes and coordinating efforts for change.[173] Rather than upholding the constitutional principle of Equal Protection,[174] distorted invocations of Justice Harlan's desire for a "color-blind" society may thus be seen as "a reactionary call to return to the race relations of the nineteenth century."[175]

---

[169] *See* Banner, *supra* note 6, at 303.

[170] OSORIO, *supra* note 17, at 254 (emphasis added). *See generally* Barnard, *supra* note 44; Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994). *But see* Office of Hawaiian Affairs v. Hous. and Cmty. Dev. Corp. of Hawai'i, No. 25570, 2008 WL 257181, *1 (Haw. Jan. 31, 2008) (instructing lower court to issue an order granting plaintiffs' motion for an injunction against selling or otherwise transferring "any ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands has been resolved").

[171] Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771, 801-02 n.148, 812 n.200 (2006). *Compare* Brophy, *supra*, *with* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994) (criticizing modern approaches to historic claims that treat indigenous peoples as second class citizens, or even as not fully human).

[172] Brophy, *supra* note 171, at 799.

[173] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking and Misremembering*, 57 DUKE L.J. 345 (2007).

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

[175] Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1149-51 (1996) (concluding with observations about "The Bankruptcy of Color Blindness"). *See also* Eric Schepard, *The Great Dissenter's Greatest Dissents: The First Justice Harlan, the "Color-Blind" Constitution and the Meaning of His Dissents in the* Insular Cases *for the War on Terror*, 48 AM. J. LEGAL HIST. 119 (2006).

Unlike *Plessy v. Ferguson*,[176] the equal protection ideals reflected by Justice Harlan's dissents in *The Insular Cases*[177] have not yet been realized. This may be perhaps due to the apparent intellectual dishonesty that is revealed by Justice Harlan's statements in the Chinese immigrant cases.[178] Others have suggested that Justice Harlan "directly confronted"[179] and expressed "outrage at the racist logic of the majority opinions"[180] in *The Insular Cases* as a result of the transformative impact that the Civil and Spanish-American wars had upon his thinking.[181] However, this claim is belied by the relatively muted nature of Justice Harlan's words as a whole.[182]

Thus, discrimination claims involving the admissions policy preference for Native Hawaiians at the Kamehameha Schools must be analyzed and under-

---

[176] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[177] *See generally*, JAMES KERR, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM (1982). *The Insular Cases* are a group of decisions involving application of the United States Constitution and Bill of Rights to overseas territories following the Spanish-American War. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); Territory of Haw. v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).

[178] *See* Schepard, *supra* note 175, at 134-41 (attempting to rebut the argument that Justice Harlan had a "blind spot" concerning the rights of non-whites). *Compare* Schepard, *supra* note 175, *with* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) and Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great was "The Great Dissenter?,"* 32 AKRON L. REV. 629 (1999) and Earl M. Maltz, *Only Partially Colorblind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973 (1996).

[179] Schepard, *supra* note 175, at 136. The racist rationale underlying the majority opinions is fairly evident. *See, e.g.*, *Downes*, 182 U.S. at 280, 282 (extolling the "principles of natural justice inherent in the Anglo-Saxon character" but contending that "grave questions will arise from difference of race, habits, laws, and customs . . . that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race"); *id.* at 306 (expressing concern about bestowing citizenship "on those *absolutely unfit* to receive it") (emphasis added); *Dorr*, 195 U.S. at 145, 148 (observing that "uncivilized parts of the archipelago were *wholly unfitted* to exercise the right of trial by jury" and "people[d] by savages") (emphasis added); *see also Mankichi*, 190 U.S. at 211-12 (upholding the omission of grand jury and unanimous verdict requirements because they were written by right-thinking people from Europe and America).

[180] *See, e.g.*, Schepard, *supra* note 175, at 138.

[181] *Id.* at 140.

[182] Justice Harlan's strongest statement is his description of the majority's interpretation of the Constitution as "utterly revolting" to the extent it constructively concludes that fundamental rights apply "except where Filipinos are concerned." *Dorr*, 195 U.S. at 156 (Harlan, J., dissenting) (emphasis omitted). In addition, Justice Harlan argues that constitutional rights "are for the benefit of all, of whatever race or nativity." *Id.* at 154; *see also Downes*, 182 U.S. at 381 (Harlan, J., dissenting) (responding that "Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent"); *Mankichi*, 190 U.S. at 234-36, 239-41 (Harlan, J., dissenting) (articulating the manifest injustice perpetuated against the territorial inhabitants by the colonial scheme).

stood in light of the unique historical and legal context of these Hawaiian Islands.

VI. CONCLUSION

Even assuming that the United States complied with its international obligations as trustee for the non-self governing Territory of Hawaii,[183] the Hawai'i Admission Act expressly incorporates the trust obligation to provide for "the betterment of the conditions of native Hawaiians."[184] This implicit recognition of the ongoing effects of the United States' exercise in imperial power at the end of the nineteenth century justifies reliance upon the internationally recognized right of indigenous control over educational systems and cultural teaching methods.[185]

By comparison, an audit of the State of Hawai'i Department of Education's Hawaiian Studies Program uncovered "huge gaps" and "mismanagement of funds" in public schools across the state, including the revelation that more than thirty percent of funds appropriated for salaries and supplies instead went "to fund things unrelated to the Hawaiian culture."[186] The audit also found "a lack of a cohesive plan," as well as the use of a culturally-insensitive textbook that describes pre-contact Hawai'i as a dark and sadistic place.[187]

This state of affairs underscores Dr. Christopher Schmidt's prescient warning that "intrusion into the decisionmaking of private school administrators unjustifiably limits their ability to offer potentially beneficial alternative approaches to education."[188] There is value, instead, in "[allowing] for experimentation .... and [recognizing] the fragility of human certainty on the *hardest questions about law and social relations*. Such questions call for a measure of judicial deference to those who directly confront the dilemmas of education in a racially fragmented society."[189]

---

[183] *See supra* note 44 and accompanying text.

[184] *See supra* notes 12-13 and accompanying text.

[185] *See supra* note 47.

[186] Tom Finnegan, *Hawaiian Program Lacks Oversight, Audit Finds*, HONOLULU STAR BULL., Jan. 24, 2008, *available at* http://starbulletin.com/2008/01/24/news/story07.html.

[187] *Id.* In numerous ways, elements of the United States' more immediate history could also be described as "dark and sadistic" but children's textbooks rarely (if ever) adopt that tone. *Id.*

[188] Schmidt, *supra* note 35, at 557; *see also* Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629 (2007).

[189] Schmidt, *supra* note 35, at 567 (emphasis added). Schmidt cites *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 841 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007), regarding "the importance of deferring to the judgment and expertise of the relevant decisionmakers" when considering affirmative action plans. *Id.* Schmidt also cites *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), and states the "Law School's educational judgment that such diversity is essential to its educational mission

Indeed, the dire circumstances addressed by the Kamehameha Schools[190] are intimately related to the "questions of considerable moment and difficulty"[191] which have not yet been addressed by the United States Supreme Court.

Rather than hoping for the nation's highest court to finally give voice to long suppressed and neglected Native Hawaiian claims for justice, advocates should instead pursue a renewed focus upon the Hawaiian usage exception as a vehicle for perpetuating cultural values and resources.

---

is one to which we defer." *Id.* Schmidt nevertheless argues that Kamehameha Schools' mission would be better served by a policy admitting non-Native Hawaiians in its classrooms. *Id.* Notwithstanding Schmidt's apparent belief that "Native Hawaiian" is a racial classification, compelling arguments can be made that the designation should instead be treated as a political status. *See generally* Van Dyke, *supra* note 51.

[190] Schmidt, *supra* note 35, at 557 (acknowledging the Kamehameha Schools as a "unique educational institution" whose "avowed educational mission is to remedy the severely disadvantaged position of Native Hawaiians and to protect Native Hawaiian culture").

[191] Rice v. Cayetano, 528 U.S. 495, 518 (2000).

Doe v. Kamehameha Schools: The Undiscovered Opinion

Eric Grant*

Contrary to the expectations of many, *Doe v. Kamehameha Schools*[1] ended not with a bang but with a whimper. On May 11, 2007, after nearly four years of hard-fought, high-profile litigation, the case settled on what was very likely the day *after* the United States Supreme Court had acted on plaintiff John Doe's petition for certiorari.[2] By causing that petition to be dismissed, the settlement left in place the Ninth Circuit's 8-to-7 en banc decision upholding Kamehameha's racially exclusionary admissions policy against Doe's federal civil rights claim. Thus, as Kamehameha's trustees observed in their public announcement of the settlement, "the Circuit Court ruling stands."[3]

And so it does—for now. But what would have happened if the parties had not settled? What if they had failed to file the necessary paperwork on Friday afternoon in time to prevent the Supreme Court from publicly acting on the case at the Court's scheduled session on Monday morning?[4] Professor Michael Stokes Paulsen, who for a time served as co-counsel for John Doe, has a penchant for discovering previously "undiscovered" judicial opinions.[5] Through means he has refused to reveal, Professor Paulsen has come into possession of the Supreme Court's opinion in *Doe v. Kamehameha Schools*. I am pleased to share it with you here.[6]

---

* Attorney at Law, Sacramento, California. The author served as lead counsel for plaintiff John Doe in the subject case. The author wishes to thank Andrea M. Miller, Professor Michael Stokes Paulsen, and Curtis R. Grant for their steadfast support and assistance in this matter.

[1] Doe v. Kamehameha Schools, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, ___ U.S. ___, 127 S. Ct. 2160 (2007).

[2] *See* Supreme Court of the United States, Docket for 06-1202, http://www.supremecourtus.gov/docket/06-1202.htm (online docket showing that the petition was "DISTRIBUTED for Conference of May 10, 2007" but was "Dismissed" by stipulation on May 11th) (last visited Feb. 17, 2008).

[3] Kamehameha Schools and "John Doe" Settle Admissions Lawsuit, http://www.ksbe.edu/article.php?story=20070514062928373 (posted May 14, 2007).

[4] The Court sat at 10:00 a.m. on Monday, May 14, 2007 to issue orders in numerous pending cases and deliver its decision in *Schriro v. Landrigan*, ___ U.S. ___, 127 S. Ct. 1933 (2007). *See Journal of the Supreme Court of the United States*, October Term 2006, at 911, 919-51, *available at* http://www.supremecourtus.gov/orders/journal/jnl06.pdf. For what it's worth, *Schriro* reversed an en banc decision of the Ninth Circuit. *See* ___ U.S. ___, 127 S. Ct. at 1939.

[5] *See* Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993 (1993); Michael Stokes Paulsen & Daniel N. Rosen, Brown, Casey-*Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994).

[6] [Editors' note: the "Supreme Court opinion" presented in this article is a hypothetical opinion drafted by the author.]

Per Curiam

SUPREME COURT OF THE UNITED STATES[7]

JOHN DOE, A MINOR, BY HIS MOTHER AND NEXT FRIEND, JANE DOE *v.* KAMEHAMEHA SCHOOLS/ BERNICE PAUAHI BISHOP ESTATE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–1202. Decided May 14, 2007.

PER CURIAM.

Kamehameha Schools is a system of private, nonsectarian, commercially operated K-12 schools located in Hawaii. The Schools' publicly stated admissions policy "is to give preference to children of Hawaiian ancestry." Kamehameha Schools, Facts About KS, http://www.ksbe.edu/about/facts.php. A student who was repeatedly denied admission to Kamehameha High School (on the conceded ground that he lacked such ancestry) challenged the admissions policy as a violation of 42 U.S.C. § 1981, a federal civil rights statute. The District Court ruled in favor of Kamehameha Schools, *Doe v. Kamehameha Schools*, 295 F. Supp. 2d 1141 (D. Haw. 2003), but a divided panel of the Court of Appeals for the Ninth Circuit reversed, holding that "the Schools' admissions policy, which operates in practice as an absolute bar to admission for those of the non-preferred race, constitutes unlawful race

---

Could the Court actually have prepared and issued an opinion without having received merits briefs or having heard oral argument? Although it is unusual, the Court occasionally will do just that, namely, "grant the petition for certiorari and reverse the judgment of the Court of Appeals by [a] summary disposition." Los Angeles County v. Rettele, ___ U.S. ___, 127 S. Ct. 1989, 1990 (2007) (per curiam) (reversing Ninth Circuit's judgment without briefing or oral argument). The Ninth Circuit seems to come in for this treatment with abnormally high frequency. *See, e.g.*, Gonzales v. Thomas, 547 U.S. 183, 185 (2006) (per curiam) (agreeing with the Government that "the Ninth Circuit's error is so obvious in light of [*INS v.*] *Ventura* that summary reversal would be appropriate"); INS v. Ventura, 537 U.S. 12, 14 (2002) ("We agree with the Government that the [Ninth Circuit] should have remanded the case to the BIA. And we summarily reverse its decision not to do so."); Ministry of Defense v. Elahi, 546 U.S. 450 (2006) (per curiam) (vacating Ninth Circuit's judgment without briefing or oral argument); Kane v. Espitia, 546 U.S. 9 (2005) (per curiam) (reversing Ninth Circuit's judgment without briefing or oral argument).

[7] [Editors' note: the "Supreme Court opinion" presented in this article is a hypothetical opinion drafted by the author.]

discrimination in violation of § 1981." *Doe v. Kamehameha Schools*, 416 F.3d 1025, 1027 (9th Cir. 2005).

The Court of Appeals then reheard the case en banc and (dividing eight judges to seven) reversed course, concluding that "the admissions policy is valid under 42 U.S.C. § 1981." *Doe v. Kamehameha Schools*, 470 F.3d 827, 849 (9th Cir. 2006) (en banc). The student now seeks review in this Court. For the reasons set forth below, we are constrained to reverse yet again. Because the en banc majority's decision is patently irreconcilable with numerous decisions of this Court, we grant the petition for certiorari and summarily reverse the judgment of the Court of Appeals.

I

Kamehameha Schools is a "charitable testamentary trust established [in 1884] by the last direct descendent of King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians." 470 F.3d at 831 (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)). In its own words, Kamehameha Schools is "the largest private landowner in the state of Hawai'i." Kamehameha Schools, Facts About KS, http://www.ksbe.edu/about/facts.php. By its own report, "the market value of [the Schools'] endowment increased by more than $600 million . . . to $6.8 billion" in the fiscal year ending June 30, 2005. Kamehameha Schools, *A Report to the Community: July 1, 2004-June 30, 2005*, at 16 (2006), *available at* http://www.ksbe.edu/pdf/annualreport05/KS_ Annual-Report_2005.pdf.

Princess Pauahi Bishop's will directed the trustees of her estate to "erect and maintain in the Hawaiian Islands two schools . . . to be known as, and called the Kamehameha Schools." 416 F.3d at 1028 (quoting Will of Bernice Pauahi Bishop, *reprinted in Wills and Deeds of Trust* 17-18 (3d ed. 1950)). In accord with that direction, the first trustees established the first Kamehameha School in 1887. Under the guidance of the current trustees (respondents here), Kamehameha Schools today operates a private school system consisting of three K-12 campuses—one each on the islands of Oahu, Maui, and Hawaii—having a total enrollment of some 5000 students. *See* 470 F.3d at 832; 295 F. Supp. 2d at 1156.

These schools can only be described as prestigious. As the District Court found, "Kamehameha Schools has achieved measurable success"; for example, "[s]eniors attending Kamehameha Schools outperform 'both national norms and state averages on the SAT I verbal and math tests.'" 295 F. Supp. 2d at 1170. As Kamehameha Schools justifiably boasts, out of the 437 graduates from Kamehameha High School on Oahu in 2004, "100% were

accepted to two- and four-year colleges nationwide." Kamehameha Schools, Facts About KS, http://www.ksbe.edu/about/facts.php. These and other alumni of the Schools—including U.S. Senators, state appellate judges, Olympic athletes, three-star admirals, and university professors—"have distinguished themselves as contributors and leaders to . . . the State of Hawaii." 295 F. Supp. 2d at 1170. It is fair to say, therefore, that Kamehameha Schools "has an illustrious network of alumni and a record of success that exceeds that of any other school in Hawaii." 470 F.3d at 869 (Bybee, J., dissenting).

In these circumstances, it is no surprise that competition for admission to Kamehameha Schools is fierce. For instance, the District Court found that for "the 450 spaces available at Kamehameha Schools' Kapalama [Oahu] campus for the 2002-2003 academic year, there were 4,518 applicants." 295 F. Supp. 2d at 1157. On the other hand, competition for admission to the Schools is restricted. The central fact in this case is that the Schools' publicly stated "policy on admissions is to give preference to children of Hawaiian ancestry." *Id.* at 1156 (quoting respondents' own declarant); *accord* 470 F.3d at 829 ("We took this case en banc to reconsider whether a Hawaiian private, non-profit K-12 school . . . violates [42 U.S.C.] § 1981 by preferring Native Hawaiians in its admissions policy.").

How to characterize the nature, operation, and duration of Kamehameha Schools' admissions "preference" was the subject of heated debate in the multiple opinions below, but certain facts are undisputed.

The first is that, by the term "Hawaiian ancestry," Kamehameha Schools means basically "Native Hawaiian blood," 470 F.3d at 844, "defined to include any person descended from the aboriginal people who exercised sovereignty in the Hawaiian Islands prior to 1778." *Id.* at 832. In this regard, the Schools' admissions policy employs essentially the same classification that we considered in *Rice v. Cayetano*, 528 U.S. 495 (2000), which restricted voting in certain elections to "Hawaiians," defined to include "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778." *Id.* at 509. In *Rice*, of course, we concluded that such a use of Hawaiian ancestry was "a proxy for race," that is, the restriction was "a racial classification." *Id.* at 514.

Another undisputed fact is that Kamehameha Schools' "preference" for Native Hawaiians is not merely a "goal" or a "plus factor" or even a percentage-type "quota." Rather, the Schools' admissions policy "operates to admit students without any Hawaiian ancestry only after all qualified applicants with such ancestry have been admitted." 470 F.3d at 832. In practice, "there are many more qualified students of Hawaiian ancestry than there are available places at the Schools," such that "it is very rare that a

student with no Hawaiian ancestry is admitted to the campus programs." *Id.* "Very rare," moreover, is a euphemism: "*from 1962 until 2002, Kamehameha admitted exactly one student who was not of Native Hawaiian descent.*" *Id.* at 870 (Bybee, J., dissenting) (citing *id.* at 844 n.10 (majority opinion)). Even that one admission was an aberration: "Kamehameha's trustees repeatedly apologized to the Native Hawaiian community" for doing it, and they made sufficient changes to the admissions process "to prevent such a 'situation' from happening again." *Id.* In other words, in the past four decades, Kamehameha Schools admitted a single student lacking Hawaiian ancestry out of the literally thousands who matriculated in that period—and promised never to do it again.

Also undisputed is that the "Hawaiians only" admissions policy is no innovation. As stated in 1888 (just a year after the Schools' founding) by Charles Reed Bishop (Princess Pauahi's husband of some thirty years and one of the first trustees), the Princess "created the Kamehameha Schools, 'in which Hawaiians have the preference,' so that 'her own people' could once again thrive." *Id.* at 831 (quoting Charles R. Bishop, *The Purpose of the Schools*, Handicraft, Jan. 1889, at 3). In 1910, Mr. Bishop wrote to his successors: "Mrs. Bishop intended that, in the advantages of her beneficence, those of her race should have preference." *Id.* at 832. Therefore, he "concluded that the principal of the Schools was justified in refusing to admit a student who had no native Hawaiian ancestry." *Id.* As the majority below put it, Mr. Bishop

> went on to convey that only if Native Hawaiians failed to apply to the Schools, or if conditions changed fundamentally, should admissions be opened to other ethnicities: "It was wise to prepare for and to admit natives only and I do not think the time has come to depart from that rule."

Id. (quoting Black & Mellen, *Princess Pauahi Bishop and Her Legacy* 155).

Charles Bishop's century-old belief that "the time has [not yet] come" to depart from a "Hawaiians only" admissions policy remains the guiding philosophy of Kamehameha Schools' current trustees. As they publicly stated after this case was commenced: the policy "must remain [in place] until Hawaiians are leading in scholastic achievement, until they are under-represented in prisons and homeless shelters, until their well-being is restored." 470 F.3d at 872 (Bybee, J., dissenting) (quoting *Trustees of Kamehameha Schools, Kamehameha Schools' Policy Advocates Social Justice*, Honolulu Advertiser, Aug. 24, 2003). More quantitatively, despite the Schools' wealth and long existence, its "campus programs can only reach 7% of the Native Hawaiian school-age children in the State of Hawaii." 295 F. Supp. 2d at 1170. Yet respondents have determined that the current

admissions policy will continue until Kamehameha Schools has the ability to offer its "K-12 campus-based educational experience . . . to all [i.e., 100%] eligible Native Hawaiian children." *Id.* at 1171 (quoting J. Douglas Keahou Ing Decl. 74). Thus, it makes sense that the Schools' publicly stated "mission is to fulfill Pauahi's desire to create educational opportunities *in perpetuity* to improve the capability and well-being of people of Hawaiian ancestry." 470 F.3d at 872 (Bybee, J., dissenting) (emphasis added) (quoting Kamehameha Schools Admission Office, Main Page, http://www.ksbe.edu/admissions/mainpage.html).

Petitioner is a native (and lifelong resident) of the State of Hawaii, but he is not "Native Hawaiian" in a racial sense. *See* 470 F.3d at 829, 834. Petitioner applied for admission to Kamehameha High School for each of four successive academic years, from 2002-2003 (his ninth grade year) through 2005-2006 (his twelfth grade year). In each instance, Kamehameha Schools "deemed him a 'competitive applicant' and put him on the waiting list"; nevertheless, "he was repeatedly denied admission." *Id.* at 834. In light of the foregoing, the reason for the repeated denials is unambiguous: respondents forthrightly "concede that [petitioner] likely would have been admitted had he possessed Hawaiian ancestry." *Id.*

In June of 2003, petitioner privately gave respondents the opportunity to remedy their racial discrimination against him by admitting him to the tenth grade for the upcoming academic year. When respondents refused, petitioner (then a minor suing by his mother as next friend) instituted this action against Kamehameha Schools and its five trustees in the District Court for the District of Hawaii. Petitioner attacked the legality of the Schools' admissions policy as described above, alleging that it constituted "invidious discrimination on the basis of race in violation of 42 U.S.C. § 1981." 295 F. Supp. 2d at 1159. Petitioner's complaint sought declaratory and injunctive relief against the policy, including an order admitting him to a campus of Kamehameha High School, as well as damages. *See* 470 F.3d at 834. Without objection from respondents or the District Court, petitioner and his mother brought this action "anonymously on the basis of their reasonable fears of retaliation by [Kamehameha] students, their parents, and members of the public for challenging [the Schools'] preference for applicants of 'Hawaiian ancestry.'" (Compl. ¶ 4.)

On cross-motions for summary judgment as to the facial validity of Kamehameha Schools' admissions policy, the District Court ruled in favor of respondents, concluding that the policy was consistent with § 1981. *See* 295 F. Supp. 2d at 1146-47. On appeal, a divided three-judge panel of the Court of Appeals for the Ninth Circuit reversed, ruling in petitioner's favor that "the

Schools' admissions policy, which operates in practice as an absolute bar to admission for those of the non-preferred race, constitutes unlawful race discrimination in violation of § 1981." 416 F.3d at 1027.

The Court of Appeals granted respondents' petition for rehearing en banc. Dividing eight judges to seven in favor of respondents and producing six opinions, the en banc court reversed again, the bare majority concluding that Kamehameha Schools' "admissions policy is valid under 42 U.S.C. § 1981." 470 F.3d at 849. We now summarily reverse.

II

As illustrated by the oscillating series of decisions that culminated in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the proper standard for scrutinizing racial classifications is a question that we have revisited many times. *Adarand*, of course, settled that the "strictest judicial scrutiny" is demanded for every racial classification challenged under the Constitution. *Id.* at 224. Respondents do not dispute that this very same level of scrutiny is demanded for racial classifications challenged under at least one federal *statute*, namely, Title *VI* of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000). *See Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (opining that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI").

Gratz involved multiple challenges to a school's race-based admissions policy under the Equal Protection Clause, Title VI, and § 1981. *See id.* at 249-50. Having concluded that such "admissions policy violates the Equal Protection Clause of the Fourteenth Amendment," *id.* at 275, we might have declined to address liability under the two statutes. Nevertheless, we went on expressly to "find that the admissions policy also violates Title VI and 42 U.S.C. § 1981." *Id.* at 275-76. In the same footnote that equated liability under the Constitution and Title VI, we declared that § 1981 shares the same substantive standard: "purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981." *Id.* at 276 n.23 (citing *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 389-90 (1982)). *Gratz*'s companion case similarly opined that "the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause." *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (citing *General Building Contractors Association*, 458 U.S. at 389-90).

In *General Building Contractors*, from which both *Gratz* and *Grutter* drew for this point, we reviewed the history of § 1981. Finding that "the origins of

the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870," which "were legislative cousins of the Fourteenth Amendment," we reasoned: "In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself." *Gen. Bldg. Contractors*, 458 U.S. at 389-90. Therefore, in holding that the strict scrutiny applied to Title VI claims does not apply to § 1981 claims (because Title *VII*-type scrutiny applies instead), the Court of Appeals departed from our decisions.[8]

Respondents proffer several reasons why we did not mean what we said about § 1981 in *Gratz* and *Grutter*. First, as did the majority below, *see* 470 F.3d at 839, respondents emphasize that those two decisions "involved challenges to race-conscious admissions policies by a *public* university," while the present case, "in contrast, involves a wholly *private* school." (Respondents' Brief in opposition 15). But no public-private distinction exists either in the text or in the jurisprudence of § 1981. To the contrary, as amended in 1991,[9] the statute expressly repudiates such a distinction: "The rights protected by this section are protected against impairment by nongovernmental discrimination *and* impairment under color of State law." 42 U.S.C. § 1981(c) (2000) (emphasis added). Our decisions do the same: "[T]he prohibitions of § 1981 encompass private as well as governmental action." *Gen. Bldg. Contractors*, 458 U.S. at 387-88; *see also Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (holding that "the racial exclusion practiced by [two *private* schools] amounts to a classic violation of 1981");

---

[8] Respondents argue that *Gratz* and *Grutter* referred to *General Building Contractors* for "a much narrower proposition—namely, that both § 1981 and the Equal Protection Clause require a showing of *purposeful* discrimination," as opposed to mere disparate impact. (Respondents' Brief in opposition 15 n.2) (emphasis added). This reading of the two cases is obtuse: there was simply no question whatever that the use of race in the two challenged admissions policies was "purposeful."

[9] The en banc majority asserted that Congress "[r]e-enacted" § 1981 as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *See* 470 F.3d at 847. This is a misnomer that reflects a misunderstanding. As we have recounted, the 1991 Act was "in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964," i.e., § 1981 and Title VII. Landgraf v. USI Film Products, 511 U.S. 244, 250 (1994). Thus, as one of many revisions to the federal civil rights statutes, section 101 of the 1991 Act "*amended* [§ 1981's] prohibition of racial discrimination in the 'mak[ing] and enforce[ment] [of] contracts . . .' in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)." *Landgraf*, 511 U.S. at 251 (emphasis added) (brackets in original).

Gratz, 539 U.S. at 275-76 (holding that a *public* university's race-based "admissions policy also violates . . . § 1981").

Second, respondents purport to distinguish Title VI from § 1981 on the ground that "[s]trict scrutiny of Title VI claims against private actors . . . ensures that the *government* does not unwittingly participate in unlawful race discrimination through public funding." (Respondents' Brief in opposition 16). This is a novel and interesting theory, but respondents' sole authority for it—Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265, 285-87 (1978)—had a far simpler explanation for why strict scrutiny applies to Title VI claims against private persons: Congress intended so.[10] As explained in *General Building Contractors*, and as applied in *Gratz* and *Grutter*, the same holds true for § 1981.

Finally, respondents argue that strict scrutiny should not govern § 1981 claims because it "would make little sense to open the door to flexible race-conscious measures in private employment under Title VII, only to close it under § 1981." (Respondents' Brief in opposition 17). Respondents have it exactly backward: with its origin in the Civil Rights Act of 1866, § 1981 was enacted almost a century before Title VII, and Congress in 1972 "specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866 . . . insofar as it affords private-sector employees a right of action based on racial discrimination in employment." *Runyon*, 427 U.S. at 174. Moreover, compliance with Title VII has never been thought to insulate a defendant from liability under § 1981: an individual who is aggrieved by racial discrimination "clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief;" rather, Title VII and § 1981 "'augment each other and are not mutually exclusive.'" *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (quoting H.R. Rep. No. 92-238, at 19 (1971)).

In sum, by applying Title VII-type scrutiny instead of the strict scrutiny applicable to Title VI and the Fourteenth Amendment, the Court of Appeals construed § 1981 in a manner markedly different from the latter provisions, thereby contradicting *Gratz*, *Grutter*, and *General Building Contractors*. We therefore confirm, with what we hope is sufficient clarity, that "purposeful

---

[10] *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265, 284 (1978) ("Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution."); *id.* at 285 ("[S]upporters of Title VI repeatedly declared that the bill enacted constitutional principles."); *id.* at 286 ("Other sponsors shared [this] view that Title VI embodied constitutional principles.").

discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981." *Gratz*, 539 U.S. at 276 n.23.

III

We now turn from the abstract to the concrete and proceed to scrutinize the racially exclusionary admissions policy that operated to deny petitioner admission to Kamehameha Schools.

A

It is readily apparent that such policy fails the "narrow tailoring" prong of strict scrutiny in two respects.

First, *Gratz* and *Grutter* together teach that in the context of race-based school admissions policies, a hallmark of a narrowly tailored policy is "individualized consideration." Thus, *Gratz* invalidated an admissions policy that did "not provide [the] individualized consideration" contemplated by Justice Powell's opinion in *Bakke*. *Gratz*, 539 U.S. at 271. Likewise, *Grutter* upheld an admissions policy only because it "satisf[ied] the requirement of individualized consideration." *Id.* at 336. Indeed, *Grutter* emphasized that the "importance of this individualized consideration in the context of a race-conscious admissions program is paramount," and it approvingly quoted Justice Powell's observation that the "'denial . . . of the right to individualized consideration' [was] the 'principal evil' of the medical school's admissions program." *Id.* at 337 (quoting *Bakke*, 438 U.S. at 318 n.52).

Individualized consideration means, at very least, that the school "cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." *Id.* at 334. In addition, a narrowly tailored admissions policy must "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337-38; *accord Gratz*, 539 U.S. at 272 (condemning the challenged policy because it "has the effect of making 'the factor of race . . . decisive' " for any given applicant (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.))). In the end, a court must be able to say that "a rejected applicant 'will not have been foreclosed from all consideration for [a] seat simply because he was not the right color or had the wrong surname.'" *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318 (opinion of Powell, J.)).

Given the undisputed facts (*ante* pp. 3-4), it is manifest that Kamehameha Schools' racially exclusionary admissions policy falls short of these

requirements in all respects. The policy is, in its essence, a two-track system: "the Schools consider the ethnic background of the students and admit qualified children with Native Hawaiian ancestry before admitting children with no such ancestry." 470 F.3d at 844. For applicants like petitioner who have no Hawaiian ancestry, race is both "defining" and "decisive"—only one such child having been admitted by the Schools since 1962. It is apparent that non-Hawaiian children are indeed foreclosed from all consideration for admission just because they are not of the right ancestry and have the wrong bloodline.

Second, in addition to failing the requirement of individualized consideration, Kamehameha Schools' admissions policy fails "[t]he requirement that all race-conscious admissions programs have a termination point." *Grutter*, 539 U.S. at 342. The Court of Appeals struggled mightily to deny the obvious, but the perpetual nature of the "Hawaiians only" policy is evident from respondents' own words. *See ante* p. 4. The en banc majority's own observation that for "118 years, the Schools' admissions policy . . . has remained constant," 470 F.3d at 845, only confirms the unlikely prospect of any change in the foreseeable future. In *Grutter*, we took "the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." 539 U.S. at 394. We likewise take Kamehameha Schools at its word that its "mission is to fulfill Pauahi's desire to create educational opportunities *in perpetuity* to improve the capability and well-being of people of Hawaiian ancestry." 470 F.3d at 872 (Bybee, J., dissenting) (emphasis added).

Kamehameha Schools' racially exclusionary admissions policy neither affords individualized consideration nor has a termination point. In nevertheless upholding that policy, the Court of Appeals misapplied our decisions that strictly scrutinize race-based school admissions policies.

B

Because the Court of Appeals dealt with the issue at such great length, *see* 470 F.3d at 839-46, we take this opportunity to confront the errors in the majority's application of the marginally less demanding scrutiny that governs Title VII claims. As we shall explain, the Schools' admissions policy also fails Title VII scrutiny.

As stated in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), and as confirmed in *Johnson v. Transportation Agency*, 480 U.S. 616, 637-38 (1987), a racial preference violates Title VII if it "unnecessarily

trammel[s] the rights of [the non-preferred] employees or create[s] an absolute bar to their advancement." While not foreclosing every kind of quota (as strict scrutiny would do), this standard nonetheless demands a modicum of individualized consideration: "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* at 638 (finding that the challenged plan did not create an absolute bar where it "sets aside no positions" but instead "merely authorizes that consideration be given to affirmative action concerns"). For the reasons set forth immediately above, the challenged admissions policy fails the "absolute bar" test as explicated by this Court.

The majority below, however, consciously "modified" this Court's test. *See* 470 F.3d at 839, 841, 842, 843, 844, 846. Judge Bybee has cogently catalogued the majority's numerous errors in this regard, *see id.* at 860-72 (Bybee, J., dissenting), but one error was particularly egregious. In asking whether a race-based policy creates an absolute bar to advancement, the majority considered not advancement within the defendant institution, but instead "within the [relevant] community as a whole." *Id.* at 842. This led the majority to ask not whether children lacking Hawaiian ancestry are absolutely barred from attending *Kamehameha Schools*, but whether they "have ample and adequate alternative educational options," i.e., whether they can "attain educational achievement in Hawaii" at other schools. *Id.* at 844. One can imagine the majority asking whether black children in Topeka, Kansas had "adequate alternative educational options" given the public school admission policies that excluded them because of their race. Indeed, one might say that the Court of Appeals has proposed a new standard for school admissions: "separate but adequate."[11]

---

[11] Respondents do not even attempt to defend the lower court's conscious departures from *Weber* and *Johnson*. Instead, respondents choose to make their stand on a factual point: "the district court found as a matter of fact that Kamehameha Schools' admissions policy is not an 'absolute bar' to the admission of non-Native Hawaiians." (Respondents' Brief in opposition 21). And so it did. *See* 295 F. Supp. 2d at 1170. But for the reasons we have discussed at length, that "finding" is *clearly erroneous*, and even the Court of Appeals did not rely on it.

Alternatively, respondents argue that "[e]ven if the Schools' admissions policy could be characterized as an absolute bar," the policy nonetheless "would satisfy the *Weber* test" because it is "remedial." (Respondents' Brief in opposition 21). Not so. In *Johnson*, the defendant's plan "directed that sex or race be taken into account for the purpose of remedying underrepresentation"; thus, the plan "sought to remedy [sex-based] imbalances" within the defendant's workforce. 480 U.S. at 634. Yet despite the plan's "remedial" character, the Court considered whether it "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement." *Id.* at 637-38. The Court found the requirement satisfied not because the plaintiff had (to paraphrase the majority below) "ample and adequate alternative

Two other aspects of the lower court's "sweeping modification of the Title VII standard," *id.* at 857 (Bybee, J., dissenting), also warrant our attention.

First, the majority below acknowledged that under a "traditional" Title VII analysis, *id.* at 839, 847—a shorthand for *Weber* and *Johnson*—a valid affirmative action plan "must respond to a manifest imbalance in the work force." *Id.* at 840. The majority also acknowledged that this requirement embodies the "goal of achieving diversity and proportional representation in the workplace," which is a goal that "necessarily focuses *internally* and is limited to the 'employer's work force.'" *Id.* at 842.

Out traditional Title VII analysis is fatal to Kamehameha Schools' admissions policy. Obviously, that policy does not seek to achieve either racial diversity or proportional ethnic representation in the classroom: it seeks precisely the opposite. Moreover, the focus of the policy is decidedly *external*. As catalogued by the majority, the Schools' efforts are directed at, among other things, "increasing the number of Native Hawaiians attending colleges and graduate schools, improving Native Hawaiian representation in professional, academic, and managerial positions, and developing community leaders who are committed to improving the lives of all Native Hawaiians." *Id.* at 844. Indeed, the Schools' policy has a goal no less ambitious than "to help perpetuate Native Hawaiian culture." *Id.*

Faced with these stubborn facts, the majority used the device of "adjusting" the manifest imbalance requirement to account for "the external focus of [Kamehameha's] educational mission." *Id.* at 842. This adjustment "render[ed] unnecessary the requirement of proof of a 'manifest imbalance' *within* a particular school; the relevant population is the community as a whole." *Id.* The majority then found that "the relevant community in this case is the state of Hawaii" and further that "a manifest imbalance exists in the K-12 educational arena in the state of Hawaii, with Native Hawaiians falling at the bottom of the spectrum in almost all areas of educational progress and success." *Id.* at 843. These findings took the majority straight to the conclusion foreordained when the majority "adjusted" this Court's test: "it is precisely this manifest imbalance that the Kamehameha Schools' admissions policy seeks to address." *Id.* But this kind of imbalance—the effects of general societal discrimination against a particular group—is "precisely" the sort of justification condemned by this Court from *Bakke* through *Grutter*.

[employment] options" elsewhere in the industry, 470 F.3d at 844, but because "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." 480 U.S. at 638. On its face, Kamehameha Schools' racially exclusionary admissions policy fails this requirement.

Second, Title VII scrutiny as formulated by this Court has a final requirement: racial preferences must be "intended to *attain* a balanced work force, not to maintain one." *Johnson*, 480 U.S. at 639. The majority below "modified" this requirement as well: rather than seek to attain a balanced work force (or, in the case of a school, a balanced student body), "an admissions policy must do no more than is necessary to remedy the imbalance *in the community as a whole*." 470 F.3d at 842 (emphasis added). Accordingly, Kamehameha Schools may hold on to its racially exclusionary admissions policy "for so long as is necessary to remedy the current educational effects of past, private and government-sponsored discrimination and of social and economic deprivation." *Id.* at 846. In other words, the racially exclusionary policy may continue until all the socioeconomic ills of Native Hawaiians are cured. Surely, this is the kind of reasoning that "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *City of Richmond. v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (plurality opinion).

The majority acknowledged that the final Title VII requirement mandates that racial preferences be "temporary." 470 F.3d at 845. Yet in the teeth of the undisputed evidence set forth above (*ante* p. 4), the majority found Kamehameha Schools' racially exclusionary admissions policy to be "limited in duration" for two reasons. *Id.* One was the assertion discussed in the previous paragraph, i.e., the policy will disappear "as soon as" Native Hawaiians overcome the lingering effects of discrimination and deprivation. The other was the notion that "if qualified students with Native Hawaiian ancestry do not apply to the Schools in sufficient numbers to fill the spots available, as happened in one recent year, the Schools' policy is to open admissions to any qualified candidate." *Id.* at 845-46 (citation omitted). To paraphrase, what happened once in the past four decades *might* someday happen again. Can this slender possibility really "assure[] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter"? *Grutter*, 539 U.S. at 342 (quoting *Croson*, 488 U.S. at 510). We think not.

Admission to Kamehameha Schools is governed by a policy that operates as an absolute and perpetual bar to children of the "wrong" ancestry. Regardless of the standard of scrutiny applied, the policy cannot pass muster.

IV

The Court of Appeals held "alternatively, and in addition," that Congress "specifically intended to allow the Kamehameha Schools to operate" its system of racially segregated schools. 470 F.3d at 847 (section heading). In

so holding, the lower court repudiated fundamental national public policy as understood by Congress and this Court.

Born of the Civil Rights Act of 1866, 14 Stat. 27, § 1981 is "one of our oldest civil rights statutes," if not the oldest. *Patterson v. McLean Credit Union*, 491 U.S. 164, 168 (1989). It has, moreover, a venerable history in this Court. In *Runyon v. McCrary*, 427 U.S. 160, 168 (1976), we held that "§ 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because" of their race. On the same day that we decided *Runyon*, we also handed down *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Against the argument that the statutory phrase "as is enjoyed by white persons" operated to exclude whites from the statute's protections, *McDonald* held that § 1981 "was not understood or intended to be reduced . . . to the protection solely of nonwhites. Rather, [§ 1981] was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts *against, or in favor of, any race*." *Id.* at 295 (emphasis added). Central to this holding was the truth that "the statute explicitly applies to '*all* persons.' " *Id.* at 287.

Subsequently, in 1989, we considered whether *Runyon* was correct in ruling that "§ 1981 prohibits *private* schools from excluding children who are qualified for admission, solely on the basis of race." *Patterson*, 491 U.S. at 171 (emphasis added). After reargument on this point in particular, we unanimously "reaffirm[ed] that § 1981 prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 172. Congress itself reaffirmed that very same thing as part of the Civil Rights Act of 1991, expressly confirming that the statute protects against "nongovernmental discrimination." 42 U.S.C. § 1981(c) (2000); *see also* H.R. Rep. No. 102-40(II), at 37 (1991) (explaining that new subsection (c) of § 1981 "is intended to codify *Runyon v. McCrary*"). Since the 1991 Act, Congress has not further amended § 1981 in any fashion. This Court, of course, has continued to apply the statute as before, ruling in 2003 that a university's race-based admissions policy violated § 1981. *See Gratz*, 539 U.S. at 275-76.

This decisional and statutory history are classic illustrations of two points that we explicated in *Bob Jones University v. United States*, 461 U.S. 574 (1983). The first is "this Court's view that racial discrimination in education violates a most fundamental national public policy." *Id.* at 593. The second is that "Congress . . . [has] clearly expressed its agreement that racial discrimination in education violates a fundamental public policy." *Id.* at 594. While the Court's view, and Congress's agreement with that view, were no doubt forged in significant part in controversies that involved *public* education, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954), the

"fundamental national public policy" identified in *Bob Jones* quintessentially targets racial discrimination by *private* schools as well—even *nonprofit* private schools. Thus, on the basis of that public policy, *Bob Jones* affirmed a denial of federal tax exemptions to two "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards." 461 U.S. at 577. More generally, but with particular relevance with respect to Kamehameha Schools and its racially exclusionary admissions policy, we said there: "Whatever may be the rationale for [the] private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy." *Id.* at 595.[12]

In this light, no court could conceivably find that Congress had affirmatively *authorized* a private school to exclude children who are qualified for admission, solely on the basis of race, absent the clearest possible expression of intent to do so. Of course, the majority below purported to find such expression, concluding that Congress "specifically intended" to authorize Kamehameha Schools' racially exclusionary admissions policy. 470 F.3d at 847 (section heading). That is, according to the majority, "the most plausible reading of § 1981, in light of the Hawkins-Stafford Amendments and the [Native Hawaiian Education Act], is that Congress intended that [the Schools'] preference for Native Hawaiians . . . be upheld." *Id.* at 849. In our

---

[12] Respondents deny the obvious relevance of *Runyon* and *Bob Jones* on the ground that "[b]oth cases involved race discrimination against African-Americans," and "[n]either case involved the use of race-conscious measures adopted for the legitimate purpose of remedying harm to a minority group." (Respondents' Brief in opposition 17). In other words, respondents advance an interpretation of § 1981 under which the statute would "mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.). *McDonald*, among other cases, squarely rejects that interpretation.

In addition, respondents assert that because Kamehameha Schools' racially exclusionary admissions policy was "adopted for an indisputably legitimate remedial purpose," the decision below "presents no inconsistency" with *Runyon* or *Bob Jones*. (Respondents' Brief in opposition 18). But the legitimacy *vel non* of a given racial classification is what emerges at the end of judicial scrutiny, not a premise to be assumed at the start: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

Finally, respondents have brought to our attention an Internal Revenue Service document purporting to find that their racially exclusionary admissions policy is consistent with *Bob Jones*. That document is hardly probative or persuasive, as it relies heavily on the Ninth Circuit's 1998 decision in Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998). We, of course, reversed that decision. *See* 528 U.S. 495 (2000).

judgment, however, the cited materials do not even come close to approaching the required expression of intent.

The "Hawkins-Stafford Amendments" are the majority's shorthand for several short-lived statutes relating to "Education for Native Hawaiians," enacted in 1988 and wholly repealed in 1994.[13] The majority's reliance on these provisions is, to say the least, untenable. That Congress instructed the Secretary of Education to provide grants to the Schools (1) to implement the "model curriculum developed by Kamehameha Elementary Demonstration School in appropriate public schools," and (2) for "a demonstration program to provide Higher Education fellowship assistance to Native Hawaiian students," former 20 U.S.C. §§ 4903(a), 4905(a) (repealed 1994), tells us literally nothing about Kamehameha Schools' policy to absolutely bar children of the wrong race from their private elementary and secondary schools. Accordingly, to say that such instruction is "clear support . . . for the validity of [that] policy," 470 F.3d at 849, is specious.

The "Native Hawaiian Education Act," now codified at 20 U.S.C. §§ 7511-7517, is likewise irrelevant. The most the majority could say about this statute is that it "recognized the special needs of Native Hawaiian students and the great disadvantages that they still face in Hawaii." 470 F.3d at 849 (citing 20 U.S.C. § 7512). How this "recognition" constitutes affirmative congressional authorization for racially segregated private schools in Hawaii is a question the majority left unanswered. That leaves the majority's reliance on a committee report:

> The Bishop Trust [i.e., Kamehameha Schools] is currently one of the largest charitable trusts in the world, valued in excess of $10 billion, and holds approximately 8 percent of all land in the State of Hawaii as well as a 10 percent share of Goldman Sachs. The Committee urges the Trust to redouble its efforts to educate Native Hawaiian children.

H.R. Rep. No. 107-63(I), at 333 (2001), *quoted in part in* 470 F.3d at 868 n.8 (Bybee, J., dissenting). While the various Members of this Court often disagree on the proper uses of legislative history, we all agree with Judge Bybee that the quoted report "provides remarkably little support for [the majority's] position." *Id.* at 868 n.8 (Bybee, J., dissenting).

In the end, there is no credible basis for concluding that Congress affirmatively authorized Kamehameha Schools to impose its racially exclusionary

---

[13] *See* Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, Title IV, 102 Stat. 130, 358-63 (codified for a time at 20 U.S.C. §§ 4901-09), *repealed by* Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 362, 108 Stat. 3518, 3975.

admissions policy on innocent children in the face of § 1981. The majority below should have heeded this Court's teaching that "a court should always turn first to one, cardinal canon before all others," i.e., "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank of Germain*, 503 U.S. 249, 253-54 (1992). In § 1981(a), Congress said that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts" on a nondiscriminatory basis; in § 1981(c), Congress said that such right is "protected against impairment by nongovernmental discrimination" like that practiced by Kamehameha Schools. For Congress literally to deny persons who lack Hawaiian ancestry the equal protection of the federal civil rights laws like § 1981 "would raise questions of considerable moment and difficulty." *Rice v. Cayetano*, 528 U.S. 495, 518 (2000). But whether Congress has in fact denied such protection by approving Kamehameha Schools' racially exclusionary admissions policy is not one of these momentous and difficult questions.

For these reasons, the Ninth Circuit's interpretation of 42 U.S.C. § 1981 repudiates the fundamental national public policy against racial discrimination in private education, as formulated by this Court and confirmed by Congress. Accordingly, we cannot countenance that interpretation.

The petition for certiorari is granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.[14]

[14] [Editors' note: the "Supreme Court opinion" presented in this article is a hypothetical opinion drafted by the author.]

"How Missionaries Thought: About Property Law, For Instance"

Alfred L. Brophy*

ABSTRACT

"How Missionaries Thought: About Property Law, For Instance" looks to a limited set of data—the writings of missionaries to Hawai'i in the antebellum era—as a gauge of American attitudes towards property more generally. Those writings analogize Hawaiian property law to feudalism, which interfered with alienability of land and left many dependent on their lords, and then suggest that property should be made more secure. They offer a prescription of Christianity, property, and the market as a solution to the ills of feudalism they have identified. Those prescriptions correlate with American attitudes more generally towards property, law, and religion in that period, and they suggest how pervasive and intertwined those ideas were.

When Chief Justice John Marshall wrote *Johnson v. M'Intosh*[1] in 1823, Christian missionaries from Connecticut had been living in the Hawaiian Islands (known to them as the "Sandwich Islands") for three years. Though they were separated by 5000 miles, the missionaries spoke a language similar to Marshall, of Christianity, civilization, and property. For Marshall wrote in *Johnson* to explain why land occupied by the Native Americans was not owned by them.[2] Marshall explained that European countries agreed to a policy that the country that "discovers" a land and then takes control of it, either through conquest or purchase, has title to the property.[3] Marshall rested part of the conclusion on the ways that the European settlers had developed a set of property rights.[4] He recognized that some of the claims were extravagant, perhaps opposed to "natural right,"[5] like the argument that the

---

* Reef C. Ivey II Professor of Law at the University of North Carolina. Many thanks to Aviam Soifer, William S. Brewbaker, Justin Levinson, and, most especially, Carl Christensen for their assistance.

1 21 U.S. (8 Wheat.) 543 (1823).

2 *Id.*

3 *Id.* at 587.

4 *Id.* at 590.

5 *Id.*

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

inhabited Americas had been "discovered" and that Christianity was adequate compensation for deprivation of land. Marshall phrased it skeptically: "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."[6] Yet, he also recognized that "the [c]ourts of the conqueror" could not deny the claim of conquest.[7]

As Marshall was writing, a similar intellectual process of justification of colonization, led by the next generation of Americans, was taking place on the other side of the earth.

The image of missionaries has shifted about as much as any figures in American history over the last one hundred fifty years.[8] Though depicted in their own time as, literally, the agents of the Lord, recent historians view them differently. There has been much writing on the role of the missionaries in the process of colonization (or what's now called by some in Hawai'i, occupation). Lilikala Kame'eleihiwa's *Native Land and Foreign Desires* interprets the missionaries as agents of capitalism. In Kame'eleihiwa's eyes, it was the combination of Christianity, the protection of property, and the market that led to the undoing of Hawaiian culture.[9] Other scholars identify similar patterns.[10] Robert H. Stauffer's *Kahana: How the Land was Lost*,[11]

Id. at 591. For more on the "discovery doctrine," see ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 314 (Oxford Univ. Press 1990).

[6] *M'Intosh*, 21 U.S. (8 Wheat.), at 573.

[7] *Id.* at 588; *see also* The Antelope, 25 U.S. (12 Wheat.) 546 (1827).

[8] WILLIAM R. HUTCHISON, ERRAND TO THE WORLD: AMERICAN PROTESTANT THOUGHT AND FOREIGN MISSIONS (1987). Hutchison, in a twist on Perry Miller's *Errand to the Wilderness*, draws upon the writings of American missionaries throughout the world—from Africa to Hawai'i to Asia. Whereas Miller wrote of the Puritans' self-described goals for their world in New England (the wilderness), Hutchison details the missionaries' self-described goals outside of America, of bringing evangelical Christianity to other people. Those self-described goals tell us much about what they sought and about the missionaries' minds. It is up to others, of course, to draw inferences about the morality of what the missionaries sought.

[9] LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 174-78 (1992). A similar story appears in JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002).

[10] Mari Matsuda found, for instance, the growth of a western legal system in her detailed study, *Law and Culture in the District Court of Honolulu, 1844-1845: A Case Study of the Rise of Legal Consciousness*, 32 AM. J. LEGAL HIST. 16 (1988). More recently Wendie Ellen Schneider has interpreted the increasing turn to Hawaiian courts in the 1840s as part of the process of accommodation between western merchants and local leaders. *See* Ellen Schneider, *Contentious Business: Merchants and the Creation of a Westernized Judiciary in Hawaii*, 108 YALE L.J. 1389 (1999). Ronald Takaki portrays the difficult life of plantation work in this period. *See* RONALD TAKAKI, PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII, 1835-1920 (1983).

[11] ROBERT H. STAUFFER, KAHANA: HOW THE LAND WAS LOST (2004).

about forfeiture of native lands in the late nineteenth century, and Noenoe K. Silva's *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism*,[12] which details native protests against colonization in the 1890s, both present the now-dominant interpretation that colonization led to loss of land and other rights.

Much recent writing has focused on the Hawaiians' reactions to the newcomers. Stuart Banner, for instance, asks why native Hawaiians adopted western patterns of land ownership.[13] His answer is that the powerful among the natives were "preparing to be colonized"—that is, they saw what was happening and wanted to maintain their wealth and power, to the extent possible, following colonization.[14] They could do this, they thought, by adopting a western property regime.[15]

This essay pursues a parallel track: how missionaries thought about property law.[16] It mines the missionaries' writings to understand how they saw property rights fitting into their world. The essay takes its title from Marshall Sahlins' much-discussed book, *How Natives Think: About Captain Cook, For Instance*. Sahlins was engaged in a debate with Princeton anthropologist Gananath Obeyesekere over whether native Hawaiians actually thought that Captain Cook was Lono, a god of the new year—or whether that was merely how westerners thought natives thought.[17] The question whether

---

[12] NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004); OSORIO, *supra* note 9 (analyzing ways that western legal regimes affected Hawaiian identity); JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2007). More traditional interpretations of Hawaiian history are still being produced. *See, e.g.*, THURSTON TWIGG SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? (1998).

[13] Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW & SOC'Y REV. 273, 275 (2005) [hereinafter Banner, *Preparing to Be Colonized*]. Banner has recently expanded that analysis in POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA (2007).

[14] Banner, *Preparing to Be Colonized*, *supra* note 13, at 303.

[15] *Id.* Carl Christensen suggests that some of the adoption of a western property system might also relate to the desire to have their property rights respected. *Calvin's Case*, for instance, suggested that the legal system (and property rights) of conquered Christian nations are preserved until changed by the conqueror, but that "the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature." Calvin's Case, 77 Eng. Rep. 377, 398 (1608); *see also* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 461-62 (2003).

[16] The missionaries' thinking about feudalism is distinct, of course, from what happened in the Hawai'i courts and from the process of conversion to a western property regime. *See* SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW (2000); MARSHALL SAHLINS, 1 ANAHULU: THE ANTHROPOLOGY OF HISTORY IN THE KINGDOM OF HAWAII (1992).

[17] *Compare* MARSHALL SAHLINS, HOW "NATIVES" THINK: ABOUT CAPTAIN COOK, FOR EXAMPLE (1995) [hereinafter SAHLINS, HOW "NATIVES" THINK], *with* GANANATH

natives believed Cook was a god has implications for our understanding of how natives thought. Obeyesekere opened the debate with a challenge to Sahlins: that Sahlins' argument that natives believed Cook was a god indicated Sahlins' adoption of a western viewpoint.[18] The western viewpoint, in Obeyesekere's opinion, was that natives would think some westerner was god.[19] In fact, westerners since the time of Columbus had told themselves that natives believed them to be gods.

Sahlins responded that Obeyesekere imposed his own set of values on the natives about what is rational.[20] And so Sahlins turns what was an attack on him for imposing western values (what one might phrase as "of course, the unsophisticated natives must have thought that Cook was Lono") into a claim that he respected natives' ideas more than Obeyesekere (maybe some in the west think it's irrational for natives to think that Cook was Lono, but it made sense within their world). The exchange is complex and an engaging read, in part for Sahlins' sparkling prose. The first line of the book captures the essence of the argument: "Heinrich Zimmermann heard it directly from the Hawaiians: Cook was Lono."[21]

The missionaries' writings about Hawai'i offer an important vantage for viewing ideas about property's place in human society, particularly in the years leading into the Civil War. There is substantial debate among legal historians about the nature of legal thought in that time, particularly about the role of property and religion.[22] Historians have identified a constellation of ideas circulating in antebellum America, where talk of moral and technological progress, Christianity, and economic development (called "improvement") was common. Factors such as the gradual amelioration (or evolution) of the common law from feudalism towards stable rules promoting the economy,[23] moral philosophy,[24] Christianity, and considerations of humanity[25]

OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK: EUROPEAN MYTHMAKING IN THE PACIFIC (1992) [hereinafter OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK].

[18] OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK, *supra* note 17, at xiii-xiv.

[19] *Id.*

[20] SAHLINS, HOW "NATIVES" THINK, *supra* note 17, at 9.

[21] *Id.* at 17. Zimmermann's journal of his voyage with Cook provides an account of Cook's and Zimmermann's dealings with the Native Hawaiians. *Id.*

[22] *See* discussion *infra*.

[23] *See, e.g.*, William W. Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property, 1760-1860*, 39 EMORY L. J. 65 (1990). Recently, Claire Priest writes of the development of an American law of property emphasizing alienability. *See* Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385 (2006). Her picture of doctrinal evolution parallels the cultural ideas illustrated here and in more theoretical areas. College orations were particularly helpful in tracing the gradual moral, technological, and economic progress. *See, e.g.*, LEVI WOODBURY, AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF DARTMOUTH COLLEGE (Hanover, Dartmouth Press 1844).

became muddled. Previous historians have found predominance of instrumentalism,[26] formalism,[27] or humanity,[28] or some combination of those constructs. Historians of religion have also provided a framework for comprehending the missionaries' conjoining of Christianity with the market.[29] In the missionaries' writings, we can view the ideas behind the conversion to western patterns of property rights.[30]

The age was enamored of the idea of progress captured so well by Samuel Bailey's *Essays on the Pursuit of Truth and the Progress of Knowledge* (London, R. Hunter 1829), which was cited in HENRY TUTWILER, ADDRESS DELIVERED BEFORE THE EROSOPHIC SOCIETY, AT THE UNIVERSITY OF ALABAMA, August 9, 1934, at 10 (Tuscaloosa, Robinson & Davenport, Printers 1834). Yet, many believed that the progression might be going too far. John Lord said that "in government [the theory of progress] is pushing liberty to the very verge of anarchy, and laying the axe of destruction, which is called, for the occasion, reform and progress, to the foundations upon which rest the sacred rights of person and property." JOHN C. LORD, THE PROGRESS OF CIVILIZATION AND GOVERNMENT, *in* LECTURES ON THE PROGRESS OF CIVILIZATION AND GOVERNMENT, AND OTHER SUBJECTS 9, 35-36 (Buffalo, Geo. H. Derby & Co. 1851). Other recent research has confirmed the predominance of economic considerations in antebellum law, from contracts and property to slave law. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) (finding predominant ideology among judges is an "instrumental conception" to use law to promote economic growth); JENNY WAHL, THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY (1997).

[24] Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999); Susanna Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959 (2006); Susanna Blumenthal, *The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 26 L. & HIST. REV. 99 (2008).

[25] PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997).

[26] HORWITZ, *supra* note 23 (framing changes in terms of "instrumental conception" of law).

[27] ROBERT COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L. J. 1916 (1987) (considering antislavery formalism as a response to proslavery law).

[28] KARSTEN, *supra* note 25. While some outsiders, like abolitionists, spoke in terms that we might call a jurisprudence of sentiment, it seems that the majority of judges separate law from considerations of humanity. Brophy, *supra* note 24, at 1184-85 (sketching the difference between a jurisprudence of sentiment and common law jurisprudence).

[29] *See, e.g.*, NATHAN HATCH, THE DEMOCRATIZATION OF CHRISTIANITY (1989); MARK NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN (2002). One might, of course, reasonably ask whether the missionaries were different from other antebellum Americans in matching talk of Christianity with the market. The modest data set here will not support speculation on that important topic. This data correlate with historians of American religion who have identified multiple ways that evangelical Christianity supported and grew in conjunction with the market economy. *See, e.g.*, PAUL E. JOHNSON, A SHOPKEEPER'S MILLENNIUM: SOCIETY AND REVIVALS IN ROCHESTER, NEW YORK, 1815-1837 (1978).

[30] Antebellum property law has benefited from some of the richest writing in any area of legal history in recent years. Much of the focus has been on the ideology of property. *See, e.g.*,

This essay, then, is concerned with what the early missionaries (those who were in Hawai'i in the 1820s and 1830s) thought about what they were doing. It turns to the ideas of missionaries, just as much recent historical work has looked to traditional ideas more generally. Those ideas, so powerful and important in their period, deserve special attention because they contain the keys to central and large pieces of American culture. What the missionaries thought they were doing has some implications for understanding antebellum history generally. Questions include: What motivated the missionaries? How did the missionaries reflect the values of their brethren who remained on the mainland? How did ideas about progress, Christianity, and property all fit together? This is fertile ground for understanding intellectual history and the process of colonization. Queries about intellectual history and colonization include: How did the intellectual structure behind colonization work? Did Christianity include the common law? How was Christianity related to the market economy? The missionaries emerge as part of a larger intellectual world, which has been discussed in depth by historians of traditional thought, such as Elizabeth Fox-Genovese and Eugene Genovese,[31] Michael O'Brien,[32] Drew Faust,[33] and Richard Brown,[34] among many others.[35]

The missionaries' writings offer the hope of putting into context the relationships between Christianity and property rights, and also between the imagery of feudalism and the market, where property was freely alienable and where individuals were not beholden to lords.

During the antebellum era, the language of independence and property appeared in numerous places; the conflicting ideologies were developed perhaps best in the anti-rent movement, which stretched across the upper

---

GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997); DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR (2007); Fisher, *supra* note 23. Sometimes the work takes the form of exploration of Native American rights. *See, e.g.*, LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2007); STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2007).

[31] ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, THE MIND OF THE MASTER CLASS: HISTORY AND FAITH IN THE SOUTHERN SLAVEHOLDERS' WORLDVIEW (2005).

[32] MICHAEL O'BRIEN, CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810-1860 (2004).

[33] DREW GILPIN FAUST, A SACRED CIRCLE: THE DILEMMA OF THE INTELLECTUAL IN THE OLD SOUTH, 1840-1860 (University of Pennsylvania Press 1986) (1977); DREW GILPIN FAUST, THE CREATION OF CONFEDERATE NATIONALISM: IDEOLOGY AND IDENTITY IN THE CIVIL WAR SOUTH (1990); DREW GILPIN FAUST, JAMES HENRY HAMMOND AND THE OLD SOUTH: A DESIGN FOR MASTERY (1985).

[34] RICHARD D. BROWN, KNOWLEDGE IS POWER: THE DIFFUSION OF INFORMATION IN EARLY AMERICA, 1700-1865 (1991).

[35] *E.g.*, DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS (1984).

Hudson River of New York from the late 1830s to the Civil War.[36] The movement arose when tenants and sharecroppers protested against the continued enforcement of the servitudes that imposed those terms. Those conflicts appeared at oblique angles, so that some of the people most interested in individual property rights—those who represented the landlords—were at conflict with those who asked for independence and autonomy over property. Some went so far as to ask why landlords have property and others do not.[37]

George Bancroft, a leading intellectual of the Democratic Party in the 1830s, spoke harshly of the Whigs and the idea of vested rights in a speech on July 4, 1836, even before the anti-rent movement brought the conflicts into relief.[38] They were the party of vested rights and law:

> The whig professes to cherish liberty, and he cherishes only his chartered franchises. The privileges that he extorts from a careless or a corrupt legislature, he asserts to be sacred and inviolable. He applies the doctrine of divine right to legislative grants, and spreads the mantle of superstition round contracts. He professes to adore freedom, and he pants for monopoly. Not that he is dishonest; he deceives himself; he is the dupe of his own selfishness; for covetousness is idolatry; and covetousness is the only passion which is never conscious to itself of its existence.[39]

That picture of Whigs as the party of aristocracy, law, and property, and the Democrats as democracy and disorder was well-entrenched, even if somewhat a caricature.[40]

There were several key points in opposition to the movement. The first, represented by conservative Whigs like Daniel Barnard and James Fenimore Cooper, held that the movement was a breakdown of law. The movement was

---

[36] CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865 (2001).

[37] *See What is Reason? "How Much Land and Property, and I Have None!"*, 16 U.S. MAG. & DEMOCRATIC REV. 17 (1845). The anti-feudalism imagery of the anti-rent movement was of a different origin from the anti-feudalism of the missionaries. While both groups critiqued feudalism, for the anti-renters imagery of feudalism carried notions of dominance by land lords. *See, e.g.*, MCCURDY, *supra* note 36, at 17 (referring to anti-rent protest against "an unconditional submission to the will of one man, elevated by an aristocratic law, emanating from a foreign monarchy"). For the missionaries, the imagery of feudalism carried notions of limitation of property rights. Commoners in Hawai'i attempted to cling to aspects of the older property regime, which had traditions that protected commoners in some ways. For example, the Hawai'i Supreme Court rejected a claim for native pasturing rights in *Oni v. Meek*, 2 Haw. 87 (1858), as a right extinguished by the transition to western property holding.

[38] George Bancroft, An Oration Delivered Before the Democracy of Springfield and Neighboring Towns, July 4, 1836 (Springfield, George and Charles Merriam, 1836).

[39] *Id.*

[40] *See, e.g.*, MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF (1957); HOWE, *supra* note 35.

led by demagogues, who catered to the interests of the propertyless (or relatively small property holder), which sought to shake the foundations of property, for relatively little gain. Barnard, a well-known Whig attorney, spoke frequently about the importance of property and respect for law.[41] He wrote perhaps the leading defense of the tenures, published in the *Whig Review* in 1845 and in pamphlet form. He saw the movement at base as an appeal to "public licentiousness," akin to other popular movements that tended to destroy respect for law.[42] Barnard considered the anti-rent movement treasonous and appealed to the Constitution and to a return to principles of respect for property and principles in place of those of both Whigs and Democrats who "look to the end, and . . . easily quiet themselves about the means."[43] Those popular appeals led to the movement. "There seems to be nothing so intrinsically base or wicked, that respectable and apparently well-meaning persons may not be found to encourage and support it, provided only it have the sanction of numbers in its favor."[44]

The second basis for opposition was that there was not much to complain about. Barnard found the leases—or "fee farms"—to be reasonable, the result of a desire to help buyers finance their purchase, which imposed minimal fees at that.[45] Such supposedly anti-republican provisions, such as the perpetual rents and quarter-sale provisions, were relatively unimportant. One opponent of the movement thought the complaints about their anti-republican nature

---

[41] *See, e.g.*, DANIEL D. BARNARD, MAN AND THE STATE: SOCIAL AND POLITICAL: AN ADDRESS DELIVERED BEFORE THE CONNECTICUT ALPHA OF PHI BETA KAPPA AT YALE COLLEGE (New Haven, B.L. Hamlen 1846).

[42] *See, e.g.*, Daniel Barnard, *The "Anti-Rent" Movement and Outbreak in New York*, 2 WHIG REV. 577, 578 (1845).

> In a country of very large liberty, it is not wonderful that some should occasionally trespass on the extreme limits of the law of order and safety, or that some others should habitually struggle for the very largest liberty—for absolute freedom from all restraint—for unbridled indulgence. Said Plato, long ago: 'Law is the god of wise men—licentiousness is the god of fools.'

Id. at 577.

[43] *Id.* at 578; *see also Anti-Rent Disturbance*, 4 NEW ENGLANDER & YALE REV. 92, 93 (1846).

> [A] few citizens combined and associated themselves to resist a portion of the established law, which they considered as founded in injustice, and from a small number increased to nearly one third of the population, and advanced from step to step in their treasonable acts, till as a closing part of the game they were playing, they murdered a valuable and honest public officer, while in the discharge of his duty.

Id.

[44] Barnard, *supra* note 42, at 580.

[45] *Id.* at 581, 583. Barnard's detailed analysis of the legal status of the lease system helped to minimize the anti-renters' complaints by suggesting that the infringements on their liberty were minor; *see also Anti-Rent Disturbance*, *supra* note 43, at 99-101, 106 (discussing details of the "lease" system and arguing that lease terms are not oppressive).

overdrawn. "The degradation of the tenants has been dwelt upon, until they feel sunken in public estimation, and suffer perhaps as keenly under imaginary evils as they would under real."[46] Politicians played on the inequality of wealth, and the great number of tenants, to structure an argument that the tenants were being oppressed and hence needed relief:

> "Why, here is a gross disproportion in the distribution of wealth, and this must be all wrong if there be any virtue or excellence in republican equality. This is *tribute* which we are paying; this man is a lordling in a republican country, and we are serfs!" From this to the cry of "Down with the Rent," was but a short step.[47]

Barnard provided a classic conservative Whig defense of the Constitution, the rule of law, and the rights of property. Barnard divided the anti-renters into three groups. The first group were those who sincerely believed that the leases were anti-republican and who were law-abiding. Presumably Governor William Seward was one such person. Others, perhaps the majority of anti-renters, were lawless. Still others, even more radical, were socialists, Fourierists and Owenites, "who [gave] a ready support to every scheme, however wide from nature, or wanting in common sense, joined themselves to the two former, and gave them their sympathy and assistance."[48]

Jurists invoked anti-rent to liken it to the destruction of property. The Indiana Supreme Court in 1855 confronted a claim that a restriction on alcohol sale violated the rights of its owners.[49] Yet, the court dismissed the references to natural rights and suggested that they could not be the basis for relief: "It is the common pretense of communists, anti-renters, and other outlaws, that society has invaded their abstract and inalienable rights; but until society is revolutionized and instituted upon a different basis, these claims will be

---

[46] *Anti-Rent Disturbance*, *supra* note 43, at 109.

[47] BARNARD, *supra* note 41, at 580.

[48] *Anti-Rent Disturbance*, *supra* note 43, at 101.

> [T]he flame has been kindled, in person and through the press, by agrarians and demagogues, who regard revolutions as useful, progressive steps toward what they call perfect equality, another name for unbridled anarchy. That society and government are but contrivances of the rich to oppress the poor—that an equal division of property is just, and that no one should possess more land than in person he can occupy—doctrines such as these, popular with those classes whose condition no change can render worse, and attractive to the ignorant, discontented population which always exists, have been advocated, and rooted in the minds of those who are already disturbed; and lest the flame should die away, appeals, skillfully contrived with cunning sophistry, have been sent forth by world-conventions, and working men's associations, composed of free thinkers and free actors, moved by such men as Owen and Fourier.

Id. at 110.

[49] Beebe v. State, 6 Ind. 501 (1855).

disallowed."[50] Anti-renters were believed to be socialists, fanatics. Those references to the destruction of property keyed into other elements of thought, such as the widespread belief that respect for property was a central value, which led to moral and economic progress[51] and to a contempt for socialism.[52] Indeed, fanaticism was a favorite adjective to describe those who urged a restriction on private property.[53] The "ravings of . . . demagogues" deserved

---

[50] *See id.* at 548. Justice Lipscomb employed references to radicalism to support modest reform, such as the Texas Homestead exemption law. Trawick v. Harris, 8 Tex. 312 (1852); *see also* JOHN H. SMYTH, THE LAW OF HOMESTEAD AND EXEMPTIONS 53 (San Francisco, Sumner Whitney & Co. 1875).

> The laws should punish crime, but not misfortune; . . . the latter should be protected, and should not permit the unfortunate to be treated as animals and hunted down, by the aid of the law, as culprits. When this is not done some of the most benevolent hearts are driven, by such omissions and defects in the law, into ultraism, socialism, and Fourierism, and an opposition to all municipal regulations. Hence, the profound wisdom of our homestead law. It is natural to the unfortunate to be grateful to those from whom they receive aid in their afflictions, and they will love and venerate the laws when they protect misfortune and not force them into the class of culprits. The homestead is a point from which they can start, released from any fear of their families being turned out without a home, and can commence again, *Antaeus*-like, with renewed energy and strength and capacity for business from their fall, unscathed by temptation; and, from experience, more practical and useful members of society. With the homestead protection thrown around him the husband may well exclaim: "I am a king, and my wife is a queen, and our domain is our home, that none dare invade."

Id. at 53.

[51] NATHAN BEVERLY TUCKER, A SERIES OF LECTURES ON THE SCIENCE OF GOVERNMENT 119-23 (Philadelphia, Carey & Hart 1845) (citing HENRY HALLAM, VIEW OF THE STATE OF EUROPE DURING THE MIDDLE AGES (1821)).

[52] *See, e.g.*, State *ex rel.* Ball v. Hand, 1 Ohio Dec. Reprint 238 (Ohio Super. 1848) ("As a general thing, I have a very poor opinion of all common property communities, from that formed on the plains of Shinar 4000 years ago, down to the latest phalanx of Fourierism. Their objects may be benevolent, but their tendency is to degenerate and demoralize man.").

[53] *See, e.g.*, *In re* New Orleans Draining Co., 11 La. Ann. 338, 355 (1856) ("So, too, fanaticism under the plea of philanthropy and the public good, is ready to purge and renovate society, revolutionize governments, and reconstruct the world according to its new ideas, provided that the cost and the consequent pain and sufferings, shall be borne by its beneficiaries."); People v. Gallagher, 4 Mich. 244, 285 (1856) (lamenting inability of penal laws to take away property used to manufacture alcohol).

> The first temperance society ever organized in the United States was in the year 1813. In 1831 there were over 4,000 organized societies, and more than 600,000 members. In the mean time over 1,000 distilleries had been entirely stopped by their owners; about 5,000 drunkards had been entirely reclaimed, and over 1,000,000 of people in the United States were entirely abstaining from the use of all kinds of intoxicating drinks. From 1824 to 1830, the importation of liquors into the United States was reduced by temperance efforts 4,189,747 gallons; and during the year 1830, over two hundred vessels sailed from American ports without provision of spirits. But the fate of these societies was sealed when they were induced by political demagogues, in conjunction with

little respect and in some cases monarchy was to be preferred to those who purported to be working for republicanism.[54]

Those who opposed such radicalism as abolitionism or the anti-rent movement threatened greater harm than they promised to avoid. As Cooper concluded in *The Redskins*:

> There is not a single just ground of complaint in the nature of any of these leases, whatever hardship may exist in particular cases; but, admitting that there were false principles of social life, embodied in the relation of landlord and tenant, as it exists among us, *it would be a far greater evil to attempt a reform under such a combination, than to endure the original wrong.*[55]

---

fanatical clergymen, to enter the political field, and take political action as a party. This was but the natural consequence of such a course of action. The cause, instead of being benefited by it, was ruined—the moral influence of the societies entirely paralyzed by party, political action, and political proscription.

Gallagher, 4 Mich. at 285.

[54] R. Wheaton, *The Revolution of 1848 in Sicily*, 69 N. AM. REV. 499, 506 (1849).

> We cannot see that Americans are any more bound to sympathize with every radical movement in Europe, which dignifies itself with the name of republican, than we should be to lend a favorable ear to the ravings of our own demagogues,—of those, for instance, who recently kindled a civil war in Rhode Island, or of the Anti-rent party who assassinated sheriffs and constables in New York. The sympathies of the true American should be enlisted on the side of liberty and order, and when he becomes convinced that those two blessings can only be attained in Europe,—at least for the present,—by a constitutional monarchy, his sympathies should be with that form of government.

Id. at 506.

> It is unsafe even in America to allow the doctrines of the socialists to be preached to the people without supplying an antidote to the poison. The *flour riot*, which took place in New York some twelve years ago, and the Anti-rent war, which more recently disgraced that State, were significant warnings. . . . The educated and reflecting portion of our community ought not to wait . . . till they are reminded by the thunder of the cannon directed against the barricades . . . that they also have a work to do for the preservation of society and the interests of truth.

French Ideas of Democracy and a Community of Goods, 69 N. AM. REV. 277, 325 (1849).

[55] JAMES FENIMORE COOPER, THE REDSKINS; OR, INDIAN AND INJIN 222 (New York, Burgess & Stringer 1846). Cooper employed a similar argument in the preface of *The Redskins*:

> The common-place argument against [leases], that they defeat the civilization of a country, is not sustained by fact. The most civilized countries on earth are under this system; and this system, too, not entirely free from grave objections which do not exist among ourselves. . . . [T]he ultra friend of humanity, who decries the condition of a tenant, should remember that if he had not been in this very condition, he might have been in a worse. It is, indeed, one of the proofs of the insincerity of those who are decrying leases, on account of their aristocratic tendencies, that their destruction will necessarily condemn a numerous class of agriculturists, either to fall back into the ranks of the peasant or day-labourer, or to migrate, as is the case with so many of the same class in New England.

Id. at xiii.

Judges at the time frequently invoked images of feudalism, particularly when they wanted to discredit or distinguish a precedent.[56] They saw the evils of feudalism in two ways. First and most frequently, feudalism illustrated backwards rules, which were anti-commercial (like restraints on alienation).[57] Second, they were anti-republican rules, which subject some to the arbitrary will of others.[58]

Judges in the antebellum era were particularly vocal in their criticism of feudalism for its effects on the economy. Justice Battle of the North Carolina Supreme Court, for instance, drew upon Blackstone's *Commentaries* for evidence of why mortmain statutes prohibited the transfer of real property to corporations, allowing unproductive accumulation of property into corporations:

> In England, the statutes were designed to prevent the accumulation of the landed property of the kingdom in the dead hands of the corporations, particularly the religious houses, whereby "it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the

---

[56] *See, e.g.*, Edrington v. Harper, 26 Ky. (3 J.J. Marsh.) 353, 360 (1830).

> But even where the common law still prevails as a system, some of its ancient iron doctrines on the rights and duties of *baron* and *feme* (the remnants of feudality), have, after a stubborn conflict, resembling that betwixt ignorance and knowledge, barbarism and civilization, yielded to some of the more mild and benevolent principles of the civil code. One of the fruits of this progressive innovation on feudalism, is the modern doctrine, that the chancellor will not compel, or even invite the husband to coerce or influence his wife to surrender a right which the law has vested in her.

Id.

[57] *See, e.g.*, Trs. of Davidson Coll. v. Ex'rs & Next of Kin of Chambers, 56 N.C. (3 Jones) 253, 266 (1857).

[58] Thus, counsel in *United States v. Percheman*, 32 U.S. 51 (1833), argued:

> Free governments are constructed upon the principle of entrusting as little power as possible, and providing against its abuse preventively by all species of checks and limitations. Arbitrary ones proceed upon the principle of bestowing ample powers and extensive discretion, and guarding against their abuse by prompt and strict accountability and severe punishment. Both have been invented by mankind for purposes of mutual defence and common justice, but the pervading spirit of the one is preventive, of the other vindicatory.
>
> How absurd would it be, then, to apply the maxims of the one government to the acts of the other. As well might we judge the life of Pythagoras by the law of the New Testament, or the philosophy of Zoroaster by that of Newton, as subject the administration of a Spanish governor to the test of magna charta, the bill of rights, the habeas corpus act, or the principles of American constitutional law.
>
> Even the laws of the Indies, obscure, perplexed, and sometimes even unintelligible as they are, hardly reached across the ocean; and the decline of the Spanish, like that of the Roman empire, was marked by the absolutism of the distant prefects.

Id. at 51-52.

> lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs and the like."[59]

Feudalism's limitations on alienability—its limits on the sale of land and its resulting limitations on commerce—was a central focus of the antebellum judicial attack. A New Jersey court refused to require express words of devise in a will.[60] It found the rule was

> at best a technical rule, having its origin in feudal principles, and based on feudal reasons, to prevent an abeyance of the fee to the trust of the lord, and when pushed beyond its natural and well defined bounds, it becomes, true to its origin, not a protection to property, but an engine of injustice.[61]

Justice Hemphill of the Texas Supreme Court upheld the power of a record owner to alienate property that was being adversely possessed.[62] He found

> the power to alienate property is a necessary consequence of ownership, and is founded on natural right. True, it must be subjected to the restraints suggested by convenience, and dictated by the laws; but wherever restrictions of any rigor, from considerations of policy, well or ill-founded, have been imposed on alienation, history reveals the fact of incessant struggles against the thraldom. And the success of these efforts appears to have been commensurate with the advancement of civilization, and of more just and enlightened views relative to the true uses of property as subservient to the multiplied wants of refined social life. Without recurring to English history, and the ages of perpetual warfare there against the feudal shackles on the rights of alienation, we may, from the events of our own time and history, perceive how extremely distasteful are all restrictions on the power of the owner to dispose of his property.[63]

In South Carolina, Chancellor Dargan wrote of the origins of the law's preference for devisees (those inheriting real property) over legatees (those inheriting personal property) in the law of feudalism. It arose from feudalism's preference for landed property and the relative unimportance of personal property. Chancellor Dargan illustrates the common understanding of the power of precedent, as well as the reasons for rejecting precedent, and he illustrates the common understanding that feudal rules were backwards:

---

[59] Trs. of Davidson Coll., 56 N.C. (3 Jones) at 266 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 270 (1765-1769)). A few decades earlier, the Virginia Supreme Court explained the fear of accumulation of property as the basis for law's suspicion of charitable corporations. *See* Gallego's Exrs' v. Attorney Gen., 30 Va. (3 Leigh) 450, 478 (Sup. Ct. App. 1832), *overruled by* Episcopal Soc'y v. Churchman's Reps, 80 Va. 718 (1885).

[60] Elle v. Young, 24 N.J.L. 775 (1854).

[61] *Id.* at 785.

[62] Carder v. McDermett, 12 Tex. 546 (1854).

[63] *Id.* at 549 (citing JAMES KENT, 4 COMMENTARIES 441 (1830)).

> Among a people living under the feudal system, landed estate constituted the predominant element in the social and political organization. And hence, we can hardly be surprised at the vast importance that was attached to its possession. The aggregate of the personal property then, embraced but a small portion of the wealth of the nation, while the few goods and chattels, that were possessed by the humbler classes, were insecure, and liable to be snatched away by the lawless, marauding barons. The lands were all monopolised and held by the strong arm of military power. Commerce had not then expanded her sails upon every sea, and in co-operation with the mechanic arts, and a more enlightened agriculture, swelled the wealth of the nation in personal property, to the enormous and incalculable amount that now exists. The feudal system yielded to the irresistible influence of advancing civilization; but it yielded slowly, and its stern features are still, and for a long period to come will remain, deeply impressed upon the civil polity of the British Isles.[64]

The importance of land, thus, explained the preference for a devisee over a legatee. Yet, such a preference was unreasonable and it might be changed because of the increasing importance of personal property. Still, even though feudalism had ended, there was a danger in changing the rules too quickly and causing upheaval. They could not make all of the changes at once:

> The hereditary nobility constitute the great bulwark of the British monarchy; the privileged classes form a barrier, that interposes between the throne, and popular encroachments and republican tendencies. . . . They support the throne, not as their warlike ancestors did, by the sword and by military array, but by the influence of their enormous wealth, and their power as hereditary legislators. They are the strong pillars that support this ancient monarchy. Volcanic and pent up fires smoulder beneath the venerable pile; the waves of popular discontent dash madly round the foundations. Take away the barrier, from which the surge is made to recoil; remove the weight by which the popular upheaval is repressed, and the flood and the earthquake would do their work in an instant; and this proud and powerful monarchy, in all its colossal proportions, would be swept away at once and forever. No reflective mind that has pondered upon the rise and fall of empires, can doubt for a moment, that the same revolutionary vortex that swallows up the British nobility, will also ingulf the British monarchy. These views are forcibly felt, if not acknowledged, by their enlightened statesmen and public functionaries. They are appreciated by the middle classes, and by all the friends of peace, order and stability, who hence submit to admitted evils and abuses, "rather than fly to those they know not of."[65]

Restraints on alienation were seen as relics of feudalism and therefore not suited to the United States. As a Wisconsin court wrote in 1849:

---

[64] Hull v. Hull, 24 S.C.Eq. 65 (3 Rich. Eq. 1850).

[65] *Id.* (speaking of "aristocratic" and "republican forms of society").

> The maxims and principles of law, as applied to real property, originating in the policy of the feudal ages, are, in many instances, entirely inapplicable in a country like ours, and particularly in the new states and territories, where there is such a vast public domain, where the spirit of emigration is so rife, and where the genius of our institutions, as well as an enlightened public policy, favors the removal of all unnecessary restraints upon the alienation of land.[66]

Another case, which held that joint tenancy does not include a right of survivorship, similarly invoked images of feudalism and its interference with alienation:

> The doctrine of entails and primogeniture, and the *jus accrescendi*, and the abolition of all patents of nobility, were the feudal badges which the American governments intended to sweep away, and thus break down all hereditary family succession by unfettering property and distributing it equally and justly among all the members of society.[67]

Judges, too, invoked feudalism as evidence of unfairness, even if the case related to something other than property. In a case on contingency fees, the Delaware Supreme Court likened the rule against contingency fees to feudalism: "It is a principle which, like many of the doctrines regarding the titles to and transmission of property, having their origin in feudal times, tends to strengthen the strong hand at the expense of the weak, to whom it might, in many instances, amount to a denial of justice."[68]

Feudalism implied economic backwardness; it also implied servility. Justice Roane of Virginia argued in dissent from a decision that upheld quit-rent payments in 1809 that the quit-rent was a form of backwards feudalism:

> Can it be denied that the rent in question is a servile and feudal rent, or that the appellant can claim it only as successor to the lord of the fee? for the lot in question had never been specifically appropriated by lord Fairfax to his own use. If the decision of the district court be now reversed, will you not, sir, create a lord paramount as to the property in question? And will not the inhabitants of Winchester be subjected forever to the degrading vassalage of paying to such lord paramount, a servile, feudal and perpetual revenue? Will you not place those citizens in that abject state, from which the legislature of our country, at the very instant of the revolution, solicitously laboured to emancipate all our people? Will you not in fact, sir, revive upon the people of the Northern Neck, a partial proprietorship? How far that proprietorship may hereafter be attempted to be extended in consequence of the precedent now to be set, and the principles now contended for, I pretend not to determine. Great, as I trust the respect of this court will ever be for the rights of private property claimed by any suitor, I hope

---

[66] Woodward v. McReynolds, 2 Pin. 268, 273 (Wis. 1849).

[67] Trammell v. Harrell, 4 Ark. 602, 604 (1842).

[68] Bayard v. McLane, 3 Del (3 Harr.) 139 (1840).

> we shall never favour mere feudal and seignoral rights: nor permit ourselves to carry back our people, or any section of our people, to that degrading state of vassalage, so strongly depicted by our laws; and, from which, the revolution ought to have liberated them.[69]

The imagery of feudalism was an important part of antebellum thought, from popular treatises like Blackstone's *Commentaries* and Kent's *Commentaries*,[70] to histories of law, like Thomas Roderick Dew's *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations*,[71] to radical literature that critiqued the legal system. One of the worst insults that William Sampson could muster against the common law was that it was a relic of feudalism—a precedent leftover from the age of barbarism. He spoke of the ancient and mysterious common law:

> [L]ong after [Americans] had set the great example of self-government upon principles of perfect equality, . . . [they] had still one pagan idol to which they daily offered up much smoky incense. They called it by the mystical and cabilistic name of Common Law. A mysterious essence. Like the Dalai Lama, not to be seen or visited in open day; of most indefinite antiquity; sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still the same that was, and was to be, and evermore to sit cross-legged and motionless upon its antique altar, for no use or purpose, but to be praised and worshipped by ignorant and superstitious votaries.[72]

The imagery of feudalism stretched half way around the world, to those missionaries who washed ashore on the Hawaiian Islands.

How Missionaries Thought: About Property, for Instance

Many of the missionaries to Hawai'i wrote accounts of their visions for what they hoped to accomplish, as well as accounts of what happened in Hawai'i. Probably the most comprehensive was that of Hiram Bingham, a

---

[69] Marshall v. Conrad, 9 Va. (5 Call) 364, 390 (1805).

[70] *See, e.g.*, James Kent, 4 Commentaries 6 (1830) (noting "the rule was founded originally on principles of feudal policy, which no longer exist"); *id.* at 82 ("In New York and Pennsylvania, this feudal notion of forfeiture is expressly renounced, and doctrine placed upon just and reasonable grounds.").

[71] Thomas R. Dew, A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations (New York, D. Appleton & Co. 1853). Dew wrote of the role of property in purchasing freedom from feudalism in his essay on the Virginia legislature's debate about abolition. Thomas R. Dew, *Professor Dew on Slavery*, *in* The Pro-Slavery Argument, as Maintained by the Most Distinguished Writers of the Southern States 313-17 (Charleston, Walker, Richards & Co. 1852).

[72] William Sampson, Esq., An Anniversary Discourse: Delivered Before the Historical Society of New York 17 (Dec. 6, 1823).

former Yale student, who was in the first group of missionaries sent by the American Board of Foreign Christian Missions, to the Hawaiian Islands. Bingham's memoirs, *Twenty One Years in the Sandwich Islands*, tell his story of the unfolding of the missions and the progress of the propagation of Christianity.[73] The scions of the Bingham family appear periodically on our country's stage. Hiram Bingham's grandson, Hiram Bingham III, taught at Yale University in the early twentieth century and was responsible for acquiring some treasures from Peru for the Yale art museum.[74] Hiram Bingham IV was a diplomat to Europe during the second world war, who worked mightily to free victims of Nazi persecution.[75]

Hiram Bingham begins his discussion of his arrival in Hawai'i, on March 31, 1820, with a provocative statement about his views of the native people and his goals there:

> Their manoeuvres in their canoes, some being propelled by short paddles, and some by small sails, attracted the attention of our little group, and for a moment, gratified curiosity; but the appearance of destitution, degradation, and barbarism, among the chattering, and almost naked savages, whose heads and feet, and much of their sunburnt swarthy skins, were bare, was appalling. Some of our number, with gushing tears, turned away from the spectacle. Others with firmer nerve continued their gaze, but were ready to exclaim, "Can these be human beings! How dark and comfortless their state of mind and heart! How imminent the danger to the immortal soul, shrouded in this deep pagan gloom! Can such beings be civilized? Can they be Christianized?"[76]

Not surprisingly, Bingham, because he was a missionary, focused on the goal of conversion to Christianity and "civilization." What did that mean? What was the role of property and the "rule of law" in "civilization"? In part it meant respect for property rights. There were in Bingham's short recitation of the history of the islands echoes of celebration of property rights. He portrayed land ownership as a feudal system—which in the early nineteenth century was viewed with universal disdain in the United States—and suggested that such patterns of ownership, and lack of the rule of law more generally, left the people without an incentive to develop economically:

---

[73] HIRAM BINGHAM, A RESIDENCE OF TWENTY ONE YEARS IN THE SANDWICH ISLANDS, OR THE CIVIL, RELIGIOUS, AND POLITICAL HISTORY OF THOSE ISLANDS (Hartfort, Hezekieh Huntington, 3d ed. 1849).

[74] *See, e.g.*, David Montgomery, *Peru Tries to Recover Gold From Yale's Ivory Tower*, WASH. POST, Mar. 9, 2006, at C01 (discussing Hiram Bingham III's excavations at Machu Picchu).

[75] Maura Casey, *A Diplomat's Quiet Battle to Rescue Jews Emerges*, N.Y. TIMES, July 11, 1999, at 14 Civ.

[76] BINGHAM, *supra* note 73, at 81.

> Claiming the right of soil throughout his realm, and the right to make and abrogate regulations at pleasure, and using the privilege of a conqueror who could not endure to have others enjoy their just rights, Kamehameha wielded a despotism as absolute probably as the islands ever knew. Retaining a part of the lands as his individual property, which he intended should be inherited by his children, he distributed the remaining lands among his chiefs and favorites, who, for their use, were to render public service in war or peace, and in raising a revenue. These let out large portions of their divisions to their favorites or dependants, who were in like manner to render their service, and bring the rent; and these employed cultivators on shares, who lived on the products which they divided, or shared with their landlord, rendering service when required, so long as they chose to occupy the land. Thus, from the poor man who could rent 1/8 or 1/4 of an acre, up to the sovereign, each was, in some sense, dependent on the will of a superior, and yet, almost all had one or more under them whom they could control or command.
>
> This, in a conquered, ignorant and heathen country, without the principles of equity, was a low and revolting state of society; where the mass could have no voice in enacting laws, or levying taxes, or appropriating the revenue, or in establishing a limited rent for the use of lands, fisheries or fish-ponds. To conceive of all as supremely selfish, and each superior as desirous to aggrandize himself at the expense of others, would do them no injustice.
>
> With the limited knowledge and skill they possessed, it would hardly be expected that cheerful and productive industry would thrive, even in such a clime and soil, unless the principles of benevolence or a high public spirit could be engrafted in the hearts of the people, or that the population could multiply while the means of subsistence were scanty, clothing and lodging miserable, possessions utterly insecure, and all inheritance hopeless or uncertain.[77]

Other missionaries and westerners writing about Hawai'i at the time invoked the imagery of feudalism to describe Hawai'i's land-holding regime. Thus, the *Missionary Record* invoked feudalism and conquest in language reminiscent of *Johnson v. M'Intosh*: "In some respects the government resembles the ancient feudal system of the northern nations. . . . The king is acknowledged, in every island, as the lord and proprietor of the soil by hereditary right, or the law of conquest."[78] Others expanded on what that feudalism looked like in Hawai'i: "These raatiras, who resembled the barons of the feudal system, kept the people under them in a state of the greatest subjection, and received from them not only military service, but a portion of the production of their lands, and personal labour whenever required."[79]

---

[77] *Id.* at 50.

[78] THE RELIGIOUS TRACT SOCIETY, MISSIONARY RECORDS: SANDWICH ISLANDS 97 (London, The Religious Tract Society 1839).

[79] 3 WILLIAM ELLIS, POLYNESIAN RESEARCHES, DURING A RESIDENCE OF NEARLY EIGHT YEARS IN THE SOCIETY AND SANDWICH ISLANDS 121-22 (London, Fisher, Son, & Jackson 1838).

Timothy Dwight Hunt similarly wrote about the Hawaiian land-holding system as one of feudalism and tyranny: "Their system of government was feudal in its character. Power was delegated by inferiors, by whom again it was divided, so that under one despot numerous petty tyrants imposed successive burdens on their serfs."[80]

Daniel Wheeler expanded on the relationship between feudalism and the dangers of lack of private property rights. He worried about the "ruin that awaited these islands . . . [unless] the private property of the poor inhabitants is respected and protected by the wholesome laws, firmly executed, without particularity. At present these people are groaning under an arbitrary feudal system, kept up with shameful and oppressive tyranny on the part of the chiefs."[81]

Even worse than feudalism was the fear and destruction wrought by war. This was the era of the gothic story, and feudalism and war played their part in stories of Hawai'i. William Ellis's 1833 history told of war and insecurity of property: "The whole island was again involved in war, and the conquering party scoured the coast . . . burning every house, destroying every plantation, plundering every article of property, and reducing the verdant and beautiful districts . . . to a state of barrenness and desolation."[82]

It was not just missionaries in early Hawai'i who likened Hawai'i's property and legal regime to feudalism. Courts interpreting the law in Hawai'i employed allusions to feudalism to describe Hawai'i's real property regime. In 1862, Hawai'i's court explained the nation's legal history through a construct of feudalism in *Keelikolani v. Robinson*:[83]

---

[80] TIMOTHY DWIGHT HUNT, THE PAST AND PRESENT OF THE SANDWICH ISLANDS 16 (San Francisco, Whitton, Towne & Co. 1853).

[81] DANIEL WHEELER, EXTRACTS FROM THE LETTERS AND JOURNAL OF DANIEL WHEELER: WHILE ENGAGED IN A RELIGIOUS VISIT TO THE INHABITANTS OF SOME OF THE ISLANDS OF THE PACIFIC OCEAN 163 (Philadelphia, Joseph Rakestraw 1840); *see also* JAMES JACKSON JARVIS, HISTORY OF THE HAWAIIAN OR SANDWICH ISLANDS 185 (2d ed., Boston, James Munroe & Co. 1844) ("This was apportioned among his followers according to their rank and deserts; they holding it on the feudal tenure of rendering military services . . . ."); EPHRAIM EVELETH, HISTORY OF THE SANDWICH ISLANDS: WITH AN ACCOUNT OF THE AMERICAN MISSION ESTABLISHED THERE IN 1820, at 46 (Philadelphia, American Sunday-School Union 1829) ("The property, and even the lives of his subjects, are at his disposal. His power over them is unlimited."); CHARLES SAMUEL STEWART, A RESIDENCE IN THE SANDWICH ISLANDS 101 (Boston, Weeks, Jordan & Co. 1839) (mentioning predominance of feudalism prior to Kamehameha).

[82] 2 WILLIAM ELLIS, POLYNESIAN RESEARCHES, DURING A RESIDENCE OF NEARLY EIGHT YEARS IN THE SOCIETY AND SANDWICH ISLANDS 110 (Harper's Stereotype ed., New York, J. & J. Harper 1833).

[83] 2 Haw. 522 (1862).

> The analogy of this system of tenure is very striking to that of the feudal system which has prevailed in Europe, the theory of which was that all property in land was originally in the King or chief who governed the country; that it was granted to his followers for services rendered and to be rendered, but the superior theoretically retained the title in the land itself. There was the lord and vassal, and were similar in relation to each other to that which existed here. The chiefs here gave certain rights and privileges in lands which were granted to them by the King, to chiefs of lower grades, and so in England the tenure was not limited to the paramount lord and vassal, but it extended to those to whom such vassal may have divided his own lands, and they became his vassals; so that he became a mesne lord between his vassals and the lord paramount. Heirship was a provision in that code. The right of primogeniture was derived from the martial policy of the system. It had, like the system in every country, provisions of inheritance peculiar to itself; such for example as the total exclusion of females, which is in contrast to the Hawaiian. Chancellor Kent says that "the transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections; and Dr. Taylor holds it to be the general direction of Providence."
>
> Immediately on the death of Kalaimoku, his son, Leleiohoku, by his guardian, designated by his father, claimed the heirship of the property, was recognized as such by the respondent during his life, which was a period of more than twenty years. The heirship was asserted and recognized, and against those rights no claim or interference was made. So far as a single instance aids in the proof of a general usage, this is very strong, from the fact that the respondent was, from time to time, paying the proportion of Kalaimoku's interest for the use and occupation of the King's wharf, according to the agreement to his son, who was regarded as the heir. By the evidence given, by the history of the times, and by the resolutions adopted by the Board of Commissioners to quiet land titles, it is very evident that the rights of heirs were disregarded to a greater or less extent, for the purpose of rendering aid to favorites; but when their inheritance was regarded, and they enjoyed its fruits for a time, which is sufficient to give a title to property by an adverse possession, it would seem to be a late day for a Court, governed by laws regulating descent of property to children, to so far disregard a law based upon principles of natural justice, and defeat a right which, in the darkest days of the feudal system, was held sacred by the King, and earnestly contended for by many of the chiefs of that day.[84]

Still, there was no respect for precedent; a mere association with feudalism would not invalidate every rule. Chancellor Kent thought that there were still reasons to follow feudal rules:

> [A]ssuming the rule to have been introduced on feudal principles, yet to disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretence that the reason of the rule no

[84] *Id.* at 528.

> longer exists, or that the rule itself is unreasonable, would not only prostrate the great land-marks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequences.[85]

That history of feudalism was important because it explained to missionaries and others the backwardness of Hawai'i. There were solutions, however, missionaries believed. Gilbert Mathieson's 1825 *Narrative* established early on the themes of feudalism and the insecurity of property on one side and Christianity and property on the other. Mathieson thought life on Hawai'i "very preferable to a seaman's life; but complained, nevertheless, of the insecure tenure by which property is held in this country. . . . and only retained possession of his property by acceding to every demand, and propitiating with continual presents the favour of the great man."[86] The King in Hawai'i was characterized as a despot.

> The King then is a complete autocrat—all power, all property, all persons, are at his disposal: the Chiefs receive grants of land from him, . . . for if he is disposed to be industrious, and bring his land into good cultivation, or raise a good breed of live stock, and becomes rich in possessions, the Chief is soon informed of it, and the property is seized for his use . . . ."[87]

Yet, in a section headed "Blessings of Christianity," Mathieson held out hope that Christianity "may ameliorate the present system of arbitrary government, and encourage the industry of individuals, by securing the rights of private property."[88]

Sheldon Dibble's 1843 *History of the Sandwich Islands* critiqued the economic backwardness of the feudal system in the greatest depth of any of the works. Dibble explained in detail how what he identified as feudalism hindered the economy and kept Hawai'i's people in poverty.[89] "[T]he soil was considered the exclusive property of the chiefs" and that led to extraordinary dependence on them.[90]

> The lands being divided, those who hold them are considered as owing every duty and perfect obedience to the chieftain from whom they are received; and expect the least failure of service to be followed by dispossession. On these

---

[85] Loving v. Hunter, 16 Tenn. (8 Yer.) 4, 8 (1832) (quoting JAMES KENT, 4 COMMENTARIES 221 (1830)).

[86] GILBERT FARQUHAR MATHIESON, NARRATIVE OF A VISIT TO BRAZIL, CHILE, PERU, AND THE SANDWICH ISLANDS, DURING THE YEARS 1821 AND 1822, at 412-13 (London, S. & R. Bentley 1825).

[87] *Id.* at 449-50.

[88] *Id.* at 477.

[89] SHELDON DIBBLE, HISTORY OF THE SANDWICH ISLANDS 88 (Lahainaluna, Press of the Mission Seminary 1843).

[90] *Id.* at 72.

landlords the King relies to promote his plans, forward his interests, and to fight his battles. They, of course, have every inducement, to support his authority, for both their power and property are by an indissoluble chain connected with his. Each of these landlords divides out his particular land into smaller portions, the occupants of which owe the same service, duty and obedience to him as he acknowledges to his superior. In this way the conquered territory is divided and subdivided, down perhaps to the sixth or seventh degree.

This was the only system of government with which, anciently, the Hawaiians were acquainted. They had no conception that authority and subordination could be maintained in any other way.

This system was exceedingly oppressive. The common laborers did not probably receive, on an average, more than one-third of the avails of their labors, while the different grades of chiefs received the remaining two-thirds. But what was worse, even this one-third they received was not safe, there being no distinct dividing line by which the tenant might know and hold any thing as his own. If a man, by uncommon industry, brought his patch of ground to a higher state of cultivation than his neighbor, or if, by skill and invention, he acquired anything more than usually desirable, it was of no avail to him; his possessions serving merely, like Naboth's vineyard, to tempt the rapacity of his superior.
The system too was peculiarly oppressive on account of the sudden changes to which it was liable. On the accession of a new king every grade of landlords, and the mere tenants too, were liable to dispossession. So if a chief either of high or low rank deceased, then all the estates under his particular authority, were liable to revolution and change. And even without the occurrence of death; favoritism, jealousy, natural fickleness of character and other like motives, led to frequent and distressing changes. On account of this, landlords ridiculed the idea of making extensive improvements; and tenants sought patches of ground under different chiefs, so that when dispossessed of one they might be saved from starvation by the produce of the other. There being no fixed law, no courts of justice, nor any place of appeal, the people were really tenants at will, each particular class to their direct landlords. Usually, too, when a man was dispossessed of his lands his personal property was also confiscated.[91]

Bingham thought the process of "civilization" entailed the development of a Christian beliefs, middle class "modesty," and the market economy.[92] Those things went together; however, many people were limited in their property rights—and that, along with a lack of capital, impeded the process of conversion:

But how difficult and long must be the process of learning to make use, or keep in order and enjoy the variety of useful articles which the arts of civilized life

---

[91] *Id.* at 73-74.

[92] BINGHAM, *supra* note 73, at 170.

> supply, had the chiefs and people possessed money or exportable products in abundance, to purchase the materials at pleasure! But not one in a thousand had the money or the exportable products at command, and while it seemed to us a difficult thing for the chiefs to pay for half a dozen brigs and schooners, for which they had contracted, and to build and furnish houses for themselves, it seemed equally difficult for the common people to supply themselves, who had not the means to purchase the soil they cultivated, if they had been allowed to buy it, nor the capital to put a plough, a pair of oxen, and a cart upon a farm, if farms were given them in fee simple; nor the skill and enterprise to use them advantageously, if every hand-spade-digger of kalo and potatoe ground had been gratuitously furnished with land, teams, and implements of husbandry, like the yeomanry of New England.[93]

In many places, Bingham remarks on commercial progress and the connections of the market economy to Christianity. Thus, after a meeting in Honolulu, he saw many people departing for other islands.

> Embarking on board eight brigs and schooners, mostly owned by them and under native commanders, leaving the harbor in regular and quick succession, and spreading all their white sails to the six knot N.E. trades, and stretching over Waikiki Bay, in full sight from the mission houses, they gave us a beautiful and striking illustration of their advancement in navigation, and of the facility, safety, and comfort with which they could pass from island to island, for pleasure or business, instead of depending on their frail canoes. This peaceful and apparently commercial scene, not only showed their ability to make progress towards a state of civilization, but was symbolical of the liberty and facility now expected to be extended to those who desired it, to acquire the knowledge of letters and of salvation, and to practise the duties and enjoy the privileges of the Gospel.[94]

At other points, it is easy to remember that Bingham was writing during the Romantic era; and while he and Ralph Waldo Emerson would have had little to say to one another, there are important echoes of Romanticism in parts of the memoirs. Bingham wrote of the snow-capped volcano a "striking view of the majestic Maunakea, distant about 120 miles, whose icy and snowy summit glittered in the morning sunbeams, beckoning them onward to the station beyond its south-eastern base."[95] But often there was a juxtaposition of the romantic with the missionaries' goals. There was the beauty of nature against the missionaries' settlements:

> The romantic might easily imagine Hilo to be a very inviting location, among barbarians, on account of the beauty, grandeur, and wonders of nature, which are there so interesting. Nay, it may too be thought, even by the sober, pious mind,

---

[93] *Id.* at 170.
[94] *Id.* at 205.
[95] *Id.* at 206.

> to be now a desirable residence, because the wonders of nature and the wonders of grace are there united and so distinguished; yet, to this day, no civilized family on earth is known to have chosen it for a residence, except those who are sent there to dispel the moral darkness, and to watch over the spiritual interests of thousands too indigent and too imbecile, with all the salubriousness and fertility of their rough country, to give a decent maintenance to their missionaries in their arduous labors of love. Such a location could hardly be chosen by a cultivated family, for the sake of its privileges, unless doing good to the needy be esteemed, as it justly might be, a privilege.[96]

The missionaries were, indeed, pushing against the romantic life:

> To a spectator from the missionary's door, or from the fort, or other precipice, is presented a good specimen of Sandwich Islands scenery. On a calm and bright summer's day, the wide ocean and foaming surf, the peaceful river, with verdant banks, the bold cliff, and forest covered mountains, the level and fertile vale, the pleasant shade-trees, the green tufts of elegant fronds on the tall cocoanut [sic]—trunks, nodding and waving, like graceful plumes, in the refreshing breeze; birds flitting, chirping, and singing among them, goats grazing and bleating, and their kids frisking on the rocky cliff, the natives at their work, carrying burdens, or sailing up and down the river, or along the sea-shore, in their canoes, propelled by their polished paddles that glitter in the sun-beam, or by a small sail well trimmed, or riding more rapidly and proudly on their surf-boards, on the front of foaming surges, as they hasten to the sandy shore, all give life and interest to the scenery. But the residence of a Christian missionary, toiling here, for elevating thousands of the heathen, and an humble house of God erected by once idolatrous hands, where from Sabbath to Sabbath the unsearchable riches of Jesus were proclaimed, amid the ruins of the bloody temples of heathenism, gave the peculiar charm to the scene which it never had for ages of pagan darkness, and which Cook, when he gazed on this landscape, did not expect it would ever have. For it was the opinion of that navigator, that the fairest isles of the Pacific would never be evangelized.[97]

Bingham was not alone in his interpretation of the Hawai'i government in terms of property. Rufus Anderson, another missionary, wrote in similar terms in 1827:

> The government could not remain unchanged, and the people become free and civilized. The people must own property, have acknowledged rights, and be governed by written, well-known, established laws. This was far from their condition before the year 1838. The government was then a despotism. The will of the king was law, his power absolute; and this was true of the chiefs, also, in their separate spheres, so far as the common people were concerned. All right of property, in the last resort, was with the king. How were the people to attain

---

[96] *Id.* at 209.

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

> the true Christian position? Obviously the rulers had duties to learn and to perform, equally with the people; and the missionaries were the Christian teachers of both classes, with God's Word for their guide.[98]

Some credited missionaries with reforming and standardizing the tax system. According to Henry Theodore Cheever's *Life in the Sandwich Islands: Or, the Heart of the Pacific, as It Was and Is*:

> Till very recently the commoners of this archipelago, like the peasants of France before the revolution, or of Canada before the conquest, were . . . taxable and taskable at discretion, while they were deterred alike from evasion or complaint by a mixture of feudal servility and superstitious terror.
>
> But, within the last year or two, certain laws, for their share in which the missionaries deserve great credit, have so far remedied this evil as to subject the amounts and times of tasking and taxing to fixed rules; and though the ascertained burdens are still too heavy and too numerous, comprising work for the . . . king, work for the public, rent for land and a poll-tax on both sexes, yet the restriction in question, if fairly carried into actual effect, will engender in the serf the idea of property, and inspire him at once with the hope and the desire of improving his physical condition by the application of his physical energies.[99]

Similarly, Sheldon Dibble linked the end of feudalism to Christianity's inroads in Hawai'i. He linked the reform of law with Christianity:

> Formerly the government had no constitution and no laws except customs and usages. In such a state of things, confusion, discord and oppression were the natural results. The burdens of the people were very great and no motive was held forth for industry and improvement. After the gospel was introduced and knowledge advanced, the evils of the government began to be seen by the chiefs and people, but could not be soon removed. It was far easier to discover the faults of the old feudal system . . . .[100]

And others looking back on Hawai'i's history thought that the introduction of western ideas of economy and Christianity—such as presented in Francis Wayland's work on political economy—was the turning point in Hawai'i's economy.[101] The *North American Review* reported in 1843 in an essay built

---

[98] RUFUS ANDERSON, THE HAWAIIAN ISLANDS: THEIR PROGRESS AND CONDITION UNDER MISSIONARY LABORS 232 (Boston, Gould & Lincoln 1864).

[99] HENRY THEODORE CHEEVER, LIFE IN THE SANDWICH ISLANDS: OR, THE HEART OF THE PACIFIC, AS IT WAS AND IS 353-54 (New York, A.S. Barnes & Co. 1856) (1851) (emphasis omitted) (quoting SIR GEORGE SIMPSON, AN OVERLAND JOURNEY ROUND THE WORLD, DURING THE YEARS 1841 AND 1842 (1847)).

[100] DIBBLE, *supra* note 89, at 432.

[101] *See* Gerard Hallock, *William Richards*, *in* 2 ANNALS OF THE AMERICAN PULPIT; OR COMMEMORATIVE NOTICES OF DISTINGUISHED AMERICAN CLERGYMEN 688, 690 (William Buell Sprague ed., 1857).

> [William Richards] translated Dr. Wayland's *Treatise on Political Economy*, and formed

around Jarves' *History of the Hawaiian or Sandwich Islands* that "[t]here is much, also, suggestive of new ideas . . . in [Jarves'] sketches of the rapid civilization of the people of this small cluster of islands,—of the working of their feudal system and constitutional monarchy, and of the management of their House of Representatives and their double Executive."[102] There is certainly a lot to say about this topic—this is an era in which Christianity and the common law were related.

There is irony, of course, in the expressions by early missionaries for the oppression wrought by what they deemed a feudal system and the actions in post-Mahele Hawai'i. While the missionaries and others created a western property regime at the time of the Mahele,[103] they shortly instituted a form of feudalism as to the person through the enactment in 1850 of the Masters and Servants Act, which permitted five-year long labor contracts.[104] That led to another form of serfdom, which made immigrant laborers a form of property alienable at the behest of their employers. This alteration is in keeping with similar ideological approaches to property and to workers in legal thought on the mainland. As United States law emphasized individual property rights, the opposition to feudalism, and later anti-slavery, in the years after Civil War, its primary emphasis shifted towards protection of individuals' rights to contract.[105] This conflict appeared, for instance, in *Hilo Sugar Co. v. Mioshi*,[106] in which a labor contract was signed in Japan between a laborer (known only by his first name Mioshi), and a representative of the Hawaiian government's Board of Immigration.[107] When Mioshi arrived in Honolulu, the Board of Immigration directed him to work for the Hilo Sugar Company.[108]

---

an interesting class, which he daily instructed on that and kindred subjects. Here they first saw clearly defined the duties of rulers and the rights of the common people. Despotism began now gradually to yield. The old Feudal system was broken down, and the King and Chiefs became willing to give up their lands to the people in fee simple, and afterwards allow them a voice in legislation.

Id.

[102] *Jarves's History of the Sandwich Islands*, 57 NORTH AM. REV. 257 (1843) (reviewing JAMES JACKSON JARVES, HISTORY OF THE HAWAIIAN OR SANDWICH ISLANDS (1843)).

[103] *See generally* Reppun v. Bd. of Water Supply, 65 Haw. 531, 542-45, 656 P.2d 57, 65-67 (1982) (providing overview of the events leading up to and including the Mahele of 1848).

[104] Penal Code of 1850, Masters and Servants Act § 1418 (King. Haw.).

[105] *See generally* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); ROBERT STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870 (1991); CHRISTOPHER TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

[106] 8 Haw. 201 (1891).

[107] *Id. See generally* EDWARD D. BEECHERT, WORKING IN HAWAII: A LABOR HISTORY 40-78 (1985).

[108] *Mioshi*, 8 Haw. at 201.

The Hawai'i Supreme Court gave substantial deference to the legislature and assessed the constitutionality of the "master and servant" law.[109] Then it cited *The Slaughterhouse Cases* as part of its conclusion that the master and servant law did not establish slavery.[110] A dissenting opinion thought that there was a system of slavery or semi-slavery, for a laborer comes to employers "without having the opportunity of choosing his employers, by a process suspiciously similar to that by which a Honolulu hack, horse and harness are hired out to a driver."[111]

During the early missionaries' time, people in the United States spoke often of what they believed was moral, economic, social, and religious progress. So the missionaries set as their goal the propagation of "Christian civilization." By that they meant alteration of the moral character; part of that meant the establishment of property rights. Hiram Bingham portrays a similar but distinct picture. He conveys the centrality of the relationship between the market, respect for property rights, and Christianity. Each provided support for the other, as Americans moved towards a world view that saw upward economic and moral progress, amelioration of a common law based in feudalism, and legal support for the market economy. Together those ideas governed American law and American thought, wherever it stretched—from the Supreme Court's chambers in Washington to Honolulu, Hilo, and Lahaina.

---

[109] *Id.* at 205-06.

[110] *Id.* at 206 (contrasting slavery with "Mexican peonage" and the "Chinese coolie labor system") (citing *The Slaughterhouse Cases*, 83 U.S. 36, 72 (1872)); *see also* Nott v. Kanahele, 4 Haw. 14 (1877) (enforcing long-term labor contract, even after sale of plantation to new owners).

Carl Christensen has remarked on this transition and seeming contradiction:

> While one must distinguish between the actions of the missionaries themselves and the acts of those haoles, many of them descendants of missionaries, who later were influential in pushing for the Mahele, this latter group's affection for a form of feudalism that very much favored their own commercial interests causes one to ask how much of the criticism of the "feudal" customary landholding system had any deeper basis than the critics' antipathy toward a landholding system that prevented alienation of Hawaiian lands into their own hands.

E-mail from Carl Christensen, Professor of Law, William S. Richardson School of Law, University of Hawai'i at Mānoa, to Alfred L. Brophy (July 26, 2007, 05:23 EST) (on file with author).

[111] *Mioshi*, 8 Haw. at 208-09.

Seed Capital is Not Enough: Lessons from Hawai'i's Attempt to Develop a High-Technology Sector

I. INTRODUCTION

Entrepreneurship in science and technology catalyzes today's knowledge-based economy.[1] Economies cannot always rely on product manufacturing[2] and agricultural[3] growth models, challenging local governments to develop and nurture environments where high-technology industries can flourish.[4] In adopting Act 221/215,[5] a tax credit program offering a one-hundred percent return on qualifying investments, Hawai'i made a "good try" at developing a high-technology sector.[6] The state, however, is still struggling to find the right path. Act 221/215, while having a positive effect on generating research and development[7]

---

[1] *See* Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1068 (2003) (stating that entrepreneurship has catapulted the American economy and resulted in economic growth, job creation, scientific breakthroughs, improvements in pharmaceuticals and biotechnology, and profound changes in the Internet).

[2] *See generally* Terrance P. McGuire, *A Blueprint for Growth or a Recipe for Disaster? State Sponsored Venture Capital Funds for High Technology Ventures*, 7 HARV. J. L. & TECH. 419, 422 (1994) (arguing that growth in Michigan's high-technology sector helped transition its economy away from being overly reliant on product manufacturing).

[3] *See generally* Matt P. McClorey, *Are State-Sponsored Venture Capital Funds Necessary for the Development and Growth of the Kansas Economy?*, 7 KAN J. L. & PUB. POL'Y 152, 153-54 (1998) (stating that Kansas is attempting to transition its economy away from agriculture and toward high-technology industries).

[4] *See* Steven L. Brooks, *The Venture Capital Investment Act of 2001: Arkansas's Vision for Economic Growth*, 56 ARK. L. REV. 397, 410 (2003) (stating that entrepreneurs cannot always rely on traditional forms of financing such as bank loans).

[5] HAW. REV. STAT. § 235-110.9 (2001 & Supp. 2007). While this article will primarily refer to Hawai'i Revised Statutes section 235-110.9 as Act 221/215, it will occasionally refer to it as either Act 221, Act 215, the Act, or the program. It will refer to it as Act 221 when discussing its history between 2001 and 2004. It will refer to it as Act 215 when describing the statute's 2004 amendments.

[6] *See* Deborah Adamson, *Case Sees Hawai'i as Business Model*, HONOLULU ADVERTISER, Nov. 11, 2004, at C1 (quoting Steve Case, co-founder of America Online and longtime Hawai'i resident).

[7] These are funds used to support basic research and development activities. *See* Nat'l Association of Seed and Venture Funds, *Seed and Venture Capital: State Experiences and Options* 5 (2006) [hereinafter NASVF], *available at* http://www.nasvf.org/web/nasvfinf.nsf/pages/svcp.html/$file/Seed%20and%20Venture%20Capital%20Report%20-%20Final.pdf; Merrill F. Hoopengardner, *Nontraditional Venture Capital: An Economic Development Strategy for Alaska*, 20 ALASKA L. REV. 357, 364 (2003).

and seed capital[8] for Hawai'i entrepreneurs, is insufficient to create a vibrant high-technology sector on its own. To continue developing its high-technology sector, Hawai'i must learn from the successes and failures of similar programs in other states, and supplement Act 221/215 with measures targeting areas of high-technology sector development that are currently lacking.[9]

This article examines Hawai'i's one-hundred percent tax credit program for investors in qualified high-technology businesses ("QHTBs"). Part II examines how Act 221/215 works and presents arguments for and against its effectiveness in developing a high-technology sector. Part III describes ways in which Hawai'i can improve its efforts to develop a strong high-technology industry. It proposes that Hawai'i lower Act 221/215's one-hundred percent tax credit and introduce a policy limiting the amount of available credits. This section further recommends that because Act 221/215's main focus is to create research and development and seed capital,[10] it should be supported by a government program that generates venture capital.[11] It argues that there is a venture capital funding gap[12] and companies started under Act 221/215 have a high likelihood of leaving Hawai'i in search of this venture capital.[13] Finally, this section suggests that Hawai'i take a long-term perspective in developing its high-technology sector and work toward finding its niche within the global high-technology economy. Part IV concludes that while, in implementing Act 221/215, Hawai'i has taken the initial step to develop a high-technology sector, many more steps are needed.

---

[8] These are funds used by young companies to establish commercial operations, launch new products, and continue research and development. *See* NASVF, *supra* note 7, at 5; Hoopengardner, *supra* note 7, at 364.

[9] *See* NASVF, *supra* note 7, at 1 (discussing lessons learned from other states); George Lipper, *State Governments Start Investing Capital for Entrepreneurs to Grow the Local Economy and Keep Jobs*, 2 COMMUNITY DEV. INVESTMENT REV. 37, 38 (2006) (stating that local governments around the country are having difficulty designing programs that generate high-technology growth).

[10] *See* David Butts, Interview, *Leadership Corner: Barry Weinman*, HONOLULU ADVERTISER, June 30, 2003, at D2 (interviewing Barry Weinman, managing director and co-founder of Allegis Capital, a $500 million Silicon Valley venture capital fund).

[11] These are funds used to expand young companies that are expected to become profitable with the help of large capital investments. *See* NASVF, *supra* note 7, at 5; Hoopengardner, *supra* note 7, at 364. Entrepreneurial growth requires entrepreneurs to have access to a variety of investment capital sources, which include research and development capital, seed capital, and venture capital. *See* Hoopengardner, *supra* note 7, at 363; *see also* NASVF, *supra* note 7, at 3 (stating that successful high-technology sectors often require seed capital, venture capital, tax incentives, and an entrepreneurial culture).

[12] A "funding gap" is the "presumed shortage of high-risk equity financing in the market . . . ." McClorey, *supra* note 3, at 155.

[13] *See* Sean Hao, *State Fund Would Invest in Local Tech Companies*, HONOLULU ADVERTISER, Apr. 10, 2006, at C1.

II. ACT 221/215: HAWAI'I'S PROGRAM FOR DEVELOPING A HIGH-TECHNOLOGY SECTOR

In 2001, Hawai'i created Act 221 to stimulate high-technology growth in its economy.[14] Act 221 provides a one-hundred percent tax credit to investors in QHTBs[15] and a twenty percent tax credit to investors in research and development endeavors.[16] Since Act 221's enactment, the program's success in developing a high-technology sector in Hawai'i has been heavily debated. The following subsections discuss the Act's design, and discuss the debate about whether it is achieving its goal of developing a high-technology industry in Hawai'i.

A. Tax Credits to Private Investors in QHTBs: Act 221 (2001-2004)

In 2001, *Business Wire* called Act 221 the "most progressive [high-technology tax incentive] in the nation[,]" because it was the only state program in the United States offering a one-hundred percent tax credit on equity investments in high-technology businesses.[17] In comparison, investment tax credit programs of other states usually offered a twenty percent credit.[18] Credits larger than twenty percent had been offered in other states, such as Oklahoma, which had a thirty percent credit on angel investments,[19] but never before had it reached one-hundred percent.[20]

Under the original version of Act 221, in place between 2001 and 2004, Hawai'i taxpayers could each receive up to $2 million in investment tax credits if they invested in a Hawai'i company with (1) fifty percent of the company's work falling under the QHTB definition[21] and (2) seventy-five

---

[14] *See HTTA Excited About Hawaii's Unprecedented 100% Technology Investment Credit*, BUS. WIRE, July 5, 2001 [hereinafter *HTTA*] ("The[Hawaii Technology Trade Association]'s mission is to grow the technology industry in Hawaii by fostering and facilitating a healthy business, financial, educational and governmental environment for Hawaii's technology companies.").

[15] *See* HAW. REV. STAT. § 235-110.9(a) (2001).

[16] *See id.* § 235-110.91(b) (2001 & Supp. 2007); 26 U.S.C. § 41(a) (2000 & Supp. 2005).

[17] *See HTTA*, *supra* note 14.

[18] *See* NASVF, *supra* note 7, at 14.

[19] *Id.* Angel investments come from groups of wealthy individuals, who often invest in developing companies in business sectors in which they gained their wealth. *See id.* at 6.

[20] *See HTTA*, *supra* note 14.

[21] Industries falling under the QHTB definition are: software, biotech, earth sciences, space sciences, sensor and optics technology, alternative fuels, pure scientific research, and performing arts. *See* HAW. REV. STAT. § 235-110.9(g) (Supp. 2007); HAW. REV. STAT. § 235-7.3(c) (2001 & Supp. 2007); 26 U.S.C. § 41(d) (2000); Marcia Sakai & Bruce Bird, *Measuring the Costs and Benefits of Hawaii's Qualified High Technology Business (QHTB) Investment*

percent of the company's work being done in Hawai'i.[22] Investors could claim the one-hundred percent credit within five years of an investment;[23] thirty-five percent of the tax credit in the first year of the investment, twenty-five percent in the second year, twenty percent in the following year, and ten percent in each of the next two years.[24]

In addition to the one-hundred percent tax credit, Act 221 also provided a twenty percent tax credit to investors in research and development endeavors.[25] Under the research and development definition, projects that engaged in the experimental discovery of new information or knowledge were entitled to receive tax credits.[26]

Hawai'i could recapture the tax credits distributed by Act 221 under three circumstances: (1) the business no longer satisfied QHTB criteria; (2) the taxpayer investing in the QHTB sold the business, or his or her interest in the business; or (3) the taxpayer withdrew his or her investment from the QHTB.[27] In each situation, the state could recover ten percent of the amount of total tax credits the investor received in the preceding two taxable years.[28]

In addition to Hawai'i taxpayers, mainland and international investors could benefit from Act 221. These non-local investors could exchange their tax credits with Hawai'i investors for the Hawai'i investors' shares of a company.[29] For example, if mainland investors contributed $2 million to a Hawai'i company and a Hawai'i investor contributed $250,000, the mainland investors, in return for the Hawai'i investor's share of the company, could transfer their $2 million tax credit (which they would have never been able to use because they did not pay taxes in Hawai'i) to the Hawai'i investor.[30] In this example, the mainland investor would, at no cost to them, receive an additional $250,000 in equity, and the Hawai'i investor $2 million in tax credits, eight times the value of his or her investment.[31] Using this method, 4Charity, a San Francisco-based company that relocated its software

---

Tax Credit, app. B, 8, Oct. 20, 2006, *available at* http://www.state.hi.us/tax/trc/docs2007/Final%20Report-Appendix%20B.pdf.

[22] HAW. REV. STAT. § 235-110.9(g) (Supp. 2007).

[23] *Id.* § 235-110.9(a) (2001); *see* Carrie Kirby, *"Blue Crush" Blues*, S.F. CHRON., Nov. 2, 2002, at B1.

[24] *See* HAW. REV. STAT. § 235-110.9(a) (2001).

[25] *See id.* § 235-110.91(b) (2001 & Supp. 2007); 26 U.S.C. § 41(a) (2000 & Supp. 2005).

[26] *See* HAW. REV. STAT. § 235-110.91(b) (2001 & Supp. 2007); 26 U.S.C. § 41(d)(1) (2000).

[27] HAW. REV. STAT. § 235-110.9(d) (2001); *see also* Sakai & Bird, *supra* note 21, at 10.

[28] HAW. REV. STAT. § 235-110.9(d) (2001); *see also* Sakai & Bird, *supra* note 21, at 10.

[29] *See* Kirby, *supra* note 23, at B1.

[30] *See id.*

[31] *See id.*

developers to Hawai'i after the passage of Act 221, raised $1 million from Hawai'i investors in exchange for its tax credits.[32]

1. Act 221's results between 2001 and 2004

Between 2001 and 2004, Hawai'i issued $108 million in high-technology investment tax credits.[33] Of the $108 million, seed capital investors received approximately $73 million.[34] Investors in research and development projects received the remaining $35 million (indicating that $175 million had been spent on endeavors qualifying as research and development).[35]

The issuance of these tax credits resulted in some high-technology development in the islands. *Honolulu Advertiser* reporter Sean Hao wrote that in 2002, Act 221 created between six-hundred and eight-hundred high-technology jobs.[36] The Act was also instrumental in creating several strong high-technology companies, such as Hoku Scientific, Inc., Hoana Medical, Inc., and Firetide, Inc.[37] John Chock, president of the Hawaii Strategic Development Corporation, stated that the tax credits "certainly have been beneficial for those companies that otherwise would be unable to attract growth investment."[38]

2. Act 221's problems between 2001 and 2004

Despite some growth in Hawai'i's high-technology sector, Act 221 faced criticism for being overly generous, subject to abuse, a drain on state revenues, and for not creating venture capital.[39] For example, although more than $100 million in tax credits were issued between 2001 and 2003, Hawai'i

---

[32] *See id.* This section of the Act 221/215 was amended in 2004 so that investors, unless they could justify it to tax officials, could usually only receive, at most, tax credits twice the amount of their investment. *See* HAW. REV. STAT. § 235-110.9(h) (Supp. 2007); Sean Hao, *Bill Renews, Limits Tax Credits*, HONOLULU ADVERTISER, May 1, 2004, at A1 [hereinafter Hao, *Bill Renews, Limits Tax Credits*].

[33] *See* Sean Hao, *Tech Credits Total $108M*, HONOLULU ADVERTISER, Aug. 23, 2005, at A1 [hereinafter Hao, *Tech Credits Total $108M*].

[34] *See* Ann Chung et al., Letters and Commentary, *Don't Denigrate It: Celebrate Islands' Tech Industry*, HONOLULU ADVERTISER, Aug. 29, 2005, at A9.

[35] *See id.*

[36] Sean Hao, *Hawai'i Likes Act 221, but Isn't Sure it Works*, HONOLULU ADVERTISER, Apr. 6, 2004, at A1.

[37] *See* Hao, *Bill Renews, Limits Tax Credits*, *supra* note 32, at A1.

[38] Hao, *Tech Credits Total $108M*, *supra* note 33, at A1.

[39] *See* Butts, *supra* note 10, at D2.

Governor Linda Lingle estimated that only $70 million was invested in start-up companies intended to benefit from the program.[40]

The state awarding tax credits to investors in short-term films is the quintessential example of Act 221's excessive generosity.[41] Although Act 221 required companies falling under the program's QHTB definition to create a long-term benefit to Hawai'i's economy, some one-film movie projects received tax credits.[42] For example, Universal Studios, which produced the movie *Blue Crush* in Hawai'i through a joint venture with local investors, was the top beneficiary of the program in its first year.[43] Local investors received between $15 and $18 million in tax credits for a movie that cost $41 million to produce,[44] and was already scheduled to film in Hawai'i.[45]

Act 221 also faced criticism for failing to create strong high-technology companies.[46] For example, Hao reported concern in Hawai'i's business community that, because of Act 221, companies were created not to produce high-technology products and services but rather to generate tax credits.[47] Additionally, because investors received thirty-five percent of the tax credits only a year after their initial investments and one-hundred percent in five years,[48] they had less of an incentive to perform the necessary due diligence to research the feasibility of a project or company.[49]

---

[40] *See* Hao, *Tech Credits Total $108M*, *supra* note 33, at A1 (citing Hawai'i Governor Linda Lingle, who remarked that the state lost at least $30 million because tax credits were issued to investors not intended to benefit from Act 221/215); *see also* Hao, *Bill Renews, Limits Tax Credits*, *supra* note 32, at A1 (stating that some believed only $50 million went to investors intended to benefit from Act 221/215).

[41] *See* Tim Ryan, *Hawaii's Big Breaks*, VARIETY, June 15, 2003, at A2.

[42] *Id.*

[43] *See* Kirby, *supra* note 23, at B1. Producers of *The Big Bounce*, a one-time movie project in Hawai'i, also benefited from Act 221. *See* Nathan Vardi, *Stars in Their Eyes*, FORBES, Feb. 2, 2004, at 50. The film cost $50 million to produce and, in exchange for its $13 million in tax credits, Shangri-La Entertainment received an extra $4 million in capital from Hawai'i investors. *Id.* *But see* Ryan, *supra* note 41, at A2 (stating that Hawai'i tax officials denied tax credit applications for the movie *Tears of the Sun*).

[44] Ryan, *supra* note 41, at A2.

[45] Mark Litwak, *Runaway Home: Production Incentives from Foreign Jurisdictions Are Playing an Increasing Role in Determining Where Films Are Made*, L.A. LAW., May 2004, at 30 n.31.

[46] *See* Butts, *supra* note 10, at D2.

[47] Sean Hao, *For Insurers, High-Tech Tax Credits Add up to 20.6M*, HONOLULU ADVERTISER, April 2, 2005, at C1 [hereinafter Hao, *For Insurers, High-Tech Tax Credits Add up to 20.6M*]; *see also* Greg Kim et al., Commentary, *It's Time for Modest Reforms To Act 221*, HONOLULU ADVERTISER, March 28, 2004, at B3.

[48] *See* HAW. REV. STAT. § 235-110.9(a)(3) (2001).

[49] *See* Kirby, *supra* note 23, at B1 (interviewing Barry Weinman, managing director of Allegis Capital, a Silicon Valley venture fund, and Joseph Blanco, former technology adviser to Benjamin Cayetano, Hawai'i's Governor between 1994 and 2002).

Act 221 also faced criticism because it lacked a deterrence mechanism to prevent questionable claims from being filed. For example, during the program's first three years, Hawai'i government officials brought neither civil nor criminal charges against those abusing the tax credit.[50] This lowered the risk to investors filing tax credit claims that did not satisfy the QHTB requirement. Furthermore, in order to keep private the names of investors receiving tax credits, Hawai'i only disclosed data about the program to the state department of taxation.[51] If Hawai'i made the names of tax credit recipients and the amount of tax credits distributed publicly available, the data could have been used to measure the effectiveness of the program in developing a high-technology industry in Hawai'i.[52]

3. Addressing Act 221's problems: Act 215 (2004-2008)

On July 1, 2004, in response to the economic problems and political criticisms of Act 221, the Hawai'i legislature amended the program,[53] changed its name to Act 215, and extended it to 2010.[54] Some components of the program stayed the same—the tax credit rate was still set at one-hundred percent, thirty-five percent of which could be accessed in the first year—but there were significant modifications.[55]

The most important change to Act 221/215 was the implementation of a more stringent certification process for investors claiming tax credits.[56] Under the new Act, what qualified as a QHTB would no longer be "liberally" construed by tax officials.[57] Additionally, investors could now usually only receive tax credits twice the amount of their investment.[58]

Even with the 2004 amendments, commentators continue to view Act 221/215 as one of the most generous high-technology tax credits in the

---

[50] *See* Sean Hao, *$20M in Tax Credits Audited*, HONOLULU ADVERTISER, June 13, 2004, at A1.

[51] *See* Sean Hao, *Legislature Ensures Act 221 Anonymity*, HONOLULU ADVERTISER, May 4, 2004, at A1.

[52] *See* Sean Hao, *State Won't Give Cost of Tax Breaks*, HONOLULU ADVERTISER, Apr. 8, 2004, at A1 [hereinafter Hao, *State Won't Give Cost of Tax Breaks*].

[53] HAW. REV. STAT. § 235-110.9 (2001 & Supp. 2007).

[54] *Id.* § 235-110.9(i) (Supp. 2007).

[55] *See* Sean Hao, *Tech Tax Credit Smoothing Out*, HONOLULU ADVERTISER, Nov. 11, 2004, at C1.

[56] *Id.*

[57] *Id.*

[58] HAW. REV. STAT. § 235-110.9(h) (Supp. 2007); *see* Hao, *Bill Renews, Limits Tax Credits*, *supra* note 32, at A1.

nation.[59] Mainly, it continues to provide a one-hundred percent tax credit for high-technology investments.[60]

B. It is Unclear Whether Act 221/215 is Propelling Hawai'i Toward Developing a Strong High-Technology Sector

Whether the value of the growth in Hawai'i's high-technology industry is proportional to the monetary cost of the tax credits given out under Act 221/215 remains unclear. Arguments on both sides of the debate are explored below.

1. Arguments that Act 221/215 achieves its purpose

Proponents of Act 221/215—which include technology companies, accountants, and state lawmakers—argue that Act 221/215 has resulted in business development and job creation.[61] They claim that Hawai'i's $486 million budget surplus four years after the Act's implementation is partly attributable to a developing high-technology sector.[62] Proponents of Act 221/215 also argue that the tax credit provided investors with an incentive to diversify their holdings.[63] Kurt Kawafuchi, Hawai'i's state tax director, notes that investments have increased from industries that previously had a limited involvement in high-technology financing.[64]

Proponents further argue that the program achieves its purpose because the investment capital it generates is greater than the cost of the tax credits distributed by the state.[65] Between 2001 and 2004, while the credits generated an estimated $184.5 million in investments, the State distributed only $110 million in tax credits.[66] Kawafuchi argues that although these figures do not definitively establish the success of the program, they do indicate that it has spurred *some* investor interest, business activity, and job creation in Hawai'i's high-technology sector.[67]

---

[59] *See* Hao, *Bill Renews, Limits Tax Credits*, *supra* note 32, at A1; Sean Hao & Dan Nakaso, *Businesses Off Political Radar*, HONOLULU ADVERTISER, May 7, 2004, at C1; Hao, *Tech Credits Total $108M*, *supra* note 33, at A1.

[60] *See* Sean Hao, *High-Tech Ready "To Give Back": Tax Credits Cited for Industry's New Attitude*, HONOLULU ADVERTISER, May 29, 2004, at C1.

[61] *See* Hao, *Tech Credits Total $108M*, *supra* note 33, at A1.

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See* Sean Hao, *State Says Tax Credits Working*, HONOLULU ADVERTISER, Sept. 29, 2006, at C1 [hereinafter Hao, *State Says Tax Credits Working*].

[66] *See id.*; Sean Hao, *Isles' Tech Jobs Drop Despite Tax Credit*, HONOLULU ADVERTISER, Oct. 7 2006, at A1 [hereinafter Hao, *Isles' Tech Jobs Drop Despite Tax Credit*].

[67] *See* Hao, *State Says Tax Credits Working*, *supra* note 65, at C1.

Supporters of Act 221/215 also claim that developing a strong high-technology industry is an on-going process.[68] Kawafuchi argues that even if the current results of Act 221/215 are not ideal, Hawai'i should take a long-term view of the program and not immediately make conclusions about its effectiveness.[69] Kawafuchi's views are supported by the statements of Deborah Markley, co-director of the Rural Policy Research Institute's Center for Rural Entrepreneurship,[70] who states that it can take seven years for a state to be able to measure any positive impact from an investment in a company.[71]

2. Arguments that Act 221/215 does not achieve its purpose

Critics of Act 221/215 argue that, despite the 2004 amendments, the program's original problems remain.[72] They claim the program is still secretive,[73] subject to political interference,[74] and inefficient.[75]

Critics also argue the program is ineffective because the state is unable to demonstrate that a high-technology sector is developing.[76] Marcia Sakai[77] and Bruce M. Bird,[78] authors of the December 2006 Tax Commission report submitted to Hawai'i Governor Linda Lingle on Act 221/215, argue that the true value of Act 221/215 should not be judged solely on current figures of investments brought in less credits distributed, because this is only an intermediate outcome.[79] Instead, they assert that program evaluators should

---

[68] *See id.*

[69] *See id.*

[70] *See* Center for Rural Entrepreneurship, http://www.energizingentrepreneurs.org (last visited Mar. 14, 2008) (stating that the center's purpose is to help rural communities use entrepreneurship as an economic development strategy).

[71] Sean Hao, *Idea Offers Help for Startups*, HONOLULU ADVERTISER, Feb. 29, 2004, at F1 [hereinafter Hao, *Idea Offers Help for Startups*].

[72] *See* Hao, *Tech Credits Total $108M*, *supra* note 33, at A1. Even at its inception, Act 221/215 was seen as a potential "black hole" because it was a "future benefit of unknown proportions, which is determined by the favored taxpayer's interpretation of what the tax credit should be, and is claimed on a tax return which is confidential." Sakai & Bird, *supra* note 21, at 4 (quoting *Report of the 2001-2003 Tax Review Commission* 8, *available at* http://www.hawaii.gov/tax/pubs/trc_rpt_2003.pdf).

[73] *See* Hao, *Tech Credits Total $108M*, *supra* note 33, at A1.

[74] *See* Sakai & Bird, *supra* note 21, at 5.

[75] *See* Hao, *Isles' Tech Jobs Drop Despite Tax Credit*, *supra* note 66, at A1.

[76] *See* Sean Hao, *Tax Credit Called Substantial Drain*, HONOLULU ADVERTISER, Dec. 3, 2006, at A1. *See generally* Sakai & Bird, *supra* note 21 (providing a comprehensive overview of the costs and benefits of Act 221/215).

[77] Dean of the College of Business and Economics at the University of Hawai'i at Hilo. Sakai & Bird, *supra* note 21, at 1.

[78] Professor of Accounting at the Richards College of Business, University of West Georgia. *Id.* at 1.

[79] *See id.* at 45; Hao, *Isles' Tech Jobs Drop Despite Tax Credit*, *supra* note 66, at A1.

look at, for example, the number of successful high-technology enterprises formed from the program.[80] Sakai and Bird, however, argue that for Act 221/215, the state and the public are unable to use this evaluation method because much of the investor data is kept secret by state tax officials.[81]

Act 221/215 critics also claim that even if some high-technology growth has occurred, the uncertainties of the actual cost of the program outweigh any potential benefit.[82] By its sunset date in 2010, the tax credit program could cost the state anywhere from $300 million (a figure based on the current annual amount of tax credits distributed) to $1 billion (an estimate submitted by the Hawai'i Department of Taxation) in uncollected taxes.[83] Sakai criticizes this potentially tremendous cost to Hawai'i taxpayers by comparing it to the annual budget of the *entire* University of Hawai'i at Hilo, which is $30 million.[84] While the tax credits could generate some growth, the millions of dollars in tax credits given away by Act 221/215 could be better used for other state purposes.[85] Lowell Kalapa, president of the nonprofit Tax Foundation of Hawaii, argues that instead of giving away tax credits, Hawai'i should collect the taxes and use the money to improve Hawai'i's schools.[86]

Critics of Act 221/215 also argue that the program is inefficient and subject to political interference.[87] Sakai and Bird's report states that tax incentives frequently do not work because they:

> often represent zero-sum strategies that divert public dollars to private companies without creating net new jobs and without demonstrating effective return on investment. State and local governments rely on incentives because the benefits are visible while the costs are hidden; they lead to good headlines ('State lures new manufacturing plant . . . '); and because other, more positive-sum strategies are long-term, difficult and don't easily translate into headlines, bumper stickers or re-election slogans.[88]

---

[80] *See* Sakai & Bird, *supra* note 21, at 45.

[81] *See id.*

[82] *See* Sean Hao, *Tech Industry Execs Defend Tax Break*, HONOLULU ADVERTISER, Oct. 26, 2006, at C1 [hereinafter Hao, *Tech Industry Execs Defend Tax Break*].

[83] *See* Hao, *State Says Tax Credits Working*, *supra* note 65, at C1 (stating that the cost of the program could easily exceed $300 million); Hao, *Tech Industry Execs Defend Tax Break*, *supra* note 82, at C1 (stating that the Hawai'i Department of Taxation has reported that the credits could result in $1 billion dollars in foregone revenue to the state).

[84] *See* Hao, *Isles' Tech Jobs Drop Despite Tax Credit*, *supra* note 66, at A1.

[85] *Id.*

[86] *See* Hao, *State Won't Give Cost of Tax Breaks*, *supra* note 52, at A1.

[87] *See* Sakai & Bird, *supra* note 21, at 5.

[88] *Id.*

3. Implications of the debate surrounding whether Act 221/215 is achieving its purpose

The arguments for and against the effectiveness of Act 221/215 indicate that it is inconclusive whether the Act has succeeded in helping Hawai'i develop a high-technology industry.[89] This inconclusiveness, however, is not the ultimate issue preventing a high-technology industry from growing in Hawai'i.

The remainder of this article argues that the program's basic design hinders the development of a high-technology sector. Primarily, Act 221/215's tax credit rate is too high, and the dollar amount the state could be responsible for in tax credits by 2010 too uncertain.

Furthermore, Act 221/215 cannot help Hawai'i fully develop a high-technology industry because there is an absence of venture capital in the state.[90] The creation of venture capital is not Act 221/215's focus,[91] and the research and development and seed capital it generates has not developed a critical mass of strong young companies capable of attracting private venture capital to Hawai'i.[92] Without venture capital financing, entrepreneurs and companies benefiting from research and development and seed capital investments under Act 221/215 are forced to look outside the state for later-stage funding.[93] This exodus of companies hurts Hawai'i's efforts to develop a high-technology industry because after spending capital to develop them, these companies take their economy-driving byproducts to other states.[94] Several possible solutions exist, however, to address these problems.

III. SOLUTIONS TO IMPROVE ACT 221/215 AND HAWAI'I'S STRUGGLING HIGH-TECHNOLOGY SECTOR

Hawai'i's legislature passed Act 221/215 to encourage the growth and development of Hawai'i's high-technology sector and increase the availability of investment capital in the state.[95] Prior to Act 221/215, capital for research

---

[89] *See id.* at 16.

[90] *See* Hawaii Institute for Public Affairs, *Venture Capital in Hawai'i: An Assessment of Market Opportunities* 27 (2008) [hereinafter *Venture Capital in Hawai'i*]; Butts, *supra* note 10, at D2.

[91] *See* Butts, *supra* note 10, at D2.

[92] *See id.*

[93] *See* Hao, *Idea Offers Help for Startups*, *supra* note 71, at F1 (stating that Firetide, Inc., a company started with the support of Act 221/215, relocated its operations to California because it could not locate venture capital funding in Hawai'i).

[94] *See id.*

[95] *See* Sakai & Bird, *supra* note 21, at 22.

and development, seed-stage funding, and venture-stage financing were essentially unavailable to Hawai'i entrepreneurs.[96] Local entrepreneurs who had a great idea and needed capital would relocate to the continental United States in search of investors.[97] Since Act 221/215 was enacted, some progress has been made in achieving the program's goals, but many steps still need to be taken.

There are four things Hawai'i can do to further develop its high-technology sector. First, the legislature should amend Act 221/215. In order to create stronger companies at a lower financial burden to the state, the amendments should reduce the investment tax credit rate and cap the aggregate amount of claimable credits. Second, in order to generate venture capital, Act 221/215 should be supported with a "fund-of-funds" program.[98] The fund-of-funds program, recognized as one of the most efficient venture capital generating models in the nation, has helped states develop vibrant high-technology sectors.[99] Third, Hawai'i should continue promoting entrepreneurship programs at local universities and in the community, and remain cognizant of the fact that strong high-technology sectors take decades to develop.[100] Fourth, Hawai'i should identify a niche market as a nucleus for its high-technology sector.

A. Amend Act 221/215

To benefit from Act 221/215's generous tax credit, which can be doubled if credits are transferred, some investors are providing seed capital to companies that normally would not be funded.[101] To address this issue and to lessen criticism that the program is a drain on state funds,[102] Hawai'i should adopt two specific amendments: (1) reduce the investment tax credit rate, and (2) limit the amount of investment tax credits that can be claimed.

---

[96] *See* Chung et al., *supra* note 34, at A9.

[97] *See* Hao, *Idea Offers Help for Startups*, *supra* note 71, at F1.

[98] In the fund-of-funds model, the state borrows (or uses its own) money and invests in a private venture capital fund. *See* NASVF, *supra* note 7, at 13. The private venture capital fund then leverages the private capital and invests, both inside and outside of the state, in strong start-up or expanding companies. *See* Sean Hao, *Venture Capital Initiatives Advance*, HONOLULU ADVERTISER, Mar. 15, 2005, at C1 [hereinafter Hao, *Venture Capital Initiatives Advance*]. Only if the company loses money does the state pay back the loan, usually in the form of transferable tax credits. *See id.*

[99] *See* Hao, *Idea Offers Help for Startups*, *supra* note 71, at F1.

[100] *See generally* NASVF, *supra* note 7, at 20 (arguing that states attempting to develop high-technology industries should implement a diversity of programs).

[101] *See* Hao, *For Insurers, High-Tech Tax Credits Add up to 20.6M*, *supra* note 47, at C1; Kim et al., *supra* note 47, at B3.

[102] *See* Hao, *Tech Credits Total $108M*, *supra* note 33, at A1.

1. Reduce the investment tax credit rate

Act 221/215's one-hundred percent tax credit is the highest in the nation, eclipsing the nearest program by forty percent.[103] A tax credit this generous, which prevents a large amount of capital from flowing into state coffers, is not necessary to generate a sufficient amount of investment capital capable of sustaining Hawai'i's high-technology sector.[104] At least nineteen states around the country have implemented tax credit programs to grow economies with rates lower than one-hundred percent.[105] These state programs, which usually have tax credit rates between twenty percent and thirty percent, challenge the idea that a one-hundred percent tax credit is essential to create a strong high-technology industry in Hawai'i.

For example, Maine's Seed Capital Tax Credit ("SCTC") program, which provides a tax credit of sixty percent in underemployed rural regions and forty percent everywhere else in the state,[106] has helped develop the state's business sector.[107] Although not exclusively focused on developing a high-technology industry, the SCTC program issued $6 million in investment tax credits between 1989 and 2001, and by 2001, the credits had generated enough economic growth that their original cost had nearly been paid for by these new businesses' personal income taxes.[108]

The success of Virginia's tax credit program also supports the argument that tax credit rates lower than one-hundred percent can generate millions of dollars in investment capital.[109] Between 1999 and 2001, Virginia set its Qualified Equity and Subordinated Debt Investment Tax Credit Program tax credit rate at fifty percent.[110] During that time period, the amount of tax credits requested by investors consistently exceeded the annual amount made available by the state, and over two-hundred high-technology companies in the state received approximately $100 million in investment capital from at least 200 different investors.[111]

---

[103] *Compare* HAW. REV. STAT. § 235-110.9(a) (2001) (stating investors are eligible for a one-hundred percent tax credit), *with* ME. REV. STAT. ANN. tit. 10, § 1100-T(2)(A) (West, Westlaw through the 2007 First Regular Session of the 123rd Legislature) (stating investors in regions with high unemployment are eligible for a sixty percent tax credit).

[104] *See* Sakai & Bird, *supra* note 21, at 6-7.

[105] *See id.*

[106] ME. REV. STAT. ANN. tit. 10, § 1100-T(2)(A) (West, Westlaw through the 2007 First Reg. Sess. of the 123rd Legislature).

[107] *See* Tom Eikenberry, *A Tennessee Seed Capital Qualified Investment Tax Credit: A Survey and Concrete Proposal for Legislative Action*, 4 TRANSACTIONS 105, 153 (2003).

[108] *See id.* at 153-54.

[109] *See id.* at 183, 185.

[110] VA. CODE ANN. § 58.1-339.4(B) (West, Westlaw through end of 2007 Reg. Sess.).

[111] *See* Eikenberry, *supra* note 107, at 183.

Even investment tax credit rates set at twenty-five percent have helped states generate an amount of investment capital sufficient to develop vibrant high-technology industries.[112] Between 1999 and 2001, North Carolina's Tax Credits for Qualified Business Investments, a twenty-five percent tax credit, helped create approximately 3400 high-technology jobs.[113] Most significantly, during that same time period, the average wage of these new jobs rose from $36,870 to $63,692,[114] demonstrating that the program was having its desired effect of creating higher-paying technology jobs in the state.[115]

These programs in other states demonstrate that a more conservative tax credit rate in Hawai'i could generate millions of dollars in investment capital at a much smaller financial burden to the Hawai'i. The increased risk to investors[116] that results from a lower tax credit could require investors to conduct more due diligence prior to financing companies. This increase in due diligence could limit funding to companies with the strongest potential and reduce the impact of the tax credit on state coffers because fewer credits would be claimed.

2. Limit the amount of claimable investment tax credits

Limiting the aggregate amount of credits claimable annually and under the life of Act 221/215 could reduce criticism that the potential cost of the program is too unknown.[117] States limit available investment tax credits to eliminate uncertainty in state budgets.[118] Maine's successful SCTC program capped the total amount of available tax credits over the life of the program at $30 million.[119] North Carolina's Tax Credits for Qualified Business

---

[112] *See id.* at 163.

[113] *Id.*

[114] *Id.*

[115] *See id.*

[116] *See, e.g.*, Kirby, *supra* note 23 at B1 (citing Joseph Blanco— former technology adviser to Benjamin Cayetano, Hawai'i's Governor between 1994 and 2002—who stated that increasing investor risk will give investors in Act 221/215 a greater incentive to research the feasibility and potential of a project).

[117] *See* Hao, *State Says Tax Credits Working*, *supra* note 65, at C1 (estimating that Act 221/215 could cost the state $300 million); Hao, *Tech Industry Execs Defend Tax Break*, *supra* note 82, at C1 (estimating that Act 221/215 could cost the state $1 billion); Eikenberry, *supra* note 107, at 182 (stating that Ohio's tax credit program's inability to restrict the amount of annual credits "prevents the state revenue department from accurately estimating a program's impact on the state's revenue collections for a particular taxable year").

[118] *See* Eikenberry, *supra* note 107, at 154, 165, 184, 194.

[119] *See id.* at 154.

Investments program, which created thousands of higher paying jobs in the state,[120] limited the amount of available tax credits to $6 million per year.[121]

Capping the amount of available tax credits under Act 221/215 could appease opponents of the program who decry its lack of transparency.[122] If the program's investment tax credits were limited to a specific amount, regardless of whether data on the investors was publicly released, the initial overall cost of the program would at least be known. Additionally, limiting the available tax credits could also eliminate the creation of weak companies.[123] Competition for a fixed amount of tax credits could ensure that investors only funded, and tax credits were only awarded to, the companies with the most potential.[124]

B. Create a State Sponsored Fund-of-Funds Program to Eliminate Hawai'i's Venture Capital Funding Gap

Amending Act 221/215 can help Hawai'i generate stronger companies and reduce the financial impact of the program on state coffers, but it will not address the venture capital funding gap.[125] To remedy this funding gap, Hawai'i should implement a fund-of-funds program. If such a program existed, successful companies started under Act 221/215 that needed venture capital funding, such as Firetide Inc.,[126] may not have relocated to the continental United States.[127] Instead, Firetide Inc. would have possibly remained in Hawai'i, creating knowledge-based jobs and anchoring the development of Hawai'i's high-technology sector.[128]

Hawai'i should adopt a fund-of-funds program that places money in the hands of private venture capitalists. The fund-of-funds program is one of the most effective and least risky capital-generating models in the nation, and it could work in Hawai'i.[129] In 2004, in response to the Hawai'i state legislature's failure to pass a version of the fund-of-funds program, Bill

---

[120] *See id.* at 163.

[121] *Id.* at 165.

[122] *See* Hao, *Tech Credits Total $108M*, *supra* note 33, at A1.

[123] *See NASVF*, supra note 7, at 17-18.

[124] *See id.*

[125] *See* Sakai & Bird, *supra* note 21, at 18.

[126] *See* Hao, *Idea Offers Help for Startups*, *supra* note 71, at F1.

[127] *See id.*

[128] *See* Kim et al., *supra* note 47, at B3 ("[G]etting one or more Hawai'i companies to achieve global significance will accelerate growth in [Hawai'i's high-technology] industry and provide role models for many other companies.").

[129] *See* Hao, *Idea Offers Help for Startups*, *supra* note 71, at F1.

Richardson, general partner of HMS Hawai'i, one of the few Hawai'i-based private venture capital firms, stated "it's been needed [since 1994]."[130]

1. The fund-of-funds model

In the fund-of-funds model, the state borrows (or uses its own) money and invests in a private venture capital fund.[131] The private venture capital fund then leverages the private capital and invests, both inside and outside of the state,[132] in strong start-up or expanding companies.[133] Only if the company loses money does the state pay back the loan, usually in the form of transferable tax credits.[134] Oversight of the program can come from both public and private institutions.[135] According to David Barkley, an economics professor at Clemson University, the fund-of-funds program "provides incentives without sacrificing state tax revenues."[136]

The fund-of-funds model was created during the 1990s, and states employing variations of the program have not only enjoyed success in developing their high-technology sectors,[137] but have also usually received returns of fifteen to twenty percent on their investments.[138] For example, in Oklahoma, after the fund-of-funds program was enacted, private venture capital firms investing in the state increased from one to fourteen.[139] The $40 million the state invested in these firms generated $130 million in venture capital investments in Oklahoma businesses.[140] Additionally, because the private venture capital firms made sound investments, the state did not need

---

[130] Sean Hao, *Venture Fund Short on Punch*, HONOLULU ADVERTISER, June 1, 2004, at D1.

[131] *See* NASVF, *supra* note 7, at 13.

[132] *See* Hao, *Idea Offers Help for Startups*, *supra* note 71, at F1.

[133] *See* Hao, *Venture Capital Initiatives Advance*, *supra* note 98, at C1.

[134] *See id.*

[135] *See, e.g.*, Utah Fund of Funds, http://www.utahfundoffunds.com (last visited Mar. 8, 2008) (stating that the Utah fund-of-funds program receives oversight from public and private institutions within the state).

[136] Hao, *Idea Offers Help for Startups*, *supra* note 71, at F1 (quoting David Barkley, professor of economics at Clemson University).

[137] *See* Daniel Sandler, *The Sandler Report: The Effective Use of Tax Credits in State Venture Capital Programs*, *reprinted in* NASVF, *supra* note 7, app.d at D-9 (2006), *available at* http://www.nasvf.org/web/nasvfinf.nsf/pages/svcp.html/$file/Seed%20and%20Venture%20Capital%20Report%20-%20Final.pdf; *see also* McGuire, *supra* note 2, at 430-31 (stating that five years after it began, Michigan's fund-of-funds program had created 3500 high-technology jobs, received returns on its investment between twenty to twenty-five percent, and attracted, in addition to the $700 million invested in the state from the fund-of-funds program, $200 million in private venture capital financing).

[138] *See* Hao, *Venture Capital Initiatives Advance*, *supra* note 98, at C1.

[139] *See* Sandler, *supra* note 137, at D-9.

[140] *See id.*

to distribute tax credits, and the only cost of the program to Oklahoma was the $600,000 required to implement it.[141]

2. The fund-of-funds program could help solve Hawai'i's venture capital funding gap

In 2002, $81.8 million of research and development and seed capital was invested in Hawai'i companies.[142] In comparison, only $2.9 million was invested in the form of private institutional venture capital.[143] A 2008 report by the Hawaii Institute for Public Affairs concluded that Hawai'i's investment capital industry had succeeded in providing seed financing to entrepreneurs, but lacked "sufficient capital to service the [venture capital] demand they've helped to create."[144] The study noted that, between 2008 and 2010, Hawai'i venture capital firms would probably be unable meet the estimated $147 million of venture capital needed to support Hawai'i's developing high-technology companies.[145]

Hawai'i can benefit from a fund-of-funds program because, in addition to not creating state-sponsored venture capital investment, Act 221/215 struggles to encourage private venture capital investment.[146] The majority of private venture capital in the United States comes from pension funds, endowments, and trusts seeking to maximize profits.[147] As such, venture capitalists who invest this money will fund companies that provide their clients with the strongest opportunity for financial gain, not companies that will give them the best tax credit.[148] Hawai'i, however, currently lacks an attractive market for many private venture capitalists to enter because, historically and in spite of Act 221/215, a critical mass of potentially profitable companies has not fully developed.[149]

---

[141] *See id.*

[142] *See* Sakai & Bird, *supra* note 21, at 18.

[143] *See id.*

[144] *See Venture Capital in Hawai'i*, *supra* note 90, at 15.

[145] *See id.* at 27 (stating that although Hawai'i venture capital fund managers plan to raise $128 million, it will still not meet the projected venture capital demand).

[146] *See* Butts, *supra* note 10, at D2.

[147] *See* Sakai & Bird, *supra* note 21, at 18.

[148] *See* Butts, *supra* note 10, at D2.

[149] *See id.*

3. Private investors should be responsible for making investment decisions in a fund-of-funds program

If Hawai'i adopts a fund-of-funds program, private venture capitalists should control the investment decisions. Fund-of-funds programs managed by the government face too many political pressures.[150] A National Association of Seed and Venture Funds ("NASVF") report states that the "government as a direct investor has a very poor track record. . . . [T]he reward system in a bureaucracy punishes risk-taking, a critical factor in early-stage investing, and it makes decisions subject to political pressure."[151] Instead, the publicly funded and privately managed program would be more effective in developing Hawai'i's high-technology industry.[152] According to the NASVF, "initiatives of government support and policy direction, combined with private sector market discipline, can be an effective formula for accelerating local economic development."[153]

4. A possible source of capital to finance a fund-of-funds program is state pension money

Hawai'i can finance a fund-of-funds program by either using its own or borrowing state pension money.[154] If it borrows state pension money, one potential source of financing is the state's Employee Retirement System ("ERS"), which manages approximately $11 billion in pension money for retired Hawai'i state and county employees.[155] State officials cannot simply take money from the ERS to finance a fund-of-funds program,[156] but it can present a strong case to ERS pension fund managers that they should invest in a fund-of-funds program.

Government pension funds around the country have successfully invested in state-sponsored venture capital programs.[157] For example, during the 1990s, the Michigan state pension fund successfully invested $800 million (five percent of the fund) in the state's venture capital program.[158] Additionally, in

---

[150] *See* Hoopengardner, *supra* note 7, at 371.

[151] NASVF, *supra* note 7, at 20.

[152] *See id.*; Hoopengardner, *supra* note 7, at 372.

[153] NASVF, *supra* note 7, at 20.

[154] *See id.* at 13.

[155] *See* Richard Borecca, *Court Finds $345M Pension Raid Illegal*, HONOLULU STAR-BULL., July 25, 2007, at A5.

[156] *See* Kaho'ohanohano v. State, 114 Hawai'i 302, 162 P.3d 696 (2007) (holding that the Hawai'i State Legislature's $345 million raid on excess earnings from the Employee Retirement System in 1999 was illegal).

[157] *See* Hao, *Venture Capital Initiatives Advance*, *supra* note 98, at C1.

[158] McGuire, *supra* note 2, at 430, 443-44.

Maryland during the 1990s, various state pension funds invested one-half of one percent of their assets in the Maryland Venture Capital Trust Fund, generating $15 to $20 million in venture funds.[159]

C. *Investment Capital Will Not Create a High-Technology Sector Without Support*

Amending Act 221/215 to reduce its impact on state funds and eliminating the venture capital funding gap through a fund-of-funds program will not automatically result in the development of a strong high-technology industry. Even if Act 221/215 is amended and venture capital is made available, a high-technology sector will not develop in Hawai'i if knowledgeable entrepreneurs do not create useful and potentially profitable products. To that end, Hawai'i should "resist the temptation to put all [its] 'eggs' into the basket of programs that lure capital to the region."[160]

To further the development of its high-technology industry, Hawai'i should continue to use its universities to develop entrepreneurs and create networking programs to cultivate an entrepreneurial spirit in the state. Additionally, Hawai'i should implement programs that will be effective in the long-term because a strong high-technology sector can take decades to develop.[161]

1. *Support Act 221/215 with complementary programs*

Hawai'i's universities must continue to create programs that develop entrepreneurs. For example, the University of Hawai'i at Mānoa is developing entrepreneurs through its Business Plan Competition, medical school, and Office of Technology Transfer and Economic Development.[162] In addition to developing entrepreneurs, these programs have increased public awareness that the university is an incubator for entrepreneurial activity.[163]

To develop a high-technology sector, Hawai'i must also continue to create an "entrepreneurial ecosystem."[164] Networking events that bring together entrepreneurs with different skill sets, such as doctors, scientists, lawyers, businesspeople, and accountants, have helped develop high-technology sectors

---

[159] *See id.* at 444.

[160] NASVF, *supra* note 7, at 20.

[161] *See* David G. Watumull, Editorial, *How a Local Biotech Industry Will Change the Face of Hawaii*, HONOLULU STAR-BULL., Jan. 28, 2007, at E1.

[162] *See* Gregory R. Kim, *Next Economy Lawyers*, HAW. B.J., April, 2002, at 2.

[163] *See id.*

[164] *See* NASVF, *supra* note 7, at 3 (stating that "entrepreneurial ecosystems" tend to require seed capital, venture capital, tax incentives, and an entrepreneurial culture).

around the country.[165] For example, national high-technology networking events like Springboard Enterprises,[166] the National Renewable Energy Laboratory Growth Forum,[167] and World's Best Technologies Showcase[168] have successfully connected entrepreneurs with different talents.[169]

2. High-technology sectors take years to develop

Hawai'i must also take a long-term perspective in developing its high-technology sector because it will not develop quickly.[170] Successful high-technology industry generating programs, which have produced long-term benefits at minimal cost, have developed their sources of investment capital over many years.[171] On the other hand, hastily built programs have suffered substantial losses of money and scared states away from considering new programs to develop their high-technology sector.[172]

According to the NASVF, "[m]aking good investments takes a lot of time, and building an industry that is prepared to make and manage these investments takes even longer."[173] Roger Quy, a partner at Technology Partners, a Silicon Valley-located venture capital firm, states that building a critical mass of companies capable of generating strong high-technology growth in biotechnology can take ten to fifteen years.[174] North Carolina's high-technology sector required committed developers to invest in the area for over thirty-years before it appeared on national lists as a top ten location for entrepreneurial activity.[175]

For Hawai'i, which has only been seriously attempting to grow its high-technology industry for eight years, taking a long-term perspective requires the state to refuse any future measures that hastily attempt to build a high-

---

[165] *See id.* at 14-15.

[166] *See* Springboard Enterprises, http://www.springboardenterprises.org (last visited Mar. 8, 2008) (stating that Springboard Enterprises is a not-for-profit organization supporting female entrepreneurs).

[167] *See* National Renewable Energy Laboratory Growth Forum, http://www.cleanenergyforum.com (last visited Mar. 8, 2008) (stating that the National Renewable Energy Laboratory Growth Forum is America's largest venture event focused exclusively on companies developing clean energy products).

[168] *See* World's Best Technologies Showcase, http://www.wbtshowcase.com (last visited Mar. 8, 2008) (stating that the World's Best Technologies Showcase is the largest collection of undiscovered technologies in the nation).

[169] *See* NASVF, *supra* note 7, at 14-15.

[170] *See* McGuire, *supra* note 2, at 433.

[171] *See id.* at 433-34.

[172] *See id.*

[173] *See* NASVF, *supra* note 7, at 20.

[174] *See* Watumull, *supra* note 161, at E1.

[175] *See* McGuire, *supra* note 2, at 433-34.

technology sector.[176] Rather, the state government must employ individuals who will identify the existing shortcomings in Hawai'i's high-technology sector, and address these shortcomings by making the necessary changes.[177]

D. Identify an Industry to Build a High-Technology Sector Around

Act 221/215 attempted to stimulate high-technology growth in general, but Hawai'i can further the development of its high-technology industry by finding a niche market its sector can develop around. Many regions and states have created their high-technology industries around specific markets. For example, Silicon Valley has become known for, among other products, its semiconductors.[178] Pennsylvania is recognized for having strong computer integrated manufacturing, robotics, and artificial intelligence services.[179] San Diego is known as a hub for life-sciences companies.[180] Hawai'i can use these examples of strong high-technology industries developing in specific sectors to justify targeting its high-technology development in particular markets.

Possibilities for this niche in Hawai'i may already be evident. Using the success of the Pacific Missile Range Facility, located on Kaua'i, as an example, a high-technology sector could develop around the military.[181] Additionally, many researchers come to Hawai'i to conduct natural science research[182] and a high-technology center could revolve around these scientists' passions and ideas. For example, because of its location in the middle of the Pacific Ocean, Hawai'i's high-technology sector could center on marine science.[183] Hawai'i's abundant plant-life and temperate climate could also enable it to become a high-technology hub for renewable energy projects.[184] Hawai'i need not be overly aggressive in promoting an industry to build a high-technology sector around, but encouraging high-technology development in fields where Hawai'i has an advantage could be beneficial.

---

[176] *See* NASVF, *supra* note 7, at 20.

[177] *See id.*

[178] *See* McGuire, *supra* note 2, at 433.

[179] *See id.* at 432-33.

[180] *See* Watumull, *supra* note 161, at E1.

[181] *See* Susan Hooper, *Neighbor Islands Anticipate Better Times Ahead*, HONOLULU ADVERTISER, Jan. 30, 2000, at G5.

[182] *See* Jan TenBruggencate, *Hawai'i Drawing Waves of Ocean Researchers*, HONOLULU ADVERTISER, Aug. 17, 2004, at A1.

[183] *See id.*

[184] *See Venture Capital in Hawai'i*, *supra* note 90, at 16 ("Several mainland-based venture funds report that Hawai'i is perceived as a potential 'Silicon Valley of Cleantech,' as no region has claimed dominance in this area.").

IV. CONCLUSION

In order to develop a strong high-technology industry, Hawai'i cannot solely rely on the current version of Act 221/215. Act 221/215, by generating investment capital for research and development and seed ventures, has created the opportunity for many local entrepreneurs to begin cultivating their ideas. These ideas, however, are not fully developed and cannot help Hawai'i build a high-technology sector on their own.

To construct a thriving high-technology sector at a lower financial cost to the state, Hawai'i should rely on the lessons learned by other states that have manufactured high-technology industries. In doing so, Hawai'i should: (1) lower Act 221/215's tax credit rate and cap the amount of available credits distributable under the program; (2) implement a state-sponsored fund-of-funds program to eliminate the venture capital funding gap; (3) expand entrepreneurship programs and community networking events to develop more local entrepreneurs; and (4) identify a niche market to focus Hawai'i's high-technology sector around. Hawai'i has taken the initial step toward developing a high-technology industry; it just needs to take a few more.

David H. Hu[185]

---

[185] J.D. Candidate 2008, William S. Richardson School of Law, University of Hawai'i at Mānoa. The author would like to express his gratitude to Professor Justin D. Levinson, the University of Hawai'i Law Review, and his family and friends.

Viability of the Continuing Violation Theory in Hawai'i Employment Discrimination Law in the Aftermath of *Ledbetter*

I. INTRODUCTION

Outrage poured through the halls of the Democratic Congress after the May 29, 2007 United States Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,[1] which effectively deprived a female employee any relief from pay discrimination she suffered due to her sex.[2] Democrats such as Representative George Miller of California quickly rallied together and introduced the Lilly Ledbetter Fair Pay Act of 2007 in the House on June 22, 2007.[3] The House passed the Act on July 31, 2007, which currently resides on the Senate's general calendar.[4] The *Ledbetter* holding dealt with determining the timeliness of a pay discrimination claim based on sex under Title VII of the Civil Rights Act of 1964 ("Title VII").[5] The decision in *Ledbetter* has been hotly debated and will have numerous ramifications at the federal level for both employees and employers. Fortunately for employees in Hawai'i, *Ledbetter* does not have a direct effect on the filing of discrimination claims at the state level.[6] Hawai'i has enacted its own set of

---

[1] ___ U.S. ___, 127 S. Ct. 2162 (2007); *see* Linda Greenhouse, *Justices' Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1, *available at* 2007 WLNR 10082762; Editorial, *Reasonable Approach to Reversing Discrimination*, DENVER POST, Aug. 6, 2007, at B5, *available at* 2001 WLNR 15208528.

[2] *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2165-78.

[3] The bill (H.R. 2831) would amend Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973 to clarify "that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice." Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. (1st Sess. 2007), 2007 CONG US HR 2831 (Westlaw).

[4] *Id.* If the Lilly Ledbetter Fair Pay Act of 2007 passes in the Senate, the Bush administration has made it clear that it will veto the bill. *See* OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY, H.R. 2831—LILLY LEDBETTER FAIR PAY ACT OF 2007 (July 27, 2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf.

[5] *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2165; *see also* 42 U.S.C. § 2000e-2(a) (1999) (proscribing various forms of discrimination in the workplace); 42 U.S.C. § 5(e)(1) (2005) (imposing a time period under which a Title VII claim must be filed).

[6] *See* Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 13, 936 P.2d 643, 649 (1997).

laws prohibiting employment discrimination,[7] and a plaintiff's "state law claims are separate, distinct and independent from [a plaintiff's federal] claims."[8] Hawai'i courts are free to interpret Hawai'i employment discrimination laws without any federal influence, because a "federal court's interpretation of Title VII is not binding on [the Hawai'i Supreme Court's] interpretation of civil rights laws adopted by the Hawai'i legislature."[9]

This note analyzes relevant differences between Hawai'i and federal employment discrimination laws. It then discusses why, in light of those differences, the Hawai'i Civil Rights Commission and the Hawai'i Supreme Court should not be influenced by the *Ledbetter* decision when interpreting Hawai'i law regarding complaints against unlawful discrimination. Instead, Hawai'i should adopt a broader approach than that of the Supreme Court in order to find claims like that of Lilly Ledbetter's to be timely and thus allow for adjudication on the merits. This note also explores the continuing violation theory[10] and its current applicability under federal and Hawai'i employment laws.

Part II provides a summary of *Ledbetter*. Part III compares the protection afforded to plaintiffs by Title VII to that by Hawai'i discrimination law as well as the differences in filing requirements. Part IV discusses the continuing violation theory in relation to pattern-or-practice and hostile work environment claims, including the treatment of such a theory under federal law for discrete discriminatory acts. This section further analyzes the continuing violation theory's application under Hawai'i law, arguing that it remains in force for systemic discrimination and hostile work environment claims as well as claims involving repeated discriminatory acts. This note contends that the viability of the continuing violation theory allows a claim like Lilly Ledbetter's to be found timely if filed under Hawai'i law. Part V illustrates why Hawai'i's approach is more beneficial to the employee than the federal interpretation of Title VII in *Ledbetter*. Part VI concludes that Hawai'i employment discrimination laws are broader and more protective of the employee than federal law, and therefore Hawai'i should not be affected by the holding in *Ledbetter*.

---

[7] *See* HAW. REV. STAT. §§ 378-1 to -6 (1993 & Supp. 2007); *see also* Shoppe v. Gucci Am., Inc., 94 Hawai'i 368, 377, 14 P.3d 1049, 1058 (2000) (describing H.R.S. section 378-2 as "Hawaii's Employment Discrimination Law").

[8] Linville v. Hawai'i, 874 F. Supp. 1095, 1105 (D. Haw. 1994).

[9] *Furukawa*, 85 Hawai'i at 13, 936 P.2d at 649.

[10] The continuing violation theory is an approach used to determine whether acts which fall outside a statutory time period for filing discrimination charges are actionable under the applicable employment discrimination law. *See* Morgan v. Nat'l R.R. Passenger Corp., 536 U.S. 101, 107 (2002). See Part IV.A for further background on the continuing violation theory as applied in the employment law context.

II. THE STORY OF LILLY LEDBETTER

Pay discrimination claims are becoming increasingly common across the country, where almost forty thousand employees filed claims between 2001 and 2006.[11] Lilly Ledbetter's story, therefore, may not be that unusual. Ms. Ledbetter was employed at Goodyear Tire and Rubber Company's ("Goodyear") plant in Gadsden, Alabama from 1979 until she retired in 1998.[12] She worked primarily as an area manager, which was a position mainly occupied by men.[13] By the end of her time with Goodyear, Ms. Ledbetter was receiving significantly less pay than her male counterparts with equal or lower seniority.[14] In 1998, Ms. Ledbetter commenced an action alleging disparate treatment on the basis of sex in violation of Title VII.[15] She specifically alleged that her pay did not increase as it should have because she received several poor annual evaluations based on her sex.[16] The United States District Court for the Northern District of Alabama allowed Ms. Ledbetter to introduce evidence relating to every annual salary review starting in 1979 through the end of her employment in 1998.[17] The jury subsequently found that Ms. Ledbetter had been discriminated against based on her sex and awarded her compensatory and punitive damages.[18] The Court of Appeals for the Eleventh Circuit reversed, holding that only those decisions related to Ms. Ledbetter's pay within the 180-day charging period in which a Title VII claim must be filed could be considered.[19] Because there was insufficient evidence to prove that any of the pay setting decisions made by Goodyear within the 180-day period were discriminatory, Ms. Ledbetter was denied relief.[20]

The Supreme Court affirmed the Eleventh Circuit's decision and held that Ms. Ledbetter's claim was untimely.[21] Ms. Ledbetter argued that each paycheck issued to her within the 180-day charging period, which was lower than her male counterparts due to previous discriminatory pay-setting decisions, was "a separate act of discrimination" that could carry forward the

---

[11] Greenhouse, *supra* note 1, at A1.

[12] Ledbetter v. Goodyear Tire & Rubber Co., Inc., ___ U.S. ___, 127 S. Ct. 2161, 2165, 2178 (2007).

[13] *Id.* at ___, 127 S. Ct. at 2178.

[14] *Id.* at ___, 127 S. Ct. at 2166, 2178.

[15] *Id.* at ___, 127 S. Ct. at 2165.

[16] *Id.* at ___, 127 S. Ct. at 2165-66.

[17] Ledbetter v. Goodyear Tire & Rubber Co. (*Ledbetter I*), 421 F.3d 1169, 1176 (11th Cir. 2005), *aff'd* ___ U.S. ___, 127 S. Ct. 2162 (2007).

[18] *Id.*

[19] *Id.* at 1180-83; *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2166.

[20] *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2166; *Ledbetter I*, 421 F.3d at 1190.

[21] *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2165, 2178.

continuing effects of prior uncharged discriminatory decisions.[22] The Court rejected this argument and held that the issuance of a paycheck reflecting past discrimination is not a discrete act capable of triggering a new charging period; only the pay-setting decisions could be considered discrete acts.[23] The Court addressed its earlier interpretation of Title VII's time-filing requirement in *Bazemore v. Friday*,[24] where it held that "[e]ach week's paycheck that delivers less to a black [employee] than to a similarly situated white [employee] is a wrong actionable under Title VII."[25] The Court distinguished *Bazemore* on the grounds that it involved "a challenge to a discriminatory pay structure, whereas Ledbetter was a challenge only to discriminatory pay decisions."[26] Furthermore, the Court refused to treat Ms. Ledbetter's gender-based disparate pay claim like a hostile work environment claim involving repeated conduct for time-filing purposes.[27]

III. Relevant Statutory Differences Between Federal and Hawai'i Employment Discrimination Laws

A. *Protection Under Federal and Hawai'i Law*

Hawai'i employment discrimination law mirrors federal employment discrimination law in many ways.[28] However, Hawai'i employment discrimina-

---

[22] *Id.* at ___, 127 S. Ct. at 2167.

[23] *Id.* at ___, 127 S. Ct. at 2169-74.

[24] 478 U.S. 385 (1986).

[25] *Id.* at 395; *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2172-74.

[26] Erwin Chemerinsky, *The Court Deals a Blow to Pay Discrimination Plaintiffs*, 43 TRIAL 60, 61 (Sept. 2007).

> *Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. . . . Because [Ms.] Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus, *Bazemore* is of no help to her.
>
> *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2174.

[27] *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2175. For a hostile work environment claim, as long as "an act contributing to the claim occurs within the filing period, the entire claim period of the hostile environment may be considered by the court for the purposes of determining liability." *Id.* at ___, 127 S. Ct. at 2180 (Ginsburg, J., dissenting) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002)).

[28] *Compare* HAW. REV. STAT. § 378-2 (1993 & Supp. 2007), *with* 42 U.S.C. § 2000e-2(a) (1999); *see also* Sam Teague, Ltd. v. Haw. Civil Rights Comm'n, 89 Hawai'i 269, 281, 971 P.2d 1104, 1116 (1999) ("Hawai'i's employment discrimination law was enacted to provide victims of employment discrimination the same remedies, under state law, as those provided by Title VII of the Federal Civil Rights Act of 1964.").

tion law departs from its federal counterpart in several meaningful ways that provide broader protection for the employee. The first difference in protection is apparent at the constitutional level. No federal constitutional provision directly provides civil rights protection for a particular class.[29] There is such protection, however, under the Hawai'i Constitution's civil rights clause: "[n]o person shall be . . . denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."[30] The Hawai'i Constitution also has a specific provision protecting sex as a class: the "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex."[31] These provisions in the Hawai'i Constitution "provid[e] a constitutional basis for interpreting Hawai'i's anti-discrimination laws in a stronger manner than similar federal laws."[32]

There are also significant differences in statutory protection between federal and Hawai'i anti-discrimination laws. Title VII prohibits discrimination by an employer against any individual because of the "individual's race, color, religion, sex, or national origin."[33] Hawaii Revised Statutes ("H.R.S.") section 378-2(1) also proscribes discrimination against such classes but extends protection to sexual orientation, age, ancestry, disability, marital status, and arrest and court record.[34] While other federal laws protect against age and disability discrimination, no specific protection is offered at the federal level for sexual orientation, marital status, or arrest and court record discrimination.[35] Also, whereas Title VII only applies to employers with

---

[29] The United States Constitution provides for equal protection of laws, but does not specify any classes which should be afforded such protection. For instance, the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Similarly, the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.* amend. V. However, the Supreme Court has recognized certain suspect classes, such as racial minorities. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144 (1938); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[30] HAW. CONST. art. I, § 5.

[31] *Id.* art. I, § 3.

[32] David F. Simons, *Employment Law That Fits Our State*, 9 HAW. B.J. 4, 4 (Mar. 2005).

[33] 42 U.S.C. § 2000e-2(a) (1999).

[34] HAW. REV. STAT. § 378-2(1) (1993 & Supp. 2007).

[35] The Age Discrimination in Employment Act ("ADEA") prohibits an employer from discriminating based on age. 29 U.S.C. §§ 621-634 (2002 & Supp. 2007). ADEA covers individuals forty years of age and above. *Id.* § 631(a). The Americans with Disability Act prohibits discrimination based on an individual's disability. 42 U.S.C. §§ 12101-12300 (2003).

fifteen or more employees,[36] H.R.S. section 378-2 affords protection to an employee of any employer with at least one employee.[37]

B. Liability and Recovery

An employer's liability and a plaintiff's ability to recover due to such liability both differ significantly under federal and Hawai'i law, where again Hawai'i law affords greater protection for the injured plaintiff than does federal law. Actions brought under Title VII are subject to caps on recovery for compensatory[38] and punitive damages between $50,000 and $300,000, depending on the number of employees the employer has.[39] Hawai'i, on the other hand, does *not* cap recovery for general or punitive damages.[40]

---

[36] 42 U.S.C. § 2000e(b) (1999).

[37] HAW. REV. STAT. § 378-1 (1993 & Supp. 2007) ("'Employer' means any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees . . . .").

[38] Both federal law and Hawai'i law limit backpay liability for up to two years from the filing of the charge with the applicable commission. *Compare* 42 U.S.C. 2000e-5(g)(1) (2005), *with* HAW. REV. STAT. § 378-5(b) (1993). Attorney's fees are mandatory for prevailing plaintiffs in employment discrimination cases brought under Hawai'i law. HAW. REV. STAT. § 378-5(c) (1993) ("[T]he court, in addition to any judgment awarded to the plaintiff or plaintiffs, *shall* allow costs of action, including costs of fees of any nature and reasonable attorney's fees, to be paid by the defendant." (emphasis added)). The court has discretion as to whether or not to award attorney's fees to a prevailing plaintiff for cases brought under federal law. 42 U.S.C. § 1988(b) (1999 & Supp. 2007) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . .").

[39] *See* 42 U.S.C. § 1981a(b)(3) (2000). Section 1981a determines caps on liability for actions filed under section 703 of Title VII of the Civil Rights Act of 1964, providing:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Id.

[40] *See* HAW. REV. STAT. § 368-17(a) (1993 & Supp. 2007).

Under Title VII, most circuits have held that liability can be imposed *only* on the employer—not on the individual employee who committed the discriminatory acts or harassment.[41] In Hawai'i, however, "[t]here is no doubt that the law recognizes individual liability for aiding, abetting, inciting, compelling, or coercing a discriminatory practice under [H.R.S.] section 378-2(3)."[42] Liability for aiding and abetting "extends to everyone, even those not employed or affiliated with the discriminatory employer."[43] While there is no Hawai'i Supreme Court decision directly on point, the United States District Court for the District of Hawai'i ("federal district court") has also held that an individual can be liable for his or her own discriminatory conduct in the workplace under H.R.S. sections 378-2(1) and 378-2(2).[44]

C. Time Limits for Filing Discrimination Claims

1. Filing under federal law (Title VII)

Prior to filing a Title VII claim in federal court, a plaintiff is first required to exhaust his or her administrative remedies.[45] In order to satisfy this requirement, plaintiffs must file a charge with the Equal Employment Opportunity Commission ("EEOC")[46] within the statutory filing period.[47] Under section 706 of the Civil Rights Act of 1964, a charge of discrimination needs to be filed with the EEOC "within one hundred and eighty days *after the*

---

[41] *See, e.g.*, Williams v. Banning, 72 F.3d 552, 554 (7th Cir. 1995); Greenlaw v. Garrett, 59 F.3d 994, 1001 (9th Cir. 1995); Cross v. Ala. State Dept. of Mental Health & Mental Retardation, 49 F.3d 1490, 1504 (11th Cir. 1995).

[42] Hale v. Haw. Publ'ns, Inc., 468 F. Supp. 2d 1210, 1227 (D. Haw. 2006); *see* HAW. REV. STAT. 378-2(3) (1993 & Supp. 2006).

[43] Sherez v. Haw. Dep't of Educ., 396 F. Supp. 2d 1138, 1147 (D. Haw. 2005).

[44] *See Hale*, 468 F. Supp. 2d at 1229 ("[A]n individual without employees may be liable for discriminatory conduct pursuant to H.R.S. § 378-2(1) or retaliatory conduct pursuant to H.R.S. § 378-2(2) as an agent of his employer."); *see also Sherez*, 396 F. Supp. 2d at 1147 ("It is hard to imagine that the Hawaii legislature meant to impose liability on small employers and on individuals who aid and abet discrimination, yet at the same time meant to immunize the individual agents who actually engage in unlawful discrimination."). Some district courts, however, have found that Hawai'i does not impose individual liability. *See, e.g.*, Mukaida v. Hawaii, 159 F. Supp. 2d 1211, 1227 (D. Haw. 2001).

[45] Benjamin J. Morris, *A Door Left Open?* National Railroad Passenger Corporation v. Morgan *and its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits*, 43 CAL. W.L. REV. 497, 502 (2007).

[46] *Id.* at 500. The Equal Employment Opportunity Commission ("EEOC") "was created by the Civil Rights Act of 1964, which focused on eliminating the workplace discrimination brought to the forefront during the civil rights protests in the early 1960s. Congress intended the EEOC to be 'the lead enforcement agency in the area of workplace discrimination.'" *Id.*

[47] *See* 42 U.S.C. § 2000e-5(e)(1) (2005).

alleged unlawful employment practice occurred"[48] if the state in which the plaintiff is filing is a non-deferral state, meaning it has no EEOC-like commission at the state level.[49] When a state has an "entity with the authority to grant or seek relief with respect to the alleged unlawful practice, [like the EEOC,] an employee who initially files a grievance with that agency must file a charge with the EEOC within 300 days of the [alleged unlawful] employment practice."[50] Hawai'i is one such "deferral state,"[51] where the Hawai'i Civil Rights Commission ("HCRC") "is authorized to grant and seek relief for discriminatory practices."[52] As a result, when an individual initially files a charge with the HCRC, the filing period under federal law with the EEOC is extended to 300 days after the alleged discriminatory practice occurred.[53]

2. Filing under Hawai'i law

"Deferral" states also have their own limitation periods for charges filed under state law, and generally those periods fall into five categories ranging from ninety days to three years.[54] The majority of states, including Hawai'i, impose a 180-day limitations period.[55] Like plaintiffs filing under Title VII, plaintiffs filing discrimination charges under Hawai'i law are required to exhaust administrative remedies prior to filing a discrimination claim in a Hawai'i state court.[56] To do so, a plaintiff must file a charge first with the HCRC, which has "jurisdiction over the subject of discriminatory practices."[57]

---

[48] *Id.* (emphasis added).

[49] *See* Ledbetter v. Goodyear Tire & Rubber Co. (*Ledbetter I*), 421 F.3d 1169, 1178 (11th Cir. 2005), *aff'd* ___ U.S. ___, 127 S. Ct. 2162 (2007); *see also Hale*, 468 F. Supp. 2d at 1219.

[50] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002).

[51] Kaulia v. County of Maui, 504 F. Supp. 2d 969, 985 (D. Haw. 2007). "As a deferral state, Hawaii may also form worksharing agreements with the EEOC, under which filing a complaint with one agency constitutes a simultaneous filing with the other." *Id.* at 985 n.20. Although a worksharing agreement between the EEOC and the Hawai'i Civil Rights Commission ("HCRC") is not on record, it has been recognized by the courts that "when filing a complaint with either the EEOC or the HCRC, a complainant may file a single form and check a box indicating that he or she wishes to file with both agencies." *Id.*

[52] *Hale*, 468 F. Supp. 2d at 1219.

[53] *Kaulia*, 504 F. Supp. 2d at 985.

[54] *See* JOHN J. COLEMAN, III, LIMITATIONS PERIODS, DISABILITY DISCRIMINATION IN EMPLOYMENT § 5:3 (July 2007).

[55] *Id.*; *see also* HAW. REV. STAT. § 368-11(c) (1993).

[56] *See* HAW. REV. STAT. § 378-4 (1993 & Supp. 2007); Mukaida v. Hawaii, 159 F. Supp. 2d 1211, 1225 (2001) (citing Linville v. Hawaii, 874 F. Supp. 1095, 1104 (D. Haw. 1994)) (noting there is an exhaustion requirement under H.R.S. section 378-12, which "require[s] a plaintiff to obtain a right-to-sue letter [from the HCRC] before filing suit in court").

[57] HAW. REV. STAT. § 378-4 (1993 & Supp. 2007).

The HCRC must then investigate the claim and "issue a determination of whether or not there is reasonable cause to believe that an unlawful discriminatory practice has occurred within one-hundred and eighty days from the date of filing [the] complaint."[58] The HCRC "may issue a notice of right to sue upon written request of the complainant. Within ninety days after receipt of a notice of right to sue, the complainant may bring a civil action . . . ."[59]

Hawai'i's filing statute (H.R.S. section 368-11(c)) includes the same language as section 706 of the Civil Rights Act of 1964, but also adds an additional provision that carries significant weight in light of the Supreme Court's analysis in *Ledbetter*: "No complaint shall be filed after the expiration of one hundred eighty days after the date: (1) Upon which the alleged unlawful discriminatory practice occurred; or (2) Of the *last occurrence in a pattern of ongoing discriminatory practice*."[60] As discussed below,[61] this "last occurrence" provision should afford plaintiffs like Lilly Ledbetter, who file charges under Hawai'i law, the very protection that was rejected by the Supreme Court.

IV. LEDBETTER'S CLAIM WOULD NOT HAVE BEEN UNTIMELY UNDER HAWAI'I LAW

Although the Hawai'i Supreme court has not directly addressed whether or not the continuing violation theory is applicable in Hawai'i employment law,[62] the additional provision found in H.R.S. section 368-11(c)(2) likely provides for the theory's application. Therefore, a claim like Lilly Ledbetter's should be found timely under Hawai'i law.

A. Brief Background of the Continuing Violation Theory

The continuing violation theory is an approach used to answer "the question of whether acts that fall outside the statutory time period for filing charges set forth in 42 U.S.C. § 2000e-5(e) are actionable under Title VII."[63] In essence, the continuing violation theory requires that at least one discriminatory act occur within the statutory filing period.[64] It also "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents

---

[58] *Id.* § 368-13(a) & (b).

[59] *Id.* § 368-12.

[60] *Id.* § 368-11(c) (emphasis added).

[61] *See infra* Part IV.B-C.

[62] Simons, *supra* note 32, at 11-12.

[63] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 108 (2002).

[64] COLEMAN, *supra* note 54.

represent an ongoing unlawful employment practice.'"[65] The circuits employing the doctrine often utilize different factors.[66] The Ninth Circuit Court of Appeals' continuing violation approach was brought to the forefront when it was directly discussed and partially overruled by the Supreme Court in 2002.[67]

In the Ninth Circuit's view, a plaintiff could establish a continuing violation and allow for recovery of claims outside of the statutory period, by either: (1) showing "*a series of related acts* one or more of which are within the limitations period[, where] [s]uch a 'serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period,'"[68] or (2) showing "*a systematic policy or practice* of discrimination that operated, in part, within the limitations period—a systematic violation."[69]

In its 2002 decision in *National Railroad Passenger Corp. v. Morgan*,[70] the Supreme Court held that the continuing violation doctrine as applied to Title VII claims involving discrete acts of discrimination, "such as termination, failure to promote, denial of transfer, or refusal to hire[,]" is no longer valid.[71] The Court noted that "discrete discriminatory acts are *not* actionable when time barred, *even when they are related to acts allegedly in timely filed charges*. Each discrete discriminatory act starts a new clock for filing charges alleging that act."[72] *Morgan*, therefore, appeared to eliminate the viability of the first section of the Ninth Circuit's continuing violation test as applied to discrete acts of discrimination.[73]

B. Applications of the Continuing Violation Theory in Hawai'i

There are three major types of claims to which the continuing violation theory might apply in the employment law context: (1) hostile work environment; (2) systemic discrimination; and (3) claims of a series of related acts of discrimination (where the acts do not constitute the typical "discrete"

---

[65] *Morgan*, 536 U.S. at 107 (quoting Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1014 (9th Cir. 2000)).

[66] *Id.* at 107-08.

[67] *Id.* at 107-15.

[68] *Id.* at 107 (quoting Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1015 (9th Cir. 2000)) (emphasis added) (citation omitted).

[69] *Id.* (emphasis added) (citation omitted).

[70] *Morgan*, 536 U.S. 101.

[71] *Id.* at 114.

[72] *Id.* at 113 (emphasis added).

[73] *Id.* at 107-15.

acts discussed above).[74] Under Title VII, the continuing violation theory only clearly remains in force for hostile work environment claims.[75] The Supreme Court has yet to determine whether the theory can be applied to claims of systemic discrimination;[76] *Morgan* and *Ledbetter* effectively eliminated the application of the theory to a series of related discriminatory acts.[77] In contrast, it appears that the continuing violation theory remains viable in Hawai'i for *all three* types of claims because of H.R.S. section 368-11(c)(2). The availability of such a theory likely saves a claim like Lilly Ledbetter's if filed under Hawai'i law.

1. The continuing violation theory remains in force under Hawai'i law for hostile work environment claims

Although the Supreme Court in *Morgan* denied further use of the continuing violation theory for discrete discriminatory acts, it did not discourage the use of the continuing violation theory for hostile work environment claims filed under Title VII.[78] Under federal law, a hostile work environment is created, and thus Title VII is violated, if the plaintiff proves "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the condition of the victim's employment and create an abusive working environment.'"[79] Hostile work environment claims normally involve harassment of one co-worker by another co-worker or supervisor because if his or her sex, race, color, religion, or national origin.[80] Hostile work environment claims are different from discrete acts in that they involve repeated conduct, and therefore the

---

[74] *See* Amanda J. Zaremba, National Railroad Passenger Corp. v. Morgan: *The Filing Quandary for Legally Ill-Equipped Employees and Eternally Liable Employers*, 72 U. CIN. L. REV. 1129, 1134-36 (2004); *Morgan*, 536 U.S. at 107-21.

[75] *See* Ledbetter v. Goodyear Tire & Rubber Co., ___ U.S. ___, 127 S. Ct. 2162, 2175-78 (2007).

[76] *See* Equal Employment Opportunity Comm'n v. Kovacevich "5" Farms, No. CV-F-06-165 OWW/TAG, 2007 WL 1174444, at *16 (E.D. Cal. Apr. 19, 2007) ("The question of how Title VII's filing deadlines should be applied to pattern-or-practice claims based on a series of discriminatory acts, some of which occurred outside the limitations period, has been left unanswered by the Court . . . ."); *see also* Zaremba, *supra* note 74, at 1151 ("The Supreme Court explicitly refused to address in Morgan . . . the filing questions surrounding systemic discrimination claims.").

[77] *See Morgan*, 536 U.S. at 105; *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2169.

[78] *Morgan*, 536 U.S. at 115-21; Morris, *supra* note 45, at 508.

[79] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (2003) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986)).

[80] *See* Zaremba, *supra* note 74, at 1136.

"'unlawful employment practice' cannot be said to occur on any particular day."[81]

Morgan held that Title VII's time filing requirements are treated differently when applied to hostile work environment claims.[82] Unlike discrete acts, events which occur outside Title VII's filing period may constitute one hostile work environment claim as long as an act which contributes to the claim occurs within the filing period.[83] Because the incidents contributing to a hostile work environment are all considered to be part of *one* unlawful employment practice, the employer can be held liable for all acts that are part of the single hostile work environment claim.[84] Therefore, under federal law, the charge is timely if filed with the EEOC within 180 or 300 days[85] of any act that is part of the hostile work environment claim.

Although the Hawai'i Supreme Court has not squarely addressed the issue of whether the continuing violation theory for hostile work environment claims is applicable in Hawai'i, the federal district court has applied the continuing violation theory to hostile work environment claims filed under H.R.S. section 378-2.[86] For example, in *Maluo v. Nakano*,[87] the plaintiff worked as a front office manager at Hawai'i Naniloa Resort in Hilo ("Resort") and alleged that the Resort created a hostile environment of sexual discrimination and harassment through acts which she did not welcome.[88] The plaintiff introduced evidence that she was harassed or had frequently observed the owner of the Resort harassing another co-worker starting in May of 1996.[89] After allegedly trying to speak to the managers about these instances, the plaintiff was advised in September that she was going to be formally fired but was not given a reason.[90] Her co-worker resigned the next day due to alleged harassing behavior the co-worker had been receiving.[91] The Resort subsequently called the plaintiff back and advised her that she was still employed, but instead of returning to the Resort, the plaintiff decided to quit.[92]

---

[81] *Morgan*, 536 U.S. at 115; *see also Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2175.

[82] *Morgan*, 536 U.S. at 117.

[83] Morris, *supra* note 45, at 509 (citing *Morgan*, 536 U.S. at 117-18, 122).

[84] *Morgan*, 536 U.S. at 118.

[85] The time period to file with the EEOC is either 180 or 300 days, depending on whether the state has an EEOC-like commission. *See supra* Part III.C.1.

[86] *See infra*; Hale v. Haw. Publ'ns, Inc., 468 F. Supp. 2d 1210, 1220 (D. Haw. 2006).

[87] 125 F. Supp. 2d 1224, 1231-32 (D. Haw. 2000).

[88] *Id.* at 1226.

[89] *Id.* at 1227.

[90] *Id.* at 1227-28. The plaintiff claimed she tried to discuss, in a managers' meeting, the harassment she had previously witnessed but was prevented from doing so by the owner of the Resort. *Id.* at 1227.

[91] *Id.*

[92] *Id.*

The court discussed the continuing violation theory in relation to her allegation that these acts created a hostile work environment, noting that the plaintiff could rely on events which occurred *prior* to the filing of her complaint as long as the evidence indicated "that the alleged acts of discrimination are *sufficiently related* to constitute a continuing violation."[93] Even though the plaintiff filed her complaint in September of 1998, the court found that the incidents which occurred prior to the limitations period were "sufficiently related" so as to constitute "a *pattern of discrimination* that continued into the limitations period."[94] By using the "last occurrence in a pattern of ongoing discriminatory practice"[95] language of H.R.S. section 368-11(c)(2), the court was in essence holding that Hawai'i recognizes that the continuing violation theory can be utilized in determining the timeliness of hostile work environment claims.

In a post-*Morgan* case, *White v. Pacific Media Group, Inc.*,[96] the federal district court also mentioned the use of the continuing violation theory for a hostile work environment claim filed under H.R.S. chapter 378. The plaintiff claimed that she experienced sex discrimination when her salary was reduced by her employer.[97] The court noted that "a [p]laintiff has a [timely] claim if she can show a 'series of acts, one or more of which are within the limitations period.'"[98]

---

[93] *Id.* at 1232 (emphasis added).

[94] *Id.* at 1233 (emphasis added). In this case, the plaintiff's claim was subject to a two-year statute of limitations period, rather than the 180-day period required under H.R.S. section 378-2. *Id.* at 1231-32. Claims of sexual harassment under H.R.S. section 378-2 can be exempt from the 180-day filing requirement of H.R.S. section 368-11(c) and instead subjected to a two-year statute of limitations for filing a civil action. *Id.* at 1231. In 1992, the Hawai'i State Legislature responded to concerns "that victims of sexual harassment were often so traumatized by the occurrence that they might fail to file with the [HCRC] within 180 days." Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 13, 936 P.2d 643, 655 (1997). The legislature therefore added H.R.S. section 378-3(10), which "excepts victims of sexual harassment and sexual assault from having to file discrimination complaints with the [HCRC] under HRS § 378-4." *Id.* at 13, 936 P.2d at 655; *see also* HAW. REV. STAT. § 378-3(10) (1993 & Supp. 2006). Therefore, victims of sexual harassment are not required to exhaust administrative remedies with the HCRC, but instead can file a civil action directly in Hawai'i courts within the two-year statute of limitations for such civil actions. HAW. REV. STAT. § 657-7 (1993); Mukaida v. Hawaii, 159 F. Supp. 2d 1211, 1225 (D. Haw. 2001); *Maluo*, 125 F. Supp. 2d at 1231.

[95] HAW. REV. STAT. § 368-11(c)(2) (1993).

[96] 322 F. Supp. 2d 1101 (D. Haw. 2004).

[97] *Id.* at 1112.

[98] *Id.* at 1113 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)).

2. While federal law remains unclear, Hawai'i law provides for the application of the continuing violation theory to claims of systemic discrimination

After the Supreme Court's decision in *Morgan*, it is uncertain whether or not the continuing violation theory applies to claims of systemic discrimination filed under Title VII. The theory appears to be available, however, for such claims filed under H.R.S. section 378-2. "Systemic disparate treatment discrimination occurs when an employer has a formal policy that ultimately discriminates across its workforce or uses some form of 'pattern-or-practice' that discriminates against a whole [protected] class."[99] In order to prove systemic disparate treatment, a plaintiff needs to show that he or she was subjected to this discriminatory pattern-or-practice.[100] The Supreme Court has stated that a plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts," and must establish that "discrimination was the company's standard operating procedure[; that it was] the regular rather than the unusual practice."[101] Such cases normally involve multiple employees alleging that they have suffered for an extended period of time from the employer's "pattern-or-practice" of discrimination or formal policy of discrimination.[102]

The continuing violation approach for systemic disparate treatment fits neatly into H.R.S. section 368-11(c)(2).[103] Therefore, the timeliness of such a charge should not be problematic under Hawai'i law; according to the plain meaning of the statute, a plaintiff would only need to file a charge with the HCRC within 180 days of any conduct by the employer constituting a "last occurrence" in such a pattern of discrimination.[104] *Maluo* appeared to confirm Hawai'i's adoption of the continuing violation theory for systemic discrimination cases, stating that "[a] continuing violation may . . . be established . . . by demonstrating a company wide policy or practice" of

---

[99] Zaremba, *supra* note 74, at 1134; *see also* Shoppe v. Gucci Am., Inc., 94 Hawai'i 368, 377, 14 P.3d 1049, 1058 (2000) (describing the systemic disparate treatment theory as "intentional discrimination against a protected class to which the plaintiff belongs (also known as 'pattern-or-practice' discrimination)").

[100] *See* Zaremba, *supra* note 74, at 1134-35.

[101] Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). *Teamsters* involved a claim of racial discrimination, but the Court was clear that the standard for systemic disparate treatment applied to all forms of discrimination protected under Title VII: "because [the plaintiff] alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.*

[102] Zaremba, *supra* note 74, at 1151-52.

[103] HAW. REV. STAT. § 368-11(c)(2) (1993).

[104] *See id.*

discrimination.[105] Furthermore, in *Lesane v. Hawaiian Airlines*,[106] the federal district court, discussing claims filed under H.R.S. section 378-2, also stated that "[a] systemic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period."[107]

3. Unlike federal law, Hawai'i's time-filing requirements allow for the application of the continuing violation theory to repeated acts of discrimination

There have been no significant discussions by Hawai'i state courts or the federal district court applying Hawai'i law regarding the application of the continuing violation theory under H.R.S. section 368-11(c) for repeated acts of discrimination not constituting a hostile work environment or systemic discrimination. The few times it has been mentioned, both Hawai'i state courts and the federal district court have followed the federal interpretation to find that it is *not* operative in Hawai'i with respect to repeated *discrete acts* of discrimination, such as refusal to hire, termination, failure to promote, or denial of transfer.[108] For example, in *Aloha Island Air v. Hoshijo*,[109] the Hawai'i Circuit Court recognized that federal law does not recognize the continuing violation theory for discrete acts of discrimination and then noted that "[t]he language of H.R.S. § 378-11(c) regarding continuing violations is consistent with those federal interpretations of law and applies to situations, for example, where an employee is continuously not promoted or whose placement is continuously affected by discrimination."[110] The court in *Aloha Island Air* was therefore stating that Hawai'i law, like federal law, does not allow a continuing violation theory to be applied to repeated discrete acts of

---

[105] Maluo v. Nakano, 125 F. Supp. 2d 1224, 1232 (D. Haw. 2000) (quoting Green v. Los Angeles County Superintendent of Sch., 883 F.2d 1472, 1480 (9th Cir. 1989)).

[106] 75 F. Supp. 2d 1113 (D. Haw. 1999).

[107] *Id.* at 1121 (quoting Angeles v. Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers, Local No. 208, 108 F.3d 336 (9th Cir. 1997) (unpublished table decision)).

[108] *See, e.g.*, Aloha Island Air v. Hoshijo, No. Civ. 001-1-3779-12 (EEH), 2001 WL 1912333, at *4 (Haw. Cir. Ct. Aug. 9, 2001), *vacated* 109 Hawai'i 457, 127 P.3d 953 (unpublished table decision); White v. Pac. Media Group, Inc., 322 F. Supp. 2d 1101, 1113 (D. Haw. 2004); *see also* Roger-Vasselin v. Marriott Int'l, Inc., No. C04-4047 TEH, 2006 WL 2038291, at *5 (N.D. Cal. July 29, 2006) (discussing the continuing violation theory as applied to Hawai'i law); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 107-15 (2002) (noting that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'").

[109] *Aloha Island Air*, 2001 WL 1912333.

[110] *Id.* at *4.

discrimination. The federal district court in *White v. Pacific Media Group*[111] similarly noted in its discussion of Hawai'i's time-filing requirements that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."[112]

Although these cases are not binding precedent in Hawai'i, they imply that Hawai'i most likely follows the federal interpretation of the timeliness of claims involving discrete acts of discrimination. Therefore, Hawai'i probably does not recognize the application of the continuing violation theory to claims of discrete acts of discrimination, such as "discrimination in termination, failure to promote, denial of transfer, [and] refusal to hire."[113] These acts constitute "unlawful discriminatory practice[s]" and therefore a claim under H.R.S. section 378-2 needs to be filed with the HCRC within 180 days of the act.[114] Lilly Ledbetter's story, however, does not involve the typical discrete acts of discrimination. Her story involves a "series of related acts" like those contemplated by the Ninth Circuit's pre-*Morgan* continuing violation theory discussed above:[115] the receipt of lower paychecks because of discriminatory decisions based on sex. The Supreme Court in *Ledbetter* banned the use of a continuing violation theory for such a series of related acts for claims filed under Title VII, and found that the lower paychecks Ms. Ledbetter received could not operate to start a charging period when issued because they were not discrete acts of discrimination; only Goodyear's discriminatory pay-setting decisions were discrete acts that triggered the 180-day charging period.[116] Because the only pay-setting decisions found to be discriminatory were outside of the Title VII charging period, Ledbetter's claim was untimely.[117]

If a claim similar to that of Lilly Ledbetter's is filed under Hawai'i law, however, the result should be much different due to Hawai'i's "last occurrence in an pattern of ongoing discriminatory practice" provision in H.R.S. section 368-11(c)(2). The Hawai'i Supreme Court has not directly addressed whether or not Hawai'i provides for the application of the continuing violation theory to certain repeated acts of discrimination.[118] However, this provision is comparable to the Ninth Circuit's pre-*Morgan* application of the continuing violation theory to claims involving a "series of

---

[111] 322 F. Supp. 2d 1101 (2004).

[112] *Id.* at 1113 (quoting *Morgan*, 536 U.S. at 113).

[113] *See* Ledbetter v. Goodyear Tire & Rubber Co., ___ U.S. ___, 127 S. Ct. 2162, 2165 (2007) (citing *Morgan*, 536 U.S. at 114); *see also White*, 322 F. Supp. 2d. at 1113.

[114] *See* HAW. REV. STAT. § 368-11(c)(1) (1993).

[115] *See supra* Part IV.A; *Morgan*, 536 U.S. at 107 (discussing the continuing violation theory as previously applied by the Ninth Circuit).

[116] *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2169-74.

[117] *Id.* at ___, 127 S. Ct. at 2167-78.

[118] Simons, *supra* note 32, at 12.

related [discriminatory] acts."[119] Therefore, analyzing whether a claim like Ledbetter's is timely under Hawai'i law should be similar to analyzing the timeliness of a hostile work environment claim. As long as the acts of discrimination are related, such that they constitute a "pattern" under H.R.S. section 368-11(c)(2), those acts occurring outside the charging period should be considered if the complaint with the HCRC is filed within 180 days of the "last occurrence" or last act.[120] Subsequently, it seems that the last paycheck a plaintiff like Ms. Ledbetter receives would constitute the "last occurrence"[121] in a pattern of sex discrimination, manifesting a continuing violation for time-filing purposes under Hawai'i law. Therefore, if ever faced with the issue, the Hawai'i Supreme Court should reject the *Ledbetter* approach and instead adopt the continuing violation approach for instances when a plaintiff continually receives lower paychecks due to his or her sex.

Hawai'i courts recognize that "federal courts have considerable experience analyzing [employment discrimination] cases, and [Hawai'i courts] look to their decisions for guidance."[122] As noted above,[123] however, Hawai'i courts interpreting Hawai'i civil rights laws are not bound by a federal court's interpretation of Title VII.[124] "[F]ederal employment discrimination authority is not necessarily persuasive, particularly where a state's statutory provision differs in relevant detail."[125] It appears that Hawai'i's time-filing requirement differs in "relevant detail" from the time-filing requirement under Title VII due to Hawai'i's additional provision in H.R.S. section 368-11(c)(2).[126] The Hawai'i Supreme Court, and the federal district court applying Hawai'i law, have demonstrated a willingness to depart from federal interpretation of Title VII in those instances in which Hawai'i employment law differs in relevant detail to Title VII.[127]

For example, in *Furukawa v. Honolulu Zoological Society*,[128] the Hawai'i Supreme Court declined to follow the federal interpretation of "similarly situated" employees in a disparate treatment case.[129] The Honolulu Zoological Society ("Society") employed Furukawa as an administrative assistant for two

---

[119] *See Morgan*, 536 U.S. at 107 (discussing the continuing violation theory as previously applied by the Ninth Circuit).

[120] HAW. REV. STAT. § 368-11(c)(2) (1993).

[121] *Id.*

[122] Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 13, 936 P.2d 643, 649 (1997).

[123] *See supra* Part I.

[124] *Furukawa*, 85 Hawai'i at 13, 936 P.2d at 649.

[125] *Id.* (quoting Romano v. Rockwell Int'l, Inc., 926 P.2d 1114, 1125 (Cal. 1996)).

[126] HAW. REV. STAT. § 368-11(c)(2) (1993).

[127] *See, e.g.*, *Furukawa*, 85 Hawai'i at 13, 936 P.2d at 649 (1997); Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 455-67, 879 P.2d 1037, 1038-50 (1994).

[128] *Furukawa*, 85 Hawai'i 7, 936 P.2d 643.

[129] *Id.* at 12-16, 936 P.2d at 648-52.

years.[130] Furukawa claimed that he had been discriminated against based upon race and gender, specifically alleging that his similarly situated female Caucasian co-workers were not subjected to the same work standards that he was.[131] The Society urged the court to follow the federal interpretation and analysis of whether employees can be considered similarly situated, where the federal approach requires comparable employees to be found "similarly situated *in all respects*."[132] The Hawai'i Supreme Court rejected such an interpretation, finding that in light of the differences between Hawai'i and federal employment discrimination law, such an interpretation was "excessively narrow."[133] Instead, the court adopted the test for "similarly situated" employees to require the plaintiff to prove that "all of the *relevant aspects* of his employment situation were similar to those employees with whom he seeks to compare his treatment."[134] Essentially, the Hawai'i Supreme Court acknowledged that Hawai'i employment discrimination laws are broader and more protective of the employee and therefore should not be constrained by a narrower federal interpretation. The court also noted that such a narrow focus would not be in line with the intent of Hawai'i's employment discrimination laws to protect employees from discrimination.[135]

In *Arquero v. Hilton Hawaiian Village LLC*,[136] involving the sexual harassment claim of a female plaintiff against a co-worker, the Hawai'i Supreme Court again interpreted Hawai'i's anti-discrimination laws in a broader context than federal precedent so as to afford more protection to the discriminated employee.[137] The plaintiff, who worked as a waitress in one of Hilton's restaurants, was squeezed on her buttocks by a fellow co-worker in the presence of her manager.[138] The Hawai'i Supreme Court recognized several federal cases holding that one instance of sexual assault, such as squeezing an employee's buttocks, is not sufficiently severe and pervasive enough to constitute sexual harassment.[139] However, the Hawai'i Supreme

---

[130] *Id.* at 9, 936 P.2d at 645.

[131] *Id.* at 11, 936 P.2d at 647.

[132] *Id.* at 13, 936 P.2d at 649 (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)).

[133] *Id.* ("In light of the applicability of employment discrimination law in Hawai'i to all employers, no matter how small, we find the Society's proposed test excessively narrow.").

[134] *Id.* at 14, 936 P.2d at 650.

[135] *Id.* at 15, 936 P.2d at 651 ("Such a requirement . . . emphasizes one way of proving intentional discrimination instead of properly focusing on the pivotal issue in disparate treatment cases—whether a *particular individual* was discriminated against and why.").

[136] 104 Hawai'i 423, 91 P.3d 505 (2004).

[137] *Id.* at 426-33, 91 P.3d at 508-15; *see also* Simons, *supra* note 32, at 9 (noting that the Hawai'i Supreme Court in *Arquero* rejected federal case law).

[138] *Arquero*, 104 Hawai'i at 426, 91 P.3d at 508.

[139] *Id.* at 430-31, 91 P.3d at 512-13 (citing Meriweather v. Caraustar Packaging Co., 326 F.3d 990, 993 (8th Cir. 2003) and Brooks v. City of San Mateo, 229 F.3d 917, 921-22 (9th Cir. 2000)).

Court rejected the federal case law and instead found that this one-time pinching of an employee's buttocks could be sufficiently severe enough so as to sustain a claim for sexual harassment.[140] Once again, the Hawai'i Supreme Court had a decision to adopt the narrower federal view or a broader stance and chose the latter.

Hawai'i courts have also departed from federal analysis in instances involving time-filing requirements in order to allow adjudication on the merits of an employee's discrimination claim. For instance, in *Ross v. Stouffer Hotel Co.*,[141] the plaintiff alleged that he had been wrongfully terminated due to discrimination based on his marital status.[142] At the time the plaintiff filed his administrative complaint, H.R.S. section 378-4(c)(1985) was in effect, which provided only that "[n]o complaint shall be filed after the expiration of ninety days after the date upon which the alleged unlawful discriminatory practice occurred."[143] The question before the court was whether, in an action for unlawful discharge, the alleged unlawful discriminatory practice occurs when (1) an employee receives notice that he or she is going to be discharged (which was the prevailing federal view at the time),[144] or (2) on the date he or she is actually discharged.[145] The Hawai'i Supreme Court declined to follow federal precedent, instead holding that the plaintiff's claim was timely because the time period for filing an administrative complaint begins to run on the date the employee is actually discharged.[146]

Although *Ross* involved a time-filing statute that is no longer in effect for discrimination claims in Hawai'i, this case is indicative of the Hawai'i Supreme Court's willingness to depart from a federal interpretation it finds too narrow. It is evident that the court was interpreting Hawai'i law, specifically time-filing requirements, to be very conscious of protecting the employee from discrimination, and allowing the employee to be relieved when such discrimination occurs:

---

[140] *Id.* at 432, 91 P.3d at 514; *see also* Simons, *supra* note 32, at 9.

[141] 76 Hawai'i 454, 879 P.2d 1037 (1994).

[142] *Id.* at 456, 879 P.2d at 1039 ("At the time he was discharged, Ross was married to . . . the principal massage therapist at the Resort. Stouffer discharged Ross pursuant to its policy prohibiting persons related by blood or marriage from working in the same department (the no-relatives policy).").

[143] *Id.* at 459-60, 879 P.2d at 1042-43. The former statute utilized the same language as the current H.R.S. section 368-11(c)(1) with the substitution of ninety days for one hundred and eighty days. The previous statute did not, however, contain the current provision in H.R.S. section 368-11(c)(2). *See* HAW. REV. STAT. § 368-11(c)(1) & (2) (1993).

[144] *Ross*, 76 Hawai'i at 460-61, 879 P.2d at 1043-44 (citing Del. State College v. Ricks, 449 U.S. 250, 259 (1980) and Chardon v. Fernandez, 454 U.S. 6, 8 (1981)).

[145] *Id.*

[146] *Id.* at 461, 879 P.2d at 1044.

> Were the time for filing an administrative complaint to begin before that, *i.e.*, upon notification that the employer intended to discharge an employee, it is likely that many employees would have little or, perhaps, no time left to invoke the protections conferred by [the existing statute prohibiting various types of discrimination] following an unlawful discharge.[147]

The court also mentioned several times that its holding was influenced by the underlying intent of Hawai'i discrimination laws, in which "favoring adjudication on the merits is more consistent with the remedial purposes of [the existing statute prohibiting various types of discrimination] than one likely to bar potentially meritorious claims."[148]

Again, the issue of whether or not Hawai'i law provides for the application of the continuing violation theory to repeated acts of discrimination like those suffered by Lilly Ledbetter remains undecided by the Hawai'i Supreme Court. However, these cases illustrate that the Hawai'i Supreme Court has been willing to depart from federal interpretation in instances where Hawai'i employment discrimination law differs in relevant detail from federal law. Therefore, the Hawai'i Supreme court should recognize that H.R.S. section 368-11(c)(2)'s language affords greater protection to a plaintiff than does Title VII and thus *does* provide for the use of a continuing violation theory for repeated acts of discrimination that are sufficiently related so as to constitute a "pattern of ongoing discriminatory practice."[149]

C. In Sum, Lilly Ledbetter's Claim is Timely in Hawai'i

If a plaintiff like Lilly Ledbetter were to file a sex discrimination action under H.R.S. section 378-2(1) because he or she receives lower paychecks than similarly situated co-workers of the opposite sex, the HCRC and Hawai'i courts have the freedom to ignore *Morgan* and *Ledbetter*. This freedom exists because of Hawai'i's additional provision in H.R.S. section 368-11(c)(2) and the broad availability of the continuing violation theory in Hawai'i employment law. The HCRC and Hawai'i courts can, therefore, employ any one of several interpretations available under Hawai'i law.

First, the HCRC and Hawai'i courts can find, contrary to *Ledbetter*, that a paycheck, or "the current payment of salaries infected by gender-based . . . discrimination—a practice that occurs whenever a paycheck delivers less to a women than to a similarly situated man,"[150] is an actionable discrete act or

---

[147] *Id.* at 462, 879 P.2d at 1045.

[148] *Id.*

[149] *See* HAW. REV. STAT. § 368-11(c)(2) (1993).

[150] Ledbetter v. Goodyear Tire & Rubber Co., ___ U.S. ___, 127 S. Ct. 2162, 2179 (2007) (Ginsburg, J., dissenting) (emphasis omitted).

"unlawful discriminatory practice."[151] As previously discussed,[152] while Hawai'i courts often looks to federal analysis for guidance, Hawai'i courts have been willing to reject the federal interpretation in light of the differences between federal and Hawai'i law,[153] often in order to afford greater protection to the plaintiff. Consequently, Hawai'i is not bound by *Ledbetter*'s determination that a paycheck is incapable of triggering a new filing period.

Second, the HCRC and Hawai'i courts can find, contrary to the Supreme Court, that a claim like that of Lilly Ledbetter's should be analyzed using the continuing violation theory as applied to a hostile work environment claim. As discussed above,[154] both H.R.S. section 368-11(c)(2) and Hawai'i case law provide for such an argument. Therefore, all of the discriminatory pay-setting decisions a plaintiff like Ledbetter experiences outside of the statutory filing period, along with the lower paychecks, would together constitute one claim. The claim would be timely as long as an act contributing to the claim (i.e., the receipt of a paycheck) occurred within the filing period.[155]

Finally, the HCRC and Hawai'i courts can choose to analyze a claim like Lilly Ledbetter's under the continuing violation theory for repeated acts of discrimination representing a "pattern of ongoing discriminatory practice"[156] to which Hawai'i likely subscribes. Unlike the Supreme Court, the HCRC and Hawai'i Supreme Court should consider each paycheck, amounting to less than the paychecks of employees of the opposite sex, to be an act constituting a "last occurrence"[157] in the pattern of ongoing discrimination. Thus, the series of lower paychecks issued by the employer would result in a continuing violation and the claim could be found timely.

V. HAWAI'I'S APPROACH IS THE FAIRER APPROACH

No matter which avenue the HCRC or the Hawai'i Supreme Court could choose to analyze a claim like Lilly Ledbetter's, it is evident that Hawai'i's time-filing requirement statute is more comprehensive and more beneficial to employees than Title VII. First, allowing for plaintiffs to utilize the continuing violation theory for hostile work environment and systemic discrimination claims, as well as claims involving repeated acts of discrimination, is more in line with the remedial purposes of both Title VII and Hawai'i

---

[151] *See* HAW. REV. STAT. § 368-11(c)(1) (1993).

[152] *See supra* Part IV.B.3.

[153] *See* Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 13, 936 P.2d 643, 649 (1997).

[154] *See supra* Part IV.B.1.

[155] *See* Morris, *supra* note 45, at 509; *see also* HAW. REV. STAT. § 368-11(c)(2) (1993).

[156] HAW. REV. STAT. § 368-11(c)(2).

[157] *See id.*

discrimination laws: protecting employees from workplace discrimination.[158] The Hawai'i Supreme Court has also specifically indicated that it strives to allow a plaintiff the opportunity to litigate a potentially meritorious claim, rather than be barred by the strict interpretation of a filing requirement.[159] This is not to say that the door for filing employment discrimination claims in Hawai'i is wide open. Hawai'i courts recognize the need to balance the interests of the employer and the employee. For example, in *Ross* the Hawai'i Supreme Court noted that its interpretation of the filing requirement commencing on the date of actual discharge versus the date an employee is notified he or she will be discharged "fairly accommodates the interests of both the employees and employers."[160] On one hand, "such a rule favors adjudication of the merits," because "many, if not most, employees become aware of and begin to pursue legal remedies for unlawful discharge only after they have actually been dismissed."[161] On the other hand, such an interpretation "does not mean that employers will be forced to defend against large numbers of 'stale' claims . . . [because] [t]he period between notice of and actual discharge is ordinarily relatively short."[162]

Second, Hawai'i's continuing violation approach is more in line with the realities of the workplace for situations like that in *Ledbetter*. Unlike discrete acts such as promotion or transfer, compensation disparities "are often hidden from sight."[163] Most employees simply do not know the salaries of their co-workers because many companies keep such information confidential.[164] As a result, employees are unlikely to bring a pay discrimination claim within 180 days of when their salary was set.[165] Hawai'i's statutory construction of the time-filing period is more forgiving in this regard because it allows for discriminatory pay-setting decisions outside of the filing period to be actionable even when the employee is unaware of such discrimination, as long as an act related to a pattern of discriminatory conduct occurs within the filing period.[166]

---

[158] *See* Ledbetter v. Goodyear Tire & Rubber Co., ___ U.S. ___, 127 S. Ct. 2162, 2188 (2007) (Ginsburg, J., dissenting); *see also* Sam Teague, Ltd. v. Haw. Civil Rights Comm'n, 89 Hawai'i 269, 281, 971 P.2d 1104, 1116 (1999) ("Hawaii's employment discrimination law was enacted to provide victims of employment discrimination the same remedies, under state law, as those provided by Title VII . . . .").

[159] *See* Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 462, 879 P.2d 1037, 1045 (1994).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Ledbetter*, ___ U.S. at ___, 127 S. Ct. at 2181 (Ginsburg, J., dissenting).

[164] *See* Chemerinsky, *supra* note 26, at 61.

[165] *Id.*

[166] HAW. REV. STAT. § 368-11(c) (1993).

Finally, by subscribing to a continuing violation approach for repeated acts of discrimination, Hawai'i can avoid the adverse affects likely to result for federal claims after *Morgan* and *Ledbetter*. Employees filing under Title VII will be forced to either (1) become experts in employment law in order to determine when they need to file their claim or (2) will need to file a charge anytime anything happens to them that they feel is unfair, for otherwise they might lose their opportunity to bring a claim.[167] Plaintiffs filing federal charges will have to "[f]ile on the slightest suspicion, file early, and file often," which will lead to a "charge-filing warfare."[168] This will result in an already overloaded EEOC being forced to investigate against the influx of claims, many of which will likely be frivolous.[169] Similarly, employers will need to spend time, energy, and money to defend against these unmeritorious claims.[170] Thus, although many thought the *Ledbetter* decision was a victory for employers, in hindsight it seems that such an approach might actually be *more* burdensome on the employer. Because Hawai'i employment law likely provides for the use of the continuing violation theory, the courthouse doors will not automatically be barred to employees whose inequitable pay results from discriminatory acts that occurred prior to the 180-day filing period. This should prevent Hawai'i plaintiffs from developing a rush-to-file mentality and thus prevent employers from defending against numerous frivolous claims.

VI. CONCLUSION

While representatives in Congress engage in a heated battle surrounding the *Ledbetter* decision and its impact on the employee, plaintiffs in Hawai'i remain protected by state law. Hawai'i employment discrimination laws differ in relevant detail to their federal counterpart (Title VII), where Hawai'i law affords greater protection to employees and is also notably more forgiving in its time-filing requirements. Based upon case law displaying Hawai'i's willingness to depart from narrow federal precedent in the employment discrimination context, as well as the plain meaning of H.R.S. section 368-11(c)(2), it appears that Hawai'i endorses the continuing violation theory for claims of (1) hostile work environment, (2) systemic discrimination claims, and (3) certain claims involving a series of repeated discriminatory acts. Therefore, if the HCRC or any Hawai'i court is ever faced with a set of circumstances like that of Lilly Ledbetter's, it should interpret Hawai'i's time-filing requirements broadly so as to find such a claim to be timely. This will

---

[167] *See* Zaremba, *supra* note 74, at 1155.

[168] Richard T. Seymour, *Trends in Employment Discrimination Law*, SN012 A.L.I.—A.B.A. 2041, 2113 (July 26-28, 2007).

[169] *See* Zaremba, *supra* note 74, at 1155.

[170] *Id.* at 1156.

not only prevent employers from defending against an influx of frivolous claims but will also provide a fairer result to plaintiffs that is more in line with the remedial purposes of Hawai'i's employment discrimination laws: protecting the employee from discrimination.

Kim Vossman[171]

[171] J.D. Candidate 2009, William S. Richardson School of Law, University of Hawai'i at Mānoa.

Maui's Residential Workforce Housing Policy: Finding the Boundaries of Inclusionary Zoning

I. INTRODUCTION

Who should pay the cost of subsidized housing? Should it be paid by buyers in the non-subsidized segment of the market? Or should the cost be borne broadly, by the community as a whole? Consider a regulatory system in which some percentage of new housing development is required to be made "affordable." Is it even fair to categorize such a system as a form of subsidized housing?

In 2006, responding to soaring residential prices,[1] the County Council of Maui, Hawai'i passed the Residential Workforce Housing Policy, an ordinance requiring forty to fifty percent of the units in new developments to be set aside as "affordable" units.[2] The ordinance became effective after the Council overrode the then-outgoing mayor's veto.[3]

The Residential Workforce Housing Policy is a specific instance of a type of regulation referred to as an inclusionary zoning ("IZ") ordinance. Such regulations are designed, perhaps to counteract the tendency of earlier regulations to exclude moderate and low-income residents or perhaps in response to a shortage of supply, to encourage or mandate that some percentage of new development be "set aside" and made available to such buyers.[4] Like much economic regulation, IZ ordinances are frequently disparaged, either by those subjected to their requirements or by those whose faith in the fairness of the free market is offended by government interference.[5] Recently Maui's own IZ ordinance was challenged in federal

---

[1] In July of 2006, median home prices on Maui reached an all time high of $780,000. Nina Wu, *Maui Home Prices Hit $780,000*, HONOLULU STAR BULL., Aug. 11, 2006, at B1.

[2] Ilima Loomis, *Council Approves Housing Policy*, MAUI NEWS, Nov. 4, 2006, at A1.

[3] Claudine San Nicholas, *Council Rejects Veto, OKs Housing Policy*, MAUI NEWS, Dec. 6, 2006, at A3.

[4] The term "inclusionary zoning" is sometimes used to refer generally to all land use regulations which encourage the construction of affordable housing. *See, e.g.*, Jennifer M. Morgan, *Zoning For All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369-85 (1995). Other writers use the term to refer specifically to mandatory programs in which development is absolutely conditioned on meeting affordability goals. *See, e.g.*, Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. Rev. 971, 972 n.2 (2002).

[5] *See* Frederick Pellin, Letter to the Editor, MAUI NEWS, Sept. 4, 2007, at A9 ("Good luck trying to beat the fundamental economic principles at work here.").

court in a complaint alleging that the ordinance violates the constitutions of Hawai'i and the United States.[6]

There are a number of theories under which a mandatory affordable housing program might be challenged, and the programs have had mixed results in the courts. Perhaps the clearest judicial endorsement is *Home Builders Ass'n of Northern California v. City of Napa*, which upheld an ordinance requiring ten percent of new units to be affordable and rejected the claim that the ordinance worked a taking of property.[7] Other courts have rejected similar programs finding, for example, that the local government lacked authority to pass the ordinance;[8] that the local government was preempted by state law from passing such an ordinance;[9] or that the ordinance was arbitrary or self-defeating and violated substantive due process.[10] However, no reported case has invalidated a mandatory affordable housing program as violating the constitutional mandate that "private property [shall not] be taken for public use, without just compensation."[11]

IZ ordinances exist in a twilight zone between two relatively well-understood bodies of law. On the one hand, municipal governments have broad authority to regulate the uses of land within their borders, and it is accepted that restrictions can be placed on the size, density, even the aesthetic character of buildings.[12] On the other hand, governments have far less power to "exact" concessions of money or property from would-be developers of property. The Takings Clause requires, according to current U.S. Supreme

---

[6] Kamaole Point Development LP v. County of Maui, No. 07-00447 (D. Haw. filed Aug 23, 2007).

[7] Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001); *see also* Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 292-93 (N.J. 1990) (holding that "[a] developer may be made to bear the economic burdens of providing affordable housing so long as those burdens are not excessive and the project remains profitable").

[8] *E.g.*, Bd. of Supervisors v. DeGroff Enters., 198 S.E.2d 600 (Va. 1973) (invalidating a mandatory affordable housing program as beyond the power of the local government). *See generally* Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635 (1990).

[9] *E.g.*, Town of Telluride v. Lot Thirty-Four Ventures, 3 P.3d 30 (Colo. 2000) (invalidating an affordable housing ordinance as a matter of statewide concern, beyond the authority of the Town to pass); Apartment Ass'n of S. Cent. Wis. v. City of Madison, 722 N.W.2d 614 (Wis. Ct. App. 2006) (holding that a statute explicitly prohibiting cities from passing rent-control ordinances applied to inclusionary housing ordinance), *review denied*, 727 N.W.2d 35 (Wis. 2006).

[10] *E.g.*, MHC Fin. P'ship v. City of San Rafael, No. C 00-3785, 2006 WL 3507937 at *10 (N.D. Cal. 2006) (denying summary judgment to City on plaintiff's substantive due process challenge to a rent-control ordinance).

[11] U.S. CONST. amend. V.

[12] *See generally* EDWARD H. ZIEGLER, JR., 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:3 (2005).

Court doctrine, that government may condition development approval on exactions of property only to the extent that the exaction is roughly proportional to the effects of the development.[13] However, there continues to be uncertainty as to the reach of this doctrine.[14] Depending on one's perspective, a law mandating a set-aside of affordable housing may appear to be a burdensome and oppressive exaction, or the natural result of the community's desire that it not be driven into collective bankruptcy.

This article will not directly question the constitutionality of IZ ordinances in general. Rather, it will examine the Maui ordinance to illustrate the weakness of current exactions doctrine, which permits heightened judicial scrutiny only when certain predicates have been satisfied. If *City of Napa* was correctly decided and a mandatory affordable housing set-aside program is not an exaction, does it follow that all such programs, without regard to operational details, are valid? Today, a court may categorically deny the applicability of the exactions cases to an IZ ordinance,[15] and IZ advocates encourage cities to craft ordinances specifically to avoid the reach of the cases.[16]

Courts should not be led into an "all or nothing" approach, declining to examine the terms of a land use regulation as a possible exaction because it was legislatively enacted, or because its burdens may be satisfied by means other than dedication of property to the public. Exactions have been singled out by the courts for special treatment because of the risk that municipalities may use their permit approval power to extract from a developer more than would be fair, given the effects of the particular development.[17] The risk that an exaction is unfair takes on a different character when it is legislatively imposed, but it does not vanish.

This article will argue for increased emphasis on the principle of fairness in cases where the characterization of a development condition as an exaction is at least open to debate. A direct concern for fairness will not enable categorical assertions about the validity of IZ ordinances, but will instead encourage sensitivity to the magnitude of the burden imposed on developers

---

[13] *See* discussion *infra* Part III.B.

[14] *See* discussion *infra* Part III.C.

[15] *See* Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 65-66 (Cal. Ct. App. 2001) (finding these cases inapplicable to the challenged ordinance).

[16] *E.g.*, Kautz, *supra* note 4, at 1022 (encouraging cities to minimize the discretion available to officials in applying an inclusionary zoning ("IZ") ordinance so as to avoid scrutiny under the exaction cases).

[17] *See* discussion *infra* Part III.B.

and those purchasing from them. This renewed focus on the nature of the burden is consistent with recent Supreme Court takings jurisprudence.[18]

Part II describes the working of the Maui ordinance, and compares its terms to those of similar ordinances. Part III describes the fundamental constitutional doctrine under which a regulation may be found to work a taking, notes some of the shortcomings of the doctrine as currently announced by the Supreme Court, and suggests a modest change in analytical emphasis. Part IV applies this modified standard to the concept of IZ generally, and to the Maui ordinance in particular. It will be seen that while IZ ordinances, despite inevitably being located in the grey area of interpretation,[19] are not automatically unfair, Maui's ordinance improperly shifts the burden of providing affordable housing away from the community and onto developers and newcomers.

II. INCLUSIONARY ORDINANCES ON MAUI AND ELSEWHERE

All IZ ordinances share a common purpose—the provision of affordable housing—but vary widely in implementation details. This section describes the terms of Maui's IZ law, and compares it to laws passed in other jurisdictions.[20]

A. Maui County's Residential Workforce Housing Policy

The stated purpose of the Maui ordinance is "to enhance the public welfare by ensuring that the housing needs of the County are addressed."[21] The ordinance is activated upon final subdivision or building permit approval, if the size of the development exceeds certain thresholds. The size thresholds are, roughly, five or more dwelling units or new lots, conversion of one or more hotel units to dwelling units, or any hotel development or renovation which increases the number of units in the hotel.[22] The requirements of the law may be adjusted or waived "based upon the absence of any reasonable relationship or nexus between the impact of the development and the number

---

[18] *See* Lingle v. Chevron U.S.A., 544 U.S. 528, 539 (2005) (noting that disparate takings doctrines all "focus[] directly upon the severity of the burden that government imposes upon private property rights").

[19] *See* Kautz, *supra* note 4, at 1018 (characterizing IZ ordinances as "neither fish nor fowl").

[20] Other counties in the State of Hawai'i have experimented with IZ ordinances as well. *See* Michelle DaRosa, Comment, *When Are Affordable Housing Exactions an Unconstitutional Taking?*, 43 WILLAMETTE L. REV. 453 (2007) (focusing on IZ programs in Hawai'i).

[21] MAUI, HAW., CODE § 2.96.010 (2007).

[22] *Id.* § 2.96.030(A).

of . . . workforce housing units . . . required."[23] Projects subject to the requirements of the law are granted the possibility at least of expedited permit processing.[24] Unlike many other IZ ordinances,[25] projects are offered no "density bonuses"—permission to build at a higher unit density than would otherwise be allowed.

The requirements of the law vary depending on the price for which the developer expects to sell the units. If fifty percent or more of the units will be sold for $600,000 or more, fifty percent of the units must be available as affordable housing.[26] Otherwise, forty percent of the units must be affordable.[27] A developer can then meet its affordability requirement by either offering the units for sale at appropriate prices, by paying an in-lieu fee or by donating property to be used for affordable housing.[28]

The in-lieu fee is specified as thirty percent of the average projected sale price of the market rate dwelling units in the development.[29] Assuming an average market rate price of $600,000, the in-lieu fee, per unit, would be $180,000. The fee is specified as "per unit," in a context in which a "unit" appears to refer to affordable units.[30] A development of forty units, with twenty market rate units at $600,000 and twenty affordable units, would be subject to an in-lieu fee of $180,000 per unit, for a total of $3.6 million. By comparison, it is estimated that all other fees on a three-bedroom one-family house on Maui total about $17,800.[31]

B. Inclusionary Zoning Generally

It has been said that it is within the power of the government "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[32] It may then seem natural to conclude that the government should determine that housing should be affordable. The method by which the government expresses the limits on permissible land uses are zoning ordinances. "Zoning is the regulation by the municipality of the use of land within the community, and of the buildings and

---

[23] *Id.* § 2.96.030(C)(1).

[24] *Id.* § 2.96.140.

[25] *See* discussion *infra* Part II.D.

[26] MAUI, HAW., CODE § 2.96.040(A)(2). As an unstated corollary, it would appear that at most fifty percent of the units in any development can be priced at $600,000 or more.

[27] *Id.* § 2.96.040(A)(1).

[28] *Id.* § 2.96.040(B). There are also provisions permitting the rental or multi-family units or the conveyance of units to a "qualified housing provider" approved by the County. *Id.*

[29] *See id.* § 2.96.040(B)(4)(a).

[30] *Id.* § 2.96.040(B)(4).

[31] *Panel OKs Bill to Waive Fees on Affordable Housing*, MAUI NEWS, Nov. 14, 2007, at A1.

[32] Berman v. Parker, 348 U.S. 26, 33 (1954).

structures which may be located thereon, in accordance with a general plan and for the purposes set forth in the enabling statute."[33]

Such regulations have been upheld since the seminal case of *Village of Euclid v. Ambler Realty Co.*[34] Besides validating the legal framework of local zoning, *Euclid* is interesting for the tenor of the opinion, in which certain undesirable elements may be regulated away from the community. At issue in *Euclid* was an ordinance restricting, among other things, apartment buildings, which the Court characterized as "mere parasite[s]. . . . [They] interfer[e] with the free circulation of air and monopoliz[e] the rays of the sun."[35] Without the protection granted by the ordinance, the looming menace of the apartment building would "utterly destroy[]" the desirable character of the neighborhood.[36] That the ordinance may have had the effect of excluding anyone unable to afford the ideal single-family detached home was of no concern to the Court.

The tendency for certain forms of zoning to effectively seal off communities became known informally as "exclusionary zoning." Exclusionary zoning may be defined as "zoning that 'has the effect of keeping out of a community racial minorities, lower-income residents, or additional population of any kind.'"[37] The term "inclusionary zoning" was adopted informally to describe efforts by municipalities to address shortcomings in traditional land use law, which tended to reinforce patterns of segregation and isolation.[38] The Maui ordinance operates at the building permit or subdivision approval stage, but is otherwise substantially similar in its structure to other inclusionary zoning ordinances.[39]

C. Inclusionary Zoning as Exactions

Paralleling the development of zoning systems has been the increasing reliance of cities on exactions to fund infrastructure development.[40]

---

[33] ZIEGLER, *supra* note 12, § 1:3.

[34] 272 U.S. 365 (1926).

[35] *Id.* at 394.

[36] *Id.* In fairness, the Court did allow that "in a different environment" apartment complexes would be unobjectionable. *Id.* at 394-95.

[37] ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 6 (1984) (quoting MARY BROOKS ET AL., HOUSING CHOICE 264 (1980)).

[38] *Id.* at 2.

[39] *See* URBAN LAND INSTITUTE, COUNTY OF MAUI, HAWAI'I: AN AFFORDABLE HOUSING STRATEGY 22 (referring to the Maui ordinance specifically as an IZ ordinance).

[40] *See* ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE 8-10 (1993); R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 28 (1987).

> Exactions can take various forms, including in-kind dedications for infrastructure, such as roads, parks, and schools, and 'in lieu' fees for the same purpose. Exactions also include impact fees, or special assessments, to cover the cost of development. The main goal of the imposition of exactions is 'to shift to the developer the costs of the public infrastructure that the development requires.' Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community.[41]

These internalized costs may, of course, be passed on by the developer to the purchasers of the developed properties. In any case, when a proposed development project burdened by an exaction receives in exchange a roughly comparable benefit, there can be no argument that the exaction was unfair.[42]

Although exactions for infrastructure support had been employed for decades, in the 1970s their use expanded to cover social and general welfare costs as cities' ability to cover these costs from other sources diminished.[43] Voter initiated constraints on the taxing power, the advance of "no growth" sentiment among community activists, and courts increasingly willing to permit cities to use exactions to expand their fundraising abilities, help explain the increased role of non-tax financing.[44] Although such "general welfare" exactions can perhaps be justified as cost internalization measures to the extent that they purport to mitigate a harm caused by a development,[45] one may perhaps begin to feel uncomfortable by the increasing burden shift away from the tax base—borne, of course, by the citizenry generally—and toward a funding based on private exactions.[46]

---

[41] Rogers Mach., Inc. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002) (quoting Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 609 (2001)) (footnotes omitted in original); *see also* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 40, at 3-4.

[42] This "average reciprocity of advantage" has been recognized as justifying land use regulations since the epochal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1992).

[43] *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 180 (2006) (describing the dual effects of reductions in state and federal revenue sources and "taxpayer revolt" limitations on local taxing power); *see also* Laurie Reynolds & Carlos Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 454 n.16 (2005) [hereinafter Reynolds & Ball (2005)] (noting that reliance on non-tax revenue had nearly doubled between 1957 to 1997).

[44] *See* Reynolds & Ball (2005), *supra* note 43, at 455-56.

[45] *Compare* Hollywood, Inc. v. Broward Co., 431 So.2d 606, 612 (holding that a mandatory open space dedication demonstrated a "reasonable connection between the need for additional park facilities and the growth in population that will be generated by the [development]"), *with* Isla Vista Int'l Holdings v. City of Camas, 990 P.2d 429, 435 (Wash. Ct. App. 1999) (rejecting a thirty percent open space set-aside as disproportionate to the impact of the development), *aff'd on other grounds*, 49 P.3d 867 (Wash. 2002).

[46] *See generally* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513 (2006); Reynolds & Ball (2005), *supra* note 43.

But what of an exaction imposed on a commercial development requiring payment into an affordable housing fund? Here, the benefit conferred on the development is less direct, but it could perhaps be found by recognizing that the commercial development will draw new employees into the area, imposing an additional burden on the traffic system. Construction of new housing at affordable prices may help alleviate some of this additional traffic burden. This argument is strained at best, and many commentators have criticized such "linkage" programs, as they are called.[47]

IZ ordinances, viewed as exactions, are even further removed from the norms imposed by the "reciprocity of advantage" standard.[48] As such, supporters characterize IZ ordinances not as exactions, but as just another of the many regulations on the uses of land imposed pursuant to a city's police power.[49] Just as the city can mandate setbacks or side yards, they can mandate that housing must be in some measure affordable.[50]

For an example of a decision upholding an IZ ordinance in the face of a challenge that it was an impermissible exaction, consider *Holmdel Builders Ass'n v. Township of Holmdel*.[51] This case concerned a mandatory fee imposed as a condition of commercial development approval which the developers attacked as being, among other things, an invalid tax.[52] The court disagreed, finding no need for a "stringent nexus" between the fee and the proposed development.[53]

Three points should be made about this decision as it relates to the Maui ordinance. First, it was decided before either of the two U.S. Supreme Court

---

[47] *E.g.*, Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515 (1998). *Compare* John A. Henning, Jr., *Mitigating Price Effects with a Housing Linkage Fee*, 78 CAL. L. REV. 721 (1990) (arguing that linkage programs are redistributive, and therefore invalid), *with* Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991) (arguing in favor of principled application of linkage programs to offset burdens created by commercial development).

[48] *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 40, at 5-6 (although IZ may be justified on other grounds, "development of market rate housing . . . clearly does not create a need for more subsidized housing").

[49] The term "police power," although "incapable of any very exact definition or limitation . . . 'extends . . . to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. . . .'" The Slaughter-House Cases, 83 U.S. 36, 62 (1872) (quoting Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 149 (1854)).

[50] *See, e.g.*, Kautz, *supra* note 4, at 989 (describing the arguments in *City of Napa*).

[51] 583 A.2d 277 (N.J. 1990); *see also* Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60 (2001) (upholding a ten percent mandatory affordable housing set-aside against takings and due process claims).

[52] *Holmdel*, 583 A.2d at 280.

[53] *Id.* at 288.

cases from which current exactions law is drawn.[54] Second, the case arose in the context of the municipal "fair share" affordable housing obligation established by the New Jersey Supreme Court in the epochal decision of *Southern Burlington County NAACP v. Mount Laurel Township*, commonly known as *Mt. Laurel II*.[55] The court imposed an obligation on cities to take affirmative measures to meet their fair share of low and moderate housing demand.[56] Many cities involved in the litigation were actively hostile to the notion of affordable housing obligations.[57] It was frequently the developers themselves suing the cities for the opportunity to construct affordable housing.[58] Mandatory affordability guidelines may be more appropriate in such contexts than in those such as Maui's, where there are no positive regulatory barriers to the construction of affordable housing.

Third, even the New Jersey courts recognized that an inclusionary ordinance may be self-defeating if it mandated too large a set-aside.[59] Given the extant marketplace factors, a twenty percent set-aside was found to be the maximum allowable for a realistic chance at commercially viable construction.[60] Compare the Maui ordinance, which mandates a forty to fifty percent set-aside.[61]

D. A Comparison of IZ Ordinances

How does the Maui ordinance compare with other IZ ordinances? A survey by the Brookings Institute of inclusionary ordinances in Maryland and the

---

[54] The two cases are *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See* discussion *infra* Part III.B.

[55] *Mt. Laurel II*, 456 A.2d 390 (N.J. 1983). In a prior decision the court had held that the effective exclusion of poor and moderate income residents by means of zoning was illegal under state law. S. Burlington County NAACP v. Mt. Laurel Twp., 336 A.2d 713, 727-28 (N.J. 1975). The Township responded to this ruling by making only minimal adjustments to its policies, rezoning less than one percent of its land for affordable housing. ZIEGLER, *supra* note 12, § 22:17 n.3.

[56] *Mt. Laurel II*, 456 A.2d at 442 ("Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real.").

[57] *Id.* at 410 ("[T]en years after the trial court's initial order invalidating its zoning ordinance, Mt. Laurel remains afflicted with a blatantly exclusionary ordinance.").

[58] *See, e.g.*, Glenview Development Co. v. Franklin Twp., 397 A.2d 384 (N.J. Super. Ct. Law Div. 1978); Urban League of Essex County v. Mahwah Twp., 504 A.2d 66, 69 (N.J. Super. Ct. Law Div. 1984) (developers "seeking a realistic opportunity to build low and moderate income housing").

[59] *See, e.g.*, *Mahwah*, 504 A.2d at 84 (accepting evidence of experts that excessive set-asides would prevent construction of any affordable units at all).

[60] *Id.* at 84.

[61] *See supra* text accompanying notes 26-27.

greater Washington, D.C. area found that the ordinances mandated on average a set-aside of around ten percent, and all included density bonuses.[62] The results of the ordinances were varied, but in general appeared to stimulate at least some affordable units.[63] Barbara Kautz, in a paper describing best practices for the adoption of IZ ordinances, says that most such ordinances require a ten to fifteen percent set-aside, with the "most aggressive city" requiring thirty-five percent.[64]

Allan Mallach, an IZ expert who testified in one of the cases consolidated in the *Mt. Laurel II* litigation,[65] notes that although it is impossible to identify with precision the ideal set-aside, a figure of twenty percent can typically be absorbed by developers, while a forty percent set-aside may prevent development altogether.[66] Mallach pointed out in his 1984 book that an IZ ordinance adopted in 1977 by Bridgewater Township, New Jersey mandating a forty percent set-aside had yet to stimulate construction of a single affordable housing unit.[67]

Outside New Jersey, jurisdictions in California have become leaders in the development of IZ programs.[68] A recent survey published by the California Coalition for Rural Housing and the Non-Profit Housing Association of Northern California showed that the number of such programs in the state has increased from 75 in 1996 to 107 as of the survey date in 2003.[69] The mean affordability set-aside is thirteen percent, the median fifteen percent, and the most frequently used value is ten percent.[70] Only a single program reached a thirty-five percent requirement.[71] Density bonuses were offered in over ninety percent of the jurisdictions.[72]

In its policy recommendations, local governments are encouraged to "aim high" in setting affordable housing set-asides. The study suggests that "15

---

[62] KAREN DESTOREL BROWN, EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA 12 tbl.1 (2001), *available at* http://www.brookings.edu/es/urban/publications/inclusionary.pdf.

[63] *Id.* at 13.

[64] Kautz, *supra* note 4, at 980.

[65] *See Mahwah*, 504 A.2d at 69.

[66] MALLACH, *supra* note 37, at 107-08.

[67] *Id.* at 107.

[68] Nico Calavita, *Introduction to Inclusionary Zoning: The California Experience*, NHC AFFORDABLE HOUSING POL'Y REV. (Nat'l Housing Conf., D.C.), Feb. 2004, at 1, 2.

[69] *Id.* at 1.

[70] CALIFORNIA COALITION FOR RURAL HOUSING & NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA, INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION iii (2003), *available at* http://www.calruralhousing.org/system/files/Inclusionary30Years.pdf.

[71] This was the city of Davis, California, listed as requiring twenty-five to thirty percent. *Id.* app. A at 31.

[72] *Id.* at 24.

percent is realistic in most communities."[73] Perhaps most critically, the study concludes that the magnitude of the set-aside is *not* the most significant factor, indicating that factors other than the set-aside requirement determine the success of a program.[74] One program was forced to reduce its set-aside from twenty-five to twenty percent to make the program effective.[75] Programs comparable to Maui's cannot be found in either the experience of California jurisdictions nor in the recommendations of experts interested in promoting successful IZ programs. The author has yet to find a single IZ ordinance outside Maui imposing an affordable set-aside of more than forty percent.

III. THE TAKINGS CLAUSE AND LAND DEVELOPMENT

A. An Overview of Regulatory Takings Doctrine

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[76] This prohibition has been applied against the States for over 100 years.[77] Although initially only physical occupations of property were considered within the scope of the Takings Clause,[78] the last century has seen the development of judge-made law holding that regulation of property can also implicate the Takings Clause. The genesis of the doctrine of "regulatory takings" is typically found[79] in the case of *Pennsylvania Coal Co. v. Mahon*,[80] in which Justice Holmes held that "while property may be regulated to a certain extent,

---

[73] *Id.* at 26. Developer incentives, entirely lacking from the Maui ordinance, are also encouraged. *Id.* at 27.

[74] *Id.* at 22.

[75] *Id.*

[76] U.S. CONST. amend. V.

[77] *See* Lingle v. Chevron U.S.A., 544 U.S. 528, 536 (2005) (citing Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897)); *but see* Aviam Soifer, *Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States*, 28 U. HAW. L. REV. 373 (2006) (arguing that a textualist interpretation of the Constitution is incompatible with the notion that the Takings Clause operates against the states); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826 (2006) (disputing that a holding of *Chicago, B. & Q.* was that the Takings Clause applies against the states).

[78] *See* FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, THE TAKINGS ISSUE 120 (1973) (stating that early cases established that police power regulations could not effect a taking). *But see* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996) (finding, contra Bosselman et al., that "nonacquisitive takings" existed prior to *Pennsylvania Coal Co. v. Mahon*).

[79] *See* BOSSELMAN, CALLIES & BANTA, *supra* note 78, at 124-38.

[80] 260 U.S. 393 (1922).

if regulation goes too far it will be recognized as a taking."[81] Courts and commentators have struggled ever since to come up with standards for determining when a regulation becomes a taking.[82]

The current state of regulatory takings doctrine was expressed with as much clarity as could be hoped by Justice O'Connor in *Lingle v. Chevron U.S.A., Inc.*[83] First, regulations which either require a physical invasion of property,[84] or which destroy "*all* economically beneficial use"[85] of the property will be deemed *per se* takings.[86] In most other cases—with one very important exception—courts will require an ad-hoc, fact bound analysis,[87] difficult enough in itself and complicated by "vexing subsidiary questions."[88] The exception is the "special context" of land-use exactions,[89] and since IZ ordinances can arguably be characterized as exactions, we shall take up this context in detail below. The Court then went on to describe what had sometimes been understood as a completely distinct takings standard, the requirement that a regulation "substantially advance" legitimate state interests,[90] and promptly denounced that standard as having "no proper place in our takings jurisprudence."[91]

The *Lingle* opinion is remarkable for its frank admission that the *Agins v. City of Tiburon* standard was misplaced.[92] A requirement that a regulation actually

---

[81] *Id.* at 415.

[82] *See, e.g.*, Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (regulatory takings is "[b]y far the most intractable constitutional property issue"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (admitting that the Court "quite simply, has been unable to develop any 'set formula' for determining [when a regulation effects a taking]"); Sheffield Development Co. v. City of Glenn Heights, 140 S.W.3d 660, 671 (2004) ("For our part, we have called these legal battlefields a 'sophistic Miltonian Serbonian bog.'" (quoting City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978))).

[83] 544 U.S. 528, 537-40 (2005).

[84] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[85] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[86] *Lingle*, 544 U.S. at 538.

[87] *See Penn Central*, 438 U.S. at 124. The factors in a *Penn Central* test are the economic impact of the regulation, the extent of its interference with "distinct investment-backed expectations," and the "character" of the regulation. *Lingle*, 544 U.S. at 538-39. For a discussion on the likelihood of a plaintiff's success in a *Penn Central* claim, see F. Patrick Hubbard, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y. F. 121 (2003).

[88] *Lingle*, 544 U.S. at 539.

[89] *Id.* at 538. The Court refers to its leading exactions cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[90] *Lingle*, 544 U.S. at 540 (quoting Agins v. City of Tiburon, 447 U.S. 255 (1980)).

[91] *Id.*

[92] In fact, and as emphasized by Justice Kennedy's concurrence, the *Agins* standard is in the nature of a due process analysis, and is still viable in that realm. *Id.* at 548-49 (Kennedy, J., concurring).

advance some legitimate interest is, rather, in the nature of a due process claim.[93] For present purposes, the importance of *Lingle* is the shadow it casts over its exactions decisions. Although the *Lingle* Court did its best to shore up its exactions cases, describing them in terms of "the doctrine of 'unconstitutional conditions,'"[94] a doctrine "worlds apart"[95] from the *Agins* standard, it is arguable that those cases may have involved an implicit evaluation of the merits of the proposed exactions—an evaluation strictly off-limits after *Lingle*.[96]

To attempt to locate IZ programs in the constitutional spectrum, one must have an understanding of the Court's exactions cases. A litigant challenging an IZ ordinance by means of a *Penn Central* claim would assert that the "character" of the regulation and the extent to which it has interfered with the "distinct, investment-backed expectations" of the developer is such as to effect a taking.[97] The nebulous nature of this framework leaves litigants on both sides of a dispute with substantial uncertainty as to how a case would play out.

On the other hand, if in the context of a challenge to an IZ ordinance it were argued persuasively that *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* apply, the argument would be settled—even supporters of IZ acknowledge that housing development doesn't create a proportional need for

---

[93] *Id.* (clarifying that "[t]here is no question that the 'substantially advances' formula was derived from due process, not takings, precedents"). *But see* Karkkainen, *supra* note 77, at 908-11 (rejecting, in regulatory takings cases, both the Takings Clause and Lochner-style substantive due process challenges in favor of an approach based on "footnote 4" of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n4 (1938), and the "unfair burden" test of *Armstrong v. United States*, 364 U.S. 40 (1960)).

[94] *Lingle*, 544 U.S. at 547 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)). Scholars have noted the apparent disconnect in the Court's use of the doctrine of unconstitutional conditions in the takings context. *See, e.g.*, *Leading Cases: 1993 Term*, 108 HARV. L. REV. 290, 296-98 (1994) (noting that no prior takings cases had employed the doctrine, which fails to provide meaningful guidance to lower courts); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 84-85 (2000) (noting the "theoretical shortcomings and logical inconsistencies" of *Nollan* and *Dolan*, and arguing that more flexibility is needed than can be provided by the doctrine).

[95] *Lingle*, 544 U.S. at 547.

[96] *See* Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 820 (2006) (arguing that the very care used by the *Lingle* Court to preserve *Nollan* and *Dolan* may operate to weaken them); Reynolds & Ball (2005), *supra* note 43, at 463 n.56 (noting that the actual decisions of *Nollan* and *Dolan* appear to be based at least in part on a disparagement of the aims of the regulations). *But see* David Callies & Christopher Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *After* Lingle v. Chevron U.S.A., Inc., 40 J. MARSHALL L. REV. 539, 541 (2007) (arguing that *Nollan/Dolan* proportionality "remains a viable takings test after *Lingle*").

[97] *See Lingle*, 544 U.S. at 538-39.

additional affordable housing.[98] The remainder of this section will examine these cases and will attempt to bring to the foreground the fairness principle underlying the decisions.

B. The Exactions Cases: Nollan *and* Dolan

The Supreme Court's position on the constitutionality of exactions can be read in two cases: *Nollan* and *Dolan*. These cases have become nearly inseparable—a reference to one signals the inevitable appearance the other. The holdings of these cases can be summarized as follows: when a government agency conditionally approves a property owner's development plan, the conditions must have a "nexus" to the government interest upon which the condition is founded,[99] and the burden imposed to satisfy the condition must be "roughly proportional" to the impact of the particular development.[100]

In *Nollan*, the owners wished to replace the small bungalow on their beach-front property with a new three-bedroom house.[101] The new house was of a size consistent with others in the neighborhood.[102] Under California law, the Nollans were required to obtain a coastal development permit from the California Coastal Commission.[103] The Commission granted the permit subject to the condition that the Nollans dedicate an easement to the public permitting pedestrian access laterally across the property, between the mean high-water line and a seawall erected on the property.[104] The Nollans objected and sought a writ of administrative mandamus invalidating the condition.[105] Among the Commission's justifications for the condition was that the new house would tend to "prevent the public psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit."[106]

---

[98] *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 40, at 5 ("[D]evelopment of market rate housing . . . clearly does not create a need for more subsidized housing."); Herbert M. Franklin, Panel Comments, *in* INCLUSIONARY ZONING MOVES DOWNTOWN 149 (Dwight Merriam et al eds., 1985) ("I suspect that if a nexus test were to be applied such an [inclusionary] ordinance would fail.").

[99] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[100] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[101] *Nollan*, 483 U.S. at 827-28.

[102] *Id.* at 828.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 828-29 (internal quotation marks removed) (omission in original). The majority focused on the "psychological barrier" rationale offered by the Commission, mentioning it five times in the opinion. None of the three dissents found it necessary to deal with this barrier at all. *See id.* at 844-45 (Brennan, J., dissenting) (characterizing the Commission's motivation as concern for "public access to the ocean and tidelands").

The core of the Court's reasoning in invalidating the condition is expressed in two paragraphs containing only a single direct cite to case law, which served merely to import the colorful charge that the condition is nothing more than "an out-and-out plan of extortion."[107] The decision is an exercise in pure reasoning from first principles.[108]

The Court acknowledged that circumstances do exist under which a hypothetical permitting authority could refuse to issue a building permit.[109] So, for example, a permit may be denied outright when the proposed building would violate height or width restrictions, or other restrictions imposed in furtherance of a "legitimate police-power purpose." Given this, it seems clear that a permit may be legitimately conditioned on mitigation of the harm purportedly caused by the development.[110]

But the legitimacy of the condition vanishes unless the condition is imposed to mitigate *the same harm* as would have justified the denial of the permit.[111] There must be, in the essential language of the case, a "nexus between the condition and the original purpose of the building restriction."[112] Without this nexus, the legitimacy of the condition vanishes and the extortionate purpose is revealed.[113]

Although the Nollans did not argue the point, the Court found it worthwhile to point out the fairness rationale of the Takings Clause, noting that "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[114]

One can see that beyond the question of nexus is the question of degree: to what degree must the burden imposed by a development condition "match" the harm caused by that particular development? The *Nollan* Court passed over this question, finding that the condition required by the Commission would fail to satisfy "even the most untailored standards."[115] It was inevitable that the issue would arise eventually, and the Court addressed the question in *Dolan v. City of Tigard*.[116]

---

[107] *Id.* at 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

[108] *Cf.* Edward J. Sullivan & Nicholas Cropp, *Making It Up—"Original Intent" and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 248-49 (2003) (arguing that far from deploying an "originalist" argument, Justice Scalia's opinion is "an exercise in value-laden, result-driven reasoning, which originalists rail against in other contexts").

[109] *Nollan*, 483 U.S. at 836.

[110] *Id.* at 836-37.

[111] *Id.* at 837.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 836 n.4 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[115] *Id.* at 838.

[116] 512 U.S. 374 (1994).

Florence Dolan, wishing to expand her plumbing and electric supply store, applied to the city for a building permit.[117] The permit was granted subject to a number of conditions, including that Dolan dedicate a portion of her property as a public "greenway" and for a storm drain improvement, and another portion as a pedestrian and bicycle path.[118] Because it was accepted by all parties that the development would have an impact on both traffic and increased storm runoff,[119] the Court found that *Nollan*'s "nexus" requirement was satisfied,[120] and passed on to a discussion of "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of . . . [the] proposed development."[121]

The Court described three standards used by various state courts in defining this relationship.[122] Illinois required a "very exacting correspondence, described as the 'specifi[c] and uniquely attributable' test."[123] At the permissive end of the spectrum are states which require only "very generalized statements as to the necessary connection between the required dedication and the proposed development."[124] The Court found the happy medium in a standard requiring a "reasonable relationship" between the dedication and the impact.[125] The Court preferred, however, to adopt the phrase "rough proportionality" to avoid confusion with the highly deferential "rational basis" review under the Equal Protection Clause.[126]

Under the rough proportionality standard, the Court found that the burden imposed on Dolan by the conditions were not roughly proportional to the impact of the proposed development.[127] The fact that Dolan would lose the right to exclude others seemed to weigh heavily against the exaction.[128] What purpose, asked the Court, was served by a public, as opposed to a private, greenway?[129] As to the bikeway, the Court found that the City had simply failed in its burden

---

[117] *Id.* at 379.

[118] *Id.* at 380.

[119] *Id.* at 382-83.

[120] *Id.* at 387.

[121] *Id.* at 388.

[122] *Id.* at 389-91.

[123] *Id.* at 389 (quoting Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)) (alteration in original).

[124] *Id.* Decisions of the courts of Montana, *Billings Properties v. Yellowstone County*, 394 P.2d 182 (Mont. 1964), and New York, *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966), are cited as examples. *Dolan*, 512 U.S. at 389.

[125] *Dolan*, 512 U.S. at 390 (citing Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980)).

[126] *Id.* at 391.

[127] *Id.* at 394-95.

[128] *Id.* at 393 (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

[129] *Id.*

of demonstrating that the additional traffic warranted this particular dedication.[130]

Once again, the Court cited the *Armstrong v. United States* "fairness principle," this time in its opening remarks on the overall framework of takings jurisprudence.[131] Similarly, several of the cases relied upon by the Court for its standard of rough proportionality adverted, explicitly or implicitly, to the unfairness that may result from a less demanding standard. For example, in *Collis v. City of Bloomington*,[132] developers challenged an ordinance requiring the dedication of land for parks and recreational facilities, or payment in lieu of such dedication.[133] The Minnesota court upheld the ordinance as facially constitutional, leaving open the possibility that it may still be attacked as unconstitutional as applied in a particular instance.[134] The court noted the possibility of an unfair application of the ordinance "to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision."[135] Such an application "would be to allow an otherwise acceptable exercise of police power to become grand theft."[136]

In *City of College Station v. Turtle Rock Corp.*,[137] the Texas Supreme Court likewise had before it a challenge to a parkland dedication ordinance.[138] The ordinance was again upheld on its face,[139] but the court left open the possibility that it could be unconstitutional in its application.[140] Without a requirement that the dedication be reasonably connected to the "harm" caused by the development, which harm may be nothing more than a population increase, "a city could exact land or money to provide a park that was needed long before the developer subdivided his land."[141]

In *Call v. City of West Jordan*,[142] the ordinance at issue mandated dedication of land or payment in lieu for the purposes of flood control, as well as for parks and recreational facilities.[143] Once again, the ordinance was upheld by the Utah

---

[130] *Id.* at 395-96.

[131] *Id.* at 384.

[132] 246 N.W.2d 19 (Minn. 1976).

[133] *Id.* at 20.

[134] *Id.* at 27.

[135] *Id.* at 26.

[136] *Id.*

[137] 680 S.W.2d 802 (Tex. 1984).

[138] *Id.* at 803.

[139] *Id.* at 806.

[140] *Id.* ("It is possible, of course, that the ordinance may be unduly harsh or create a disproportionate burden in the case of a particular subdivision or developer.").

[141] *Id.* at 807.

[142] 606 P.2d 217 (Utah 1979).

[143] *Id.* at 218.

court.[144] The city's power was not without limit, however. "To the extent that the establishment of subdivisions *increases the need for flood control measures or recreational facilities*, it is both fair and essential that subdividers be required to contribute to the costs of providing those facilities."[145] We may infer from this rationale that the court would hold unfair a requirement that subdividers pay for measures unrelated to the effects of the development.[146]

We see, then, that even before *Dolan* courts were concerned with the potential for unfair treatment in the context of development exactions. The courts' general deference to legislative authority was limited by an awareness that the leverage available to that authority may lead to unfair treatment. The applicability of this principle to IZ ordinances is clear. More important than the particulars of the standard described in *Dolan* is the basic notion that it is unfair to charge a segment of the population—developers and their purchasers—with responsibility for remedying social problems not of their own making. Disputes, however, over the applicability of *Dolan* have masked this fundamental proposition and turned the issue into a meaningless debate over the breadth of the holding.

C. *The Trouble with* Nollan *and* Dolan

Although *Nollan* and *Dolan* may have provided some comfort to property-rights advocates, they have not been popular decisions with either state courts[147] or commentators.[148] They have not advanced regulatory takings doctrine, and have merely shifted the debate from "which regulations impose burdens equivalent to a taking?" to "which regulations are subject to *Nollan* and *Dolan*?"

---

[144] *Id.* at 221 ("[I]t is our opinion that the ordinance . . . is within the scope of the powers granted to the City . . . .").

[145] *Id.* at 219-20 (emphasis added).

[146] Indeed, Utah has recently held that the *Dolan* standard of rough proportionality holds in all land-use contexts, including uniform legislatively imposed schemes. B.A.M. Dev. v. Salt Lake County, 128 P.3d 1161, 1171 (Utah 2006) (retroactively applying a legislative order to that effect).

[147] *See* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 537 (1995) (summarizing research showing that state courts "had given [the cases] far less attention and apparently attached far less significance . . . in reaching their own decisions" than would appear likely, given the amount of academic commentary); Reynolds & Ball (2005), *supra* note 43, at 466-67 (summarizing the inconsistent approaches taken by lower courts in applying *Nollan* and *Dolan*).

[148] *See, e.g.*, Fennell, *supra* note 94, at 84-85 ("Efficient land use requires more flexibility and more coherence than these judicial bargaining limits can offer."); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 614-15 (2004) (arguing that the exactions cases have created "judicial indeterminacy and regulatory variability," and generally make no sense).

In particular, two unresolved issues have perplexed courts attempting to apply the *Dolan* test.

First, does heightened scrutiny apply when the exaction demands not the dedication of a property interest, as was the case in both *Nollan* and *Dolan*, but payment of a fee? Courts and commentators have split on this issue.[149] Adjudication of a suit challenging an IZ ordinance could implicate this issue, since many such ordinances (including Maui's) permit the developer to satisfy its obligations by paying a fee "in lieu" of construction of affordable housing.[150]

Perhaps the most contentious post-*Dolan* issue has been the applicability of the doctrine of the case to broadly applicable regulations enacted by legislative bodies, as opposed to ad hoc, individualized exactions.[151] *Dolan* clearly applies to the later, but under the facts of the case may not apply to the former. This issue continues to be resolved on a state-by-state basis,[152] and has never been adjudicated in Hawai'i. Because the Maui ordinance is generally applicable to all developments above a certain size threshold, it also clearly implicates this issue.

Dolan must have been a particularly upsetting decision for city planners. Not only were exactions to be scrutinized at a level at least somewhat less deferential than mere rationality, with "individualized determinations" that each exaction was justified and proportional,[153] but the city would apparently bear the

---

[149] *Compare* Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (applying *Nollan* and *Dolan* to a monetary exaction), *and* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 375-76 (arguing that heightened scrutiny should apply to monetary exactions), *with* Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 875-76 (9th Cir. 1991) (declining to apply *Nollan* to a development "linkage" fee) *and* Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 482 (suggesting that *Lingle* removes monetary exactions from *Dolan*'s "sphere of applicability").

[150] *See supra* text accompanying notes 29-31.

[151] *See generally* Inna Reznick, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242 (2000); Jane C. Needleman, Note, *Exactions: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 CARDOZO L. REV. 1563 (2006). The distinction between legislative and adjudicative actions may not be as clear as the cases imply. *See* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 772 (2007) ("The line between legislative and adjudicative regulation frequently breaks down at the local level . . . .");

[152] *Compare Ehrlich*, 911 P.2d at 447 (*Nollan* and *Dolan* do not apply to "*generally* applicable development fee[s]"), *with* Town of Flower Mound v. Stafford Estaes Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) (rejecting *Ehrlich*, it being "entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others").

[153] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

burden of justifying the exaction should it ever come to litigation.[154] It is unsurprising that cities would not swallow *Dolan* willingly, and lower courts have been willing partners in helping cities avoid the requirements of *Dolan*.[155]

And yet *Dolan* cannot be said to have been a victory for property-rights advocates either. Cities fearful of being compelled in court to justify administratively imposed exactions can avoid the problem by imposing the exactions generally, via an ordinance. But because in this context the city can no longer take account of the varied circumstances in which the exaction will be applied, the law must be written broadly, with little or no discretion left to administrators. The generally applicable regulation may in fact impose a higher burden on property owners and developers generally that a regulation which permitted case-by-base discretion.[156] Alternately, rather than facing the risk that a court will strike down an exaction as excessive, cities may deny development altogether.[157]

Nollan and *Dolan* have provoked an enormous amount of commentary,[158] and law review articles continue to evince the debate on the cases' applicability and meaning. The Supreme Court has also offered equivocal signals on its holding in *Dolan*. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[159] the Court said that it had "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."[160] Courts and commentators have seized upon this dictum to justify the limitation of *Dolan* to similar circumstances.[161] As well they might, there being little other

---

[154] *Id.* at 391 n.8. Notwithstanding one's expectation that such a significant rule would not be buried in a footnote, courts have taken the note at its word. *See, e.g.*, Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (explaining the rationale for the "burden shifting"); Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 975 (Or. Ct. App. 2002) (noting that the *Dolan* test "places the burden on the government . . . to justify the condition").

[155] *See* Rosenberg, *supra* note 147, at 537 (finding that most state courts decide cases with little reference to the main Supreme Court takings decisions).

[156] *See* Fenster, supra note 151, at 748 (arguing that the mechanical application of generally applicable regulations "potentially limits the ability of property owners to negotiate an individualized exaction that would be more advantageous and attractive to both parties").

[157] *See* David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C.L. REV. 1243, 1249 (1997) (arguing that the strict proportionality framework leads to inefficient allocation of development resources).

[158] *See* Ehrlich v. City of Culver City, 911 P.2d 429, 439 n.6 (Cal. 1996) ("Scholarly commentary on the two cases is almost unmanageably large.").

[159] 526 U.S. 687 (1999).

[160] *Id.* at 702.

[161] *See, e.g.*, San Remo Hotel, L.P. v. San Francisco, 364 F.3d 1088, 1098-99 (9th Cir. 2004) (declining application of *Dolan* to hotel conversion fee), *aff'd*, 545 U.S. 323 (2005); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697-98 (Colo. 2001) (proportionality test doesn't apply to wastewater treatment fee). *But see Ehrlich*, 911 P.2d at 433 (holding that the heightened standard of *Nollan* and *Dolan* applies to monetary exactions).

guidance coming from the Court on the issue.[162] The silence might be read to indicate some misgivings on the breadth of *Dolan*, although there are some who clearly approve of a broad application.[163]

The *Nollan* and *Dolan* opinions are nearly always cited together, and while both opinions are controversial in their own rights, perhaps *Dolan* has caused the larger share of controversy. To the extent that *Dolan* can be seen as an extension or crystallization of *Nollan*, one would expect opposition to the former to be as strong or stronger as to the latter. A quick, unscientific experiment was performed to test this hypothesis. On the assumption that law review titles bear some relation to their subjects, and that treatment as a law review subject correlates to some degree with a measure of controversy, a search was executed for law review articles with titles containing one case, but not the other.[164] Eighty-five articles have been written with "Dolan" in the title, but not "Nollan." Only thirty mention "Nollan" without "Dolan", despite the *Nollan* opinion having been written seven years before *Dolan*. *Dolan* appears to have attracted significantly more scholarly attention.

Perhaps is it the exactitude of the *Dolan* standard, felt to be unrealistic in the rough-and-tumble world of municipal development negotiations, that causes the additional angst over *Dolan*.[165] Perhaps *Dolan*'s imposition of the "burden shifting" is felt to be an unwarranted imposition on the police power.[166] In any case, *Dolan* will remain controversial at least until the Supreme Court finally addresses the issues head on. In the meantime, a standard which applies in all cases, of monetary exactions or possessory dedications, of ad hoc adjudications and broad legislative enactments, would at least inject some measure of certainty into the negotiations between regulators and developers. But first, we must clarify the proposition we expect to be universally adhered to.

The holding of *Nollan* is often summarized as: conditions upon development approval must bear a nexus to a legitimate public purpose.[167] But this

---

[162] The Court also passed up an opportunity to decide whether legislatively mandated exactions were subject to *Dolan* when it granted certiorari to answer only a different question in *San Remo Hotel*. 543 U.S. 1032, 1032 (2004) (limited grant of certiorari). *See* Fenster, *supra* note 151, at 750 (explaining the procedural background and certiorari petition in *San Remo Hotel*).

[163] *See, e.g.*, Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116 (1995) (denying certiorari) (Thomas, J., dissenting).

[164] This search was performed by the author on Westlaw on March 7, 2008.

[165] *See* Fenster, *supra* note 151, at 733 (reading *Lingle* as "signal[ing] both that lower courts should limit *Nollan* and *Dolan*'s application and that other levels of government . . . can limit—and indeed, frequently have limited—municipalities' discretion to impose exactions").

[166] *See supra* text accompanying note 154.

[167] *E.g.*, Wis. Builders Ass'n v. Wis. Dept. of Transp., 702 N.W.2d 433, 498 (Wisc. Ct. App. 2005) (stating that *Nollan* requires that "there must be a nexus to a legitimate public purpose"); Tapps Brewing v. City of Sumner, 482 F. Supp. 2d 1218, 1229 (W.D. Wash. 2007) (summarizing *Nollan* as holding "that an 'essential nexus' must exist between the 'legitimate

formulation obscures an essential aspect of the holding of the case, and can easily appear to be nothing more than a restatement of the deferential "rational basis" standard of due process. Beyond the due process requirement that the government's interest must be generally legitimate is the requirement that the effects of the development negatively impact that interest. A condition is not constitutional under *Nollan* merely because a "nexus" of some sort exists between the condition and the purpose. Rather, the condition must further the same purposes as would the outright denial of permission to develop. Although the Court framed the requirement in these terms (equating the condition with the legitimate denial of development), an equivalent and perhaps clearer formulation is to say that the burden imposed by the condition must bear a nexus to a harm attributable in some degree to the development, the mitigation of which is a legitimate public purpose. This was the standard expressed with much greater clarity in the opinions relied upon in *Dolan*.

The rule to be applied in all cases of development conditions, whether imposed on an ad hoc basis or broadly across all developments, is that there must be some reasonable connection between the burden imposed by the condition and the anticipated effects of the development such that it is fair to impose the burden. Benefits accruing to the applicant as a result of the condition should be considered to offset the burden, but only to the extent that they are tangible and reasonably ascertainable. Conditions may be presumed to be constitutional,[168] and the burden must be placed on a challenger to demonstrate the unfairness of the condition, rather than on the government to justify every application of the rule leading to the specific condition in question.

It would do no harm to consider this a weaker test than that imposed by both *Nollan* and *Dolan*. What the test looses in rigor it makes up in consistency of application. Such a standard would permit flexibility in negotiations leading to the issuance of development permits while discouraging overreaching by cities.[169]

How might one justify such a standard? One justification is a normative one: that increasing reliance on non-tax revenue sources such as exactions distorts the municipal agenda, focusing on physical infrastructure to the detriment of social welfare programs.[170] Instead, I advert to a more general principle, that of basic

---

state interest' and the permit conditions") (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

[168] *Cf.* Parham v. Hughes, 441 U.S. 347, 351 (1979) (holding that state laws will be presumed constitutional in equal protection challenges).

[169] *See generally* Fennell, *supra* note 94.

[170] *See* Reynolds & Ball (2005), *supra* note 43, at 456 (describing how such reliance leads to a focus "skewed toward the types of projects that are amenable to non-tax financing, producing an over-emphasis on the construction of tangible infrastructure and a necessary slighting of services for people").

fairness. In his opinion in *Armstrong v. United States*, Justice Black provides a concise statement of the Takings Clause's purpose: that the government be absolutely barred from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[171] *Armstrong* is frequently cited in the cases and the literature for this proposition, and is especially important in regulatory takings cases, in which the clear rules of per se takings do not apply.[172]

In an influential article, Frank Michelman argued that a standard derived from the "test of fairness" is the only correct method of evaluating the compensability of a government action.[173] While at first blush the use of fairness as a guiding light may seem uncomfortably vague, it need not be so,[174] and ignoring fairness concerns in favor of a so-called "bright line" rule reduces the takings clause to a hollow shell.[175]

---

[171] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[172] *E.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002) (referring to the proposition as the "*Armstrong* principle"); Pennel v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (emphasizing that land-use regulation does not violate the *Armstrong* principle when the use in question is the source of the problem regulated); Florida Rock Indus. v. United States, 45 Fed. Cl. 21 (Fed. Cl. 1999) ("The present case puts the *Armstrong* principle to the test and goes to the heart of Justice Holmes' formulation of regulatory takings."); Ehrlich v. City of Culver City, 911 P.2d 429, 447 (Cal. 1996) (associating *Nollan* and *Dolan* with the *Armstrong* principle, "one of the fundamental principles of modern takings jurisprudence"); Mission Springs, Inc. v. City of Spokane, 954 P.2d 250, 258 (Wash. 1998) (noting that a violation of the *Armstrong* fairness principle is "the talisman of a taking"); *see also* Jeffrey M. Gaba, *Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 571 (2007) (discussing "the concept of distributive justice reflected in the *Armstrong* principle[]"); William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997) ("Justice Black's view has received a remarkable degree of assent across the spectrum of opinion."); Clynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 747 (1993) (describing *Armstrong* as part of the "ritual litany" of takings analyses).

[173] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1171-72 (1967). The article has been cited in many of the Supreme Court's landmark takings cases. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 428 n.5 (1982); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 128 (1978) (Stevens, J., concurring); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

[174] *See* Michelman, *supra* note 173, at 1172 (arguing that fairness concerns can lead to a effective practical guidelines).

[175] *Cf.* STEPHEN BREYER, ACTIVE LIBERTY 129 (2005) (arguing, in the context of mandatory sentencing laws, that "rule-based clarity [is] not worth the constitutional price").

IV. APPLYING THE "FAIRNESS STANDARD" TO LAND USE REGULATIONS

A. As Applied to Exactions Generally

How would a principled application of the fairness rationale operate in land-use disputes? Since all parties to every dispute already claim fairness for themselves, one might expect few changes. Certainly, a city's power to regulate the uses of property within its jurisdiction would be unimpaired. The exactions cases might, perhaps, have come out differently. It may not have been unfair to ask the Nollans to dedicate the lateral easement, or Florence Dolan the bike path.[176] A principled and consistent fairness based standard, focusing on the relation of the burden imposed by the exactions to the effects of the development, would advantage neither the developers nor the regulators.

A standard explicitly grounded in the fairness principle would settle the main controversies surrounding the application of the present exactions doctrine. A court should certainly take into account the nature, whether legislative or individualized, of a disputed exaction, but it should do so in the context of an inquiry into the overall fairness of the exaction. The analysis should focus on the nature and magnitude of the exaction, a focus specifically mandated in *Lingle* for all manner of regulatory takings analyses.[177]

A fairness standard may be criticized as being overly idealistic and divorced from the rough-and-tumble realities of development negotiations and the very real needs of cities.[178] There is, of course, a risk that a clumsy application of such a blunt standard may sweep too broadly. But it is unacceptable to ignore the issue altogether on the theory that simply because developers and market rate buyers may be more capable of bearing the cost, they must bear it. To hold this would be to reduce regulatory takings doctrine to a comparison of bank account balances—an admirable simplification, perhaps, but also an abdication of the notion that a regulation could ever "go too far."

B. As Applied to Inclusionary Zoning Generally

It is entirely possible to conceive of "run of the mill" IZ programs as being fair, and therefore protected under the proposed standard. In the first place, when projects subject to inclusionary requirements are granted benefits in the form of density bonuses or expedited processing of permits and licenses, it could be argued that there is no appreciable burden at all, and nothing to balance

---

[176] *See* Fenster, *supra* note 151, at 748-49; Ball & Reynolds, *supra* note 46, at 1557-58.

[177] *See* Lingle v. Chevron U.S.A, Inc., 544 U.S. 528, 542 (2005) (proper regulatory takings analysis focuses on the "*magnitude or character of the burden*").

[178] *See* MALLACH, *supra* note 37, at 93.

against the effects of the development. Even where, as will typically be the case, some cost must be absorbed by the project,[179] it does not immediately follow that the program is unfair. Where a city has taken upon itself an obligation to provide its "fair share" of affordable housing, as cities in New Jersey are mandated to do, it cannot be seen as unfair to pass some of that obligation on to developers.

Let us return to our opening question: who pays for affordable housing? A better starting point in the context of IZ is to ask whether there is any cost to be borne at all. First, consider a case where a developer opts to pay fees in-lieu of the inclusionary requirement. When density bonuses are available, the developer may be able to recoup these fees in the additional units afforded by the bonus.[180] Without a bonus or some other offsetting concession, it is clear that the in-lieu fee represents a very real cost to the developer. The magnitude of the fee and the presence or absence of bonuses will determine the cost.

The situation is much less clear when in-lieu fees are either not available or not used by the developer. The cost of the program is never manifested in the form of a check to the city. There appears, however, to be general agreement among supporters that IZ programs may impose burdens great enough that developers will not build at all.[181] In such cases the costs to the developer outweigh the expected gain. In any case, the cost or lack thereof of a given IZ program are tied directly to the specific parameters of that program. Although it is not meaningful to speak in general terms of the cost of IZ, it is fair to say that the cost to the city imposing the project will be, in essence, zero.[182]

To the extent that an IZ program does impose costs, who pays? There are three possibilities.[183] First, the developer can pay out of his profits. Second, the costs can be passed "forward," to unsubsidized buyers from the developer. Third, the costs can be passed "backward" to landowners, as developers adjust the price they are willing to pay for land when their developments will be

---

[179] *Id.* at 58 ("In the majority of cases, most probably some subsidy will be required.").

[180] Kautz, *supra* note 4, at 986 n.91 ("[B]y providing adequate density bonuses, cities may design their programs so that there are no costs to anyone.").

[181] *See, e.g.*, MALLACH, *supra* note 37, at 57-58 (noting that subsidies imposed on developers may be high enough to discourage development altogether); Urban League of Essex County v. Mahwah Twp., 504 A.2d 66, 84 (N.J. Super. Ct. Law Div. 1984) (finding twenty percent to be the maximum mandatory set-aside under which development was realistic).

[182] Kautz, *supra* note 4, at 983 ("[F]rom a local agency standpoint, inclusionary zoning provides affordable housing at no public cost.").

[183] *See* MALLACH, *supra* note 37, at 88; *see also* Robert C. Ellickson, *Inclusionary Housing Programs: Yet Another Misguided Urban Policy?*, *in* INCLUSIONARY ZONING MOVES DOWNTOWN 85 (Dwight Merriam et al eds., 1985).

subject to affordability requirements. In theory, over the long run, the last factor should predominate.[184]

Even admitting that the development of market-rate housing does not itself create any need for additional affordable housing, and that the burdens imposed by an IZ program are not appreciably offset by any tangible benefits—admitting, that is, a lack of "nexus"—such a program cannot be seen as inherently unfair. For better or worse, a fairness standard is a subjective standard, and the author finds himself unoffended by the notion that new developments must share to some degree in the general social obligation of providing housing for the community.

C. As Applied to Maui's IZ Ordinance

An inclusionary mandate, then, is not inherently unfair, and decisions upholding IZ programs against Fifth Amendment challenges[185] can be respected. But there is surely some point beyond which such a program ceases to be fair and tends to become nothing more than, to put it as bluntly as the U.S. Supreme Court, "an out-and-out plan of extortion."[186] Maui's ordinance lies beyond that point.

It does this not because it fails to guarantee any particular rate of return to the developers and their investors,[187] nor because the police power of Maui county does not permit the regulation of the uses of land in the county. One can assume that Maui has the power to rezone land at will to prevent residential development entirely. Instead, although residential development remains a permitted use, it cannot be exploited unless a large contribution is made to the social welfare of the county. It is entirely unfair to impose a contribution of this magnitude on parties who, to speak plainly, bear no responsibility for the underlying problem. Or rather, the parties are responsible for solving the

---

[184] MALLACH, *supra* note 37, at 88. However, in a location where much of the developable land is held by a few landowners, and where the landowner *is* the developer, this long-run factor may not come into play at all, and the cost of the program will be split between the developer and the market-rate purchasers. Although the extent to which this situation obtains on Maui today is unclear, land ownership in Hawai'i has traditionally been concentrated in a few large holdings. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 232-33 (1984) (permitting compelled leasehold to fee-simple conversion where eighteen owners held forty percent of the state's land).

[185] *E.g.*, Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001); Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277 (N.J. 1990).

[186] Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14 (1981)).

[187] *Cf. City of Napa*, 108 Cal. Rptr. 2d at 66-67 (doubting that due process entitles developers to a "fair return" on their investment).

housing crisis to the same extent as every other citizen of Maui, and their contribution should be assessed in the same way: via taxes.

One objective measure of the fairness of a practice can be found in comparison with similar practices in other jurisdictions. As we have seen, Maui's IZ ordinance imposes a burden twice as great as that imposed even in cities with aggressive programs. Maui is unique in many ways, but nothing in Maui's unique situation justifies such a departure from accepted practices.

It is appropriate in general for the judiciary to defer to legislative determinations of need and appropriateness of social remedies, and to leave the political process room in which to operate.[188] But it is wrong to raise this tendency to the level of a fixed principle. The political situation on the ground may just as easily lead to abuses, which it is the prerogative of the courts to correct.[189] Maui, an island community subjected to and utterly dependent on a continual influx of outsiders, is at least arguably an environment in which such a situation could develop.[190] One may wonder whether there is any set-aside which, as a political matter, would go too far.[191]

V. CONCLUSION

No one should be satisfied with a standard the applicability of which in many common circumstances is so unclear as to render all parties uncertain as to their legal positions. It would be best if the Supreme Court clarified *Dolan* and ended debate on its applicability. But even if it should be held that the "rough proportionality" standard does not apply to legislative enactments such as Maui's Workforce Housing ordinance, such laws must remain subject to attack as unfair. Otherwise, even well-intentioned cities could be tempted by the political attractiveness of mandatory set-asides to an extent which stifles development altogether. At the extremes, the inclusionary aspect shades into its opposite.

There is no dispute that affordable housing is a problem on Maui. But the problem must be recognized for what it is: a community problem, the

---

[188] *See* San Remo Hotel v. City and County of San Francisco, 41 P.3d 87, 105 (Cal. 2002) (postulating that a city council enacting extortionate fees would soon be voted out of office).

[189] *See* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) (constituents may not only tolerate, but may actively support an uneven application of burdens).

[190] *See, e.g.*, Ilima Loomis, *Council Approves Housing Policy*, MAUI NEWS, Nov. 4, 2006, at A1 (quoting a council member as supporting local residents against "millionaires who want to buy a piece of Maui").

[191] *See, e.g.*, Charmaine Tavares, Editorial, *Setting Affordable Housing at Eighty Percent will Bring Maui Back in Balance*, MAUI NEWS, Sep. 13, 2006, at A8 (then Councilwoman, now Mayor, Charmaine Tavares, proposing that in order to meet Maui's housing needs, an eighty percent set-aside would be required).

responsibility for which lies with the entire community. Developers must, in the nature of things, be centrally involved in efforts to combat the crisis. But loading upon developers and their purchasers significantly more than their fair share is to violate a central purpose of the Takings Clause: to ensure that those burdened for the benefit of society are compensated.

Joseph A. Dane[192]

---

[192] M.S., University of Hawai'i at Mānoa, J.D. Candidate 2009, William S. Richardson School of Law, University of Hawai'i at Mānoa.

Standing Down: The Negative Consequences of Expanding Hawai'i's Doctrine of Standing

I. INTRODUCTION

In a democracy that values governmental restraint, the requirement of standing has been an integral part of the United States judiciary system. Standing is fundamental in disputes because it establishes the right for parties to bring lawsuits before the judiciary.[1] Justice Scalia explained, "standing . . . is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"[2]

In the past, Hawai'i courts generally followed the federal standing doctrine. More recently, they have demonstrated a willingness to depart from the federal approach and broaden standing. Especially in public interest cases, judges are perceivably taking cases away from other governmental branches. This article contends that the Hawai'i state courts should, at a minimum, stop expanding the standing doctrine by limiting the definition of who has a personal stake in the outcome of a case. By following principles from the federal judicial system, Hawai'i courts can further develop a standing doctrine that is both predictable and serviceable to the public, while still maintaining a separation of powers. Hawai'i's current standard of "the needs of justice" creates a slippery slope that could potentially disrupt the separation of powers in state government. Although Hawai'i case law still indicates similarity to the federal system, if the court continues on its current path, many are left to question the future limits, if any, of standing in Hawai'i.

This article compares the stricter federal doctrine with the now more liberal Hawai'i standard and then discusses several negative implications of the current application of standing in Hawai'i. Part II first reviews the background of standing at the federal level, and Part III looks at the application and interpretation of the issue in federal courts. Following a discussion of Hawai'i Supreme Court cases in Part IV, two recent 2007 Hawai'i decisions are examined to illustrate the legal community's perception of the court's changing view on standing in Hawai'i. Finally, the article identifies potential problems of expanding standing, including blurring the separation of governmental branches, increasing the number of frivolous lawsuits, and negatively impacting Hawai'i's economy.

---

[1] Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994).

[2] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983); *see also* Stasha D. McBride, *Civil Procedure: Time to Stand Back: Unnecessary Gate-Keeping to Oklahoma Courts*, 56 OKLA. L. REV. 177, 177 (2003).

II. BACKGROUND OF THE DOCTRINE OF STANDING IN THE FEDERAL JUDICIARY

As the Hawai'i judiciary has paralleled the federal system[3] and has "on occasion[] received guidance therefrom,"[4] one must look to standing's purpose in the federal system to understand standing's role in Hawai'i's system. Although state courts are not bound by the federal courts' strict interpretation of standing,[5] lessons about judicial restraint and the separation of powers in the federal system initially shaped standing in Hawai'i.[6]

In the United States Constitution, the framers emphasized that the role of the courts was limited to disputes of a judicial nature.[7] In the Constitutional Convention of 1787, the framers rejected the notion of giving federal judges the power to render advisory opinions.[8] Article III of the Constitution states that "judicial Power shall extend to all Cases . . . [and] to Controversies."[9] Disputes that fall outside the "cases or controversies" limitation are considered advisory opinions.[10]

---

[3] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 173, 623 P.2d 431, 439 (1981).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See infra* notes 8 & 9 and accompanying text.

[8] *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430-31 (Max Farrand ed., 1966). Framers wanted the federal judges to decide only cases of a judicial nature. For example, an early draft of Article III omitted any mention to jurisdiction over cases "arising under the Constitution." *Id.* When a motion was made to insert the clause into Article III, Madison objected, "fearing [that the addition] gave a general right of expounding the Constitution beyond cases of a judicial nature." Brian A. Stern, Note, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 91 (1994) (citing JOHN A. KASSON, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES AND HISTORY OF THE MONROE DOCTRINE 94-95 (1904)). The framers allayed Madison's fears and "accepted the addition confident that that it would only be applied in cases of a 'judicial nature.'" *Id.* at 91-92.

[9] U.S. CONST. art. III, § 2, cl. 1. The Supreme Court defined "case or controversy" as:

> [T]he claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. . . . The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

Muskrat v. United States, 219 U.S. 346, 357 (1911) (quoting *In re* Pacific Ry. Comm'n, 32 F. 241, 255 (1887)).

[10] BLACK'S LAW DICTIONARY 1125 (8th ed. 1999) (defining advisory opinions as "[a] nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose."); *see also* Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 3 (1990) (stating that the doctrine of standing is "the primary force harmonizing judicial lawmaking with the doctrine of separation of powers."); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100 (J. P. Mayer ed. & George Lawrence trans., Perennial Library 1988) (1966) ("[I]f [a judge]

In following the principles and ideals of the framers, the United States Supreme Court has avoided issuing advisory opinions. Soon after the Constitution was ratified, Chief Justice John Jay responded to a request by President George Washington for legal guidance.[11] Justice Jay stated that without an actual controversy, his decision would be an advisory opinion which violates the Constitution and disturbs the separation of powers.[12]

The problem of issuing advisory opinions resurfaced over one hundred years later in *Muskrat v. United States*.[13] The Court in *Muskrat* found that a controversy was indirectly created by Congress to test the constitutionality of legislation.[14] The opposing claims were funded by the Department of Treasury for the sole purpose of questioning the validity of a Congressional statute involving the partition of Indian tribal lands.[15] Though named as a defendant, the court held that the government did not have a personal stake in the litigation and that a ruling on the merits would be nothing more than a constitutionally prohibited advisory opinion.[16]

The rationale behind the cases and controversies limitation has been maintained by the federal judicial system. Echoing principles communicated in Justice Jay's letter,[17] the Supreme Court has held that one of the principle purposes of standing is to promote the separation of powers so that federal courts only exercise power "'in the last resort, and as a necessity.'"[18] The judiciary must avoid decision-making where another branch of government should act first so as "not [to] intrude into areas committed to other branches

---

pronounces upon a law without a reference to a particular case, he steps right beyond his sphere and invades that of the legislature.").

[11] CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (Henry P. Johnston ed., 1891) [hereinafter JAY], *cited in* Robert P. Dahlquist, *Advisory Opinions, Extrajudicial Activity and Judicial Advocacy: A Historical Perspective*, 14 SW. U. L. REV. 46, 59-60 (1983).

[12] *Id.*

[13] 219 U.S. 346 (1911).

[14] *Id.* at 348.

[15] *Id.* at 360.

[16] *Id.* at 361-62; *see also* Michael S. Gilmore, *Standing Law in Idaho: A Constitutional Wrong Turn*, 31 IDAHO L. REV. 509, 541 (1995) (commenting that standing decisions of the Supreme Court have "become firmly grounded upon the case or controversy requirements of article III as well as the proposition that the judiciary is not in a position of authority over the other departments of government").

[17] *See* JAY, *supra* note 11.

[18] Allen v. Wright, 468 U.S. 737, 752 (1984) (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)); *see* Stern, *supra* note 8, at 85 (discussing that another important facet of the case and controversy requirement is that it ensures that parties will be zealous advocates before the court).

of government."[19] As Justice Brandeis stated, "The most important thing we do . . . is not doing."[20]

III. "PERSONAL STAKE" IN FEDERAL COURTS

In order to avoid rendering advisory opinions, courts have held that having a personal stake in the outcome of the case is an important requirement for people seeking recourse through the judicial system.[21] Because Hawai'i courts "exercise the federal rule of prudential self-restraint,"[22] it is important to understand how this rule is applied on the federal level.

In order to ensure that federal courts use their power only "as a necessity,"[23] the Supreme Court has declared that the parties need to have a personal stake in the outcome of the case.[24] In *Allen v. Wright*, parents of black public school children alleged that the government was wrongfully giving tax exemptions to racially discriminatory private schools.[25] The Court first held that the parties must have a personal stake in the outcome of the case by showing an "injury in fact" to a cognizable interest.[26] The Court further limited the pool of petitioners to people whose injury was fairly traceable to the alleged unlawful conduct.[27] In *Allen*, the Court found an injury for one of the claims, but it held the injury too attenuated to establish a necessary causal connection.[28] The resulting rule, termed the injury in fact rule, illustrates that the Court refuses to render decisions when parties do not have a direct injury sufficient to prove that they had a personal stake in the case.[29]

---

[19] Flast v. Cohen, 392 U.S. 83, 95 (1968); *see also* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71, 112-13 (2d ed. 1986).

[20] BICKEL, *supra* note 19, at 71 (quoting Justice Brandeis). This oft quoted phrase has become the mantra for judicial restraint. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 158 (2000) (Breyer, J., dissenting). It originates through the many personal communications that J. Louis Brandeis had with Felix Frankfurter during the 1920s and 1930s concerning the issues before the court. *See generally*, ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK (1957).

[21] *See, e.g.*, *Flast*, 392 U.S. at 99; Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992); *Allen*, 468 U.S. at 752.

[22] Avis K. Poai, Recent Development, *Hawai'i's Justiciability Doctrine*, 26 U. HAW. L. REV. 537, 572 (2004).

[23] *Allen*, 468 U.S. at 752.

[24] *Id.* at 770.

[25] *Id.* at 739.

[26] *See id.* at 751.

[27] *Id.*

[28] *Id.* at 756-57.

[29] *See, e.g.*, Muskrat v. United States, 219 U.S. 346 (1911); United States v. Fruehauf, 365 U.S. 146 (1961).

In addition to requiring a cognizable interest, the Supreme Court has also held that for a party to have a personal stake, it must be among the injured.[30] Plaintiffs in *Lujan v. Defenders of Wildlife* alleged that the Endangered Species Act of 1973 caused significant environmental harm.[31] The Court found that the plaintiffs did not have standing, because they did not show how damage to the environment would result in their imminent injury.[32] To have a personal stake, the Court declared, a plaintiff needs more than a "generally available grievance about government."[33]

Allen and *Lujan* illustrate that the Supreme Court has followed the original intent of judicial restraint and separation of powers.[34] In so doing, the Court has limited its decisions to parties who have a personal stake in the outcome of the case and can show an injury in fact.

Unlike federal courts, Hawai'i State courts are not bound by the Constitutional limitation of Article III, and they can depart from the federal standing doctrine.[35] A persuasive argument for Hawai'i to diverge from the stricter federal standard is that the lower standing bar provides more access to the court.[36] By opening up the courts, the judiciary can adjudicate complex public issues with the help of logic and legal precedent.[37] Hawai'i's population has diverse goals and limited resources, requiring compromise and a greater sense of cultural tradition in resolving public disputes. Departing from the stricter federal standard may best serve Hawai'i's diverse interests. However, without a clear line of standing limitations, Hawai'i courts potentially produce negative consequences, including subtly disrupting the separation of state powers.

---

[30] Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

[31] *Id.* at 559.

[32] *Id.* at 564.

[33] *Id.* at 573 (referencing Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922)). Although the definition of personal injury has evolved since *Lujan*, the requirement of showing personal injury to plaintiffs has been echoed in later cases involving standing. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 181-84 (2000) (finding sufficient personal injury to confer standing when a citizen's recreational habits were affected by a company's unlawful discharge of pollutants).

[34] *See, e.g.*, *Lujan*, 504 U.S. at 573; Allen v. Wright, 468 U.S. 737, 752 (1984); *see also* Warth v. Seldin, 422 U.S. 490, 508 (1975).

[35] Poai, *supra* note 22, at 572-73 (citing Helen Hershkoff, *State Courts and the "Passive Virtures": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834 (2001)).

[36] *Id.* at 573.

[37] *See id.* at 574.

IV. THE DOCTRINE OF STANDING IN HAWAI'I

Like the federal courts, Hawai'i courts historically have upheld standing's gate-keeping function and role in maintaining the separation of powers.[38] Although not needing to adopt the federal standard entirely, judges should continue to look to the purpose of the federal doctrine to avoid negative consequences of a compromised judiciary.[39] Because Hawai'i courts have more recently lowered the standing bar, they must take measures to create a clear definition of people's standing to adjudicate their claims. If not, the judiciary could lose its role as a neutral arbiter.

A. Background of Standing in Hawai'i Courts

Historically, Hawai'i courts have not "radically depart[ed] from federal justiciability standards" and generally "exercise the federal rule of prudential self restraint."[40] Similar to the federal system, Hawai'i courts are "concerned with whether the parties have the right to bring suit."[41] Courts believe judicial power can only resolve disputes where there is a separation of power and "to those questions capable of judicial resolution and presented in an adversary context."[42]

Although not bound to follow "every twist and turn" of federal courts,[43] Hawai'i courts have sought guidance from the U.S. Supreme Court.[44] Notwithstanding the important constitutional difference, Hawai'i courts still value the "'prudential rules' of judicial self-governance 'founded in concern about the proper and properly limited role of courts in a democratic society.'"[45] In reaching decisions, Hawai'i "courts still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government."[46]

---

[38] *E.g.*, Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 431, 437-38 (1981).

[39] *See infra* Part VI.

[40] Poai, *supra* note 22, at 572.

[41] Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994) (citing Md. Waste Coal. v. Md. Dep't of Educ., 581 A.2d 60, 61 (Md. Ct. Spec. App. 1990)).

[42] *Life of the Land*, 63 Haw. at 172, 623 P.2d at 437-38; *see also* Bremner v. Honolulu, 96 Hawai'i 134, 28 P.3d 350 (App. 2001).

[43] *Life of the Land*, 63 Haw. at 176, 623 P.2d at 441.

[44] *Id.* at 173, 623 P.2d at 439.

[45] *Id* at 172, 623 P.2d at 438 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

[46] *Id.*

As an alternative to the cases and controversy limitation, Hawai'i courts' touchstone of standing is "the needs of justice."[47] Because Hawai'i is not subject to the cases or controversy limitation, the judiciary is perceived as more serviceable to its people.[48] Although the "needs of justice" standard is less stringent, especially in public interest cases,[49] courts still require that parties have a personal stake sufficient to warrant the invocation of a court's jurisdiction.[50]

To determine whether a party has personal stake in the outcome of the litigation, Hawai'i courts employ a three-part injury in fact test. To satisfy the test, the plaintiff must allege that "'(1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for the plaintiff's injury.'"[51] By using this test the court is not only looking for a "'distinct and palpable injury,' . . . but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct."[52] In summary, the plaintiff must have suffered an actual distinct injury as opposed to one that is "abstract, conjectural, or merely hypothetical."[53]

An example of a case where one party did not have a sufficient personal stake in the outcome of the litigation to establish standing is found in *Bremner v. City & County of Honolulu*.[54] The plaintiff in *Bremner* alleged that a zoning ordinance in Waikīkī would create overcrowding, harm beaches, and decrease the recreational value of the area.[55] The court held that because the plaintiff

---

[47] *Id.* at 176, 623 P.2d at 441. The Court explained that "'complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice.'" *Id.* at 174, 623 P.2d at 439 (quoting Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 473 (1970)).

[48] *See id.* at 172, 623 P.2d at 438; *see also* Richard v. Metcalf, 82 Hawai'i 249, 254 n.12, 921 P.2d 169, 174 n.12 (1996); ASARCO v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . .").

[49] *See* Pele Def. Fund v. Paty, 73 Haw. 578, 614-15, 837 P.2d 1247, 1269 (1972).

[50] *Life of the Land*, 63 Haw. at 172, 623 P.2d at 438 (citing Warth v. Seldin, 422 U.S. 490, 498-99 (1975)).

[51] Bremner v. City & County of Honolulu, 96 Hawai'i 134, 139, 28 P.3d 350, 355 (App. 2001) (quoting Bush v. Watson, 81 Hawai'i 474, 479, 918 P.2d 1130, 1135 (1996)); *see also* Mottl v. Miyahira, 95 Hawai'i 381, 391, 23 P.3d 716, 726 (2001); Akinaka v. Disciplinary Bd. of Haw. Supreme Ct., 91 Hawai'i 51, 55, 979 P.2d 1077, 1081 (1999).

[52] *Life of the Land*, 63 Haw. at 173 n.6, 623 P.2d at 439 n.6 (citations omitted).

[53] Kaho'ohanohano v. State, 114 Hawai'i 302, 321, 162 P.3d 696, 715 (2007); *see also Bremner*, 96 Hawai'i at 139-40, 28 P.3d at 355-56 (citations omitted).

[54] 96 Hawai'i 134, 28 P.3d 350 (App. 2001).

[55] *Id.* at 141-42, 28 P.3d at 357-58.

did not work or participate in any activities in Waikīkī, the plaintiff did not have a sufficient personal stake in the case to confer his standing before the court.[56]

B. Hawai'i Has Adopted a Broad View Regarding Standing in Public Interest Cases

Although plaintiffs must satisfy the injury in fact test,[57] Hawai'i has been willing to adopt "a broad view of . . . 'personal stake' in cases in which the rights of the public might otherwise be denied hearing in a judicial forum."[58] Hawai'i courts have generally lowered standing barriers in declaratory relief actions involving environmental concerns and Native Hawaiian rights.[59] Although relaxing barriers to justice in some cases, the court still "abhor[s] the use of courtrooms as political forums to vindicate individual value preferences."[60]

Notwithstanding more liberal standing barriers, Hawai'i courts have usually followed the federal system and required a traceable injury sufficient to create a personal stake.[61] An illustration of a traceable injury under the Hawai'i's broader "needs of justice" standard is set forth in *Life of the Land v. Land Use Commission*.[62] There, a group of citizens filed a class action seeking declaratory judgment against the state concerning determinations of Hawai'i land use law.[63] The state, along with other significant landholders, countered that citizens did not have an adequate personal stake because they were not owners or even adjoining owners of the reclassified land.[64] The Hawai'i Supreme Court affirmed that standing can include "aesthetic and environmental interests [that] are 'personal' and 'special,' or [those] where a

---

[56] *Id.* at 142-43, 28 P.3d at 358-59.

[57] *See, e.g.*, Akinaka v. Disciplinary Bd. of Haw. Supreme Ct., 91 Hawai'i 51, 55, 979 P.2d 1077, 1081 (1999).

[58] Pele Def. Fund v. Paty, 73 Haw. 578, 593 (1992) (citing Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989)); *see also* Mottl v. Miyahira, 95 Hawai'i 381, 389, 23 P.3d 716, 724 (2001) (explaining that Hawai'i Revised Statutes section 632-1 "interposes less stringent requirements for access and participation in the court process").

[59] *Mottl*, 95 Hawai'i at 393-94, 23 P.3d at 728-29 (citing Ka Pa'akai O Ka'aina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000) & County of Haw., Dept. of Fin. v. Civil Serv. Comm'n of County of Haw., 77 Hawai'i 396, 402 n.5, 885 P.2d 1137, 1143 n.5 (App. 1994)); *see also Paty*, 73 Haw. at 593; Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981); Citizens for Prot. of N. Kohala Coastline v. County of Hawaii, 91 Hawai'i 94, 979 P.2d 1120 (1999); Poai, *supra* note 22, at 562.

[60] Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 284, 768 P.2d 1293, 1299 (1989).

[61] *See, e.g.*, Kaho'ohanohano v. State, 114 Hawai'i 302, 162 P.3d 696 (2007).

[62] 63 Haw. 166, 623 P.2d 431 (1981).

[63] *Id.* at 169, 623 P.2d at 436.

[64] *See id.* at 176-77, 623 P.2d at 441.

property interest is also affected."[65] The judges then rejected the state's argument and held that the citizens' position illustrated a traceable direct injury sufficient to create a stake in the outcome.[66]

In comparison, a recent case illustrates that a causal connection must exist between the conduct and plaintiff's injury: *Sierra Club v. Hawaii Tourism Authority* ex rel. *Bd. of Directors* (*HTA*).[67] There, the Sierra Club filed suit claiming that the Hawai'i Tourism Authority's effort to increase the number of tourists would adversely impact Hawai'i's environment.[68] The court rejected the Sierra Club's argument because the club did not sustain a causal connection between the government's conduct and the alleged injury.[69] In distinguishing *HTA* from other environmental cases where "the conduct challenged concretely affected or threatened the plaintiff's interests,"[70] the court held that Sierra Club's claims were too speculative in its alleged cause and too attenuated in its chain of causation.[71] The court articulated, however, that a plaintiff need not "wait until its concrete interests [are] injured."[72] The plaintiff need only show that it has concrete interests that will be injured if the threat materializes.[73]

Another example where the injury was too hypothetical, so that the petitioners did not have a personal stake in the case, is *Mottl v. Miyahira*.[74] University faculty members sued then-Governor Ben Cayetano and Budget Director Earl Anzai to enjoin the implementation of a legislative act which would reduce University of Hawai'i's expenditures by over six million dollars.[75] The tenured faculty members claimed injury because they had a vested interest in the fiscal condition of the university.[76] The court found that because there was insufficient evidence to demonstrate the loss of money would adversely impact the faculty, the alleged injury was merely "abstract, conjectural, or merely hypothetical."[77] Perhaps also due to the role of the

---

[65] *Id.* at 176, 623 P.2d at 441; *see also* Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982); Ka Pa'akai O Ka'aina v. Land Use Comm'n, 94 Hawai'i 31, 43, 7 P.3d 1068, 1079-80 (2000).

[66] *Life of the Land*, 63 Haw. at 176-77, 623 P.2d at 441.

[67] 100 Hawai'i 242, 59 P.3d 877 (2002).

[68] *See id.* at 251, 59 P.3d at 886.

[69] *Id.* at 254, 59 P.3d at 889.

[70] *Id.* at 252, 59 P.3d at 887.

[71] *Id.* at 254, 59 P.3d at 889.

[72] *Id.* at 252 n.16, 59 P.3d at 887 n.16.

[73] *Id.*

[74] 95 Hawai'i 381, 23 P.3d 716 (2001).

[75] *See id.* at 383-84, 392, 23 P.3d at 718-19, 727.

[76] *Id.* at 392, 23 P. 3d at 727.

[77] *Id.* at 395, 23 P.3d at 730 (citing Akinaka v. Disciplinary Bd. of Haw. Supreme Ct., 91 Hawai'i 51, 55, 979 P.2d 1077, 1081 (1999)). The court in *Mottl* also held that faculty members did not have actual personal stake but were rather "airing a political or intellectual grievance."

legislature in the creation the controversy, the court in *Mottl* exerted judicial restraint.[78]

Hawai'i cases dealing with the issue of standing have demonstrated the delicate balance between judicial restraint and opening the judicial system to service more people. On one hand, *Bremner*, *HTA*, and *Mottl* show the exercise of judicial restraint because the respective plaintiffs did not establish an injury sufficient to create a personal stake in the case.[79] On the other hand, *Life of the Land* demonstrates that a plaintiff could establish a personal stake for broad interests like aesthetics and environmental injury.[80] The resulting Hawai'i approach is apparently less strict than the federal standard,[81] but it is unclear exactly how the Hawai'i standard compares with the federal approach. Without drawing a clear line to define Hawai'i's standard, confusion for legal practitioners and potential problems for the Hawai'i judiciary system will continue.[82]

V. RECENT EXPANSION OF STANDING IN HAWAI'I

Hawai'i courts determine standing by balancing judicial restraint against the public interest in trying the case on the merits.[83] The facts, reasoning, and holdings of *County of Kauai v. Baptiste ex rel. Nakazawa*[84] and *Sierra Club v. Department of Transportation (Superferry)*[85] illustrate the court's expansion of standing. Both cases have received national attention[86] and illustrate the

---

Id. (citing Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982)).

[78] *See Mottl*, 95 Hawai'i 381, 23 P.3d 716; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation . . . is not to be pronounced unconstitutional unless [the facts] . . . preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

[79] *See* Sierra Club v. Haw. Tourism Auth. *ex rel.* Bd. of Directors, 100 Hawai'i 242, 59 P.3d 877 (2002); *Mottl*, 95 Hawai'i 381, 23 P.3d 716; Bremner v. City & County of Honolulu, 96 Hawai'i 134, 28 P.3d 350 (App. 2001).

[80] *See* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 176, 623 P.2d 431, 440-41 (1981).

[81] *Id.* at 172, 623 P.2d at 438 (explaining that although standing priciples are governed by "prudential rules" of judicial self-governance, standing requisites "may also be tempered, or even prescribed, by legislative and constitutional declarations of policy").

[82] *See infra* Part VI.

[83] *See generally* Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982); *Life of the Land*, 63 Haw. 166, 623 P.2d 431; *Mottl*, 95 Hawai'i at 393-94, 23 P.2d at 728-29.

[84] 115 Hawai'i 15, 165 P.3d 916 (2007).

[85] (*Superferry*) 115 Hawai'i 299, 167 P.3d 292 (2007).

[86] *See, e.g.*, Malia Zimmerman, *This Side of Paradise*, WALL ST. J., Sept. 1, 2007, at A6, *available at* http://online.wsj.com/article_print/SB118861126804615425.html; *Superferry Pleads for Permission to Set Sail*, USA TODAY, Oct. 10, 2007, http://www.usatoday.com/travel/news/2007-10-08-superferry-special-session_N.htm?csp=34.

liberalizing trend toward barriers of standing in Hawai'i. The cases also demonstrate the harm to the judiciary in ever expanding the "needs of justice" standard.[87]

A. County of Kauai v. Baptiste[88]

In the last decade, residents of Kaua'i have purportedly suffered from soaring rates of property taxes. Since 1998, the average Kaua'i homeowner experienced a nearly 100% increase in property taxes.[89] An average home that cost $299,000 in 2001 had risen to an average of $635,000 by September 2007.[90]

In an attempt to get relief from property taxes, residents voted for a charter amendment to cap the rising tax.[91] Before the amendment was passed, both the mayor and the council opposed the measure because the loss of revenue would cause significant problems for the county budget.[92]

In its amended complaint, Kaua'i County sued the Mayor, Finance Director, and Kaua'i County Council seeking to declare the Charter Amendment invalid and enjoin officials from implementing the referendum.[93] The amended complaint stated that "[a]n actual controversy has arisen and presently exists between the County and [the] Mayor, Finance Director and Council. The interest[s] in controversy are direct and substantial."[94] The county alleged, "the Charter Amendment language is in direct conflict with the Kaua'i County Charter and the Kaua'i County Code."[95]

---

[87] *Superferry*, 115 Hawai'i at 319, 167 P.3d at 312; *Baptiste*, 115 Hawai'i 15, 165 P.3d 916.

[88] 115 Hawai'i 15, 165 P.3d 916 (2007).

[89] Robert H. Thomas, *Government's Creative Assault on Hawaii Tax Relief*, CPR ONLINE (2007), http://www.cppf.us/CPR/Articles/2007/03MJune07/0507MJuneThomas.html (last visited Mar. 1, 2008).

[90] Zimmerman, *supra*, note 86. As an illustration, a local resident who paid $6000 a year in property taxes in 2000, paid $18,000 a year in 2007. *Id.*

[91] *Baptiste*, 115 Hawai'i at 19, 165 P.3d at 920.

[92] *See id.* at 48-49, 165 P.3d at 949-50 (Acoba, J., dissenting). Seven council members even purchased a newspaper advertisement encouraging citizens to "Vote NO" on the Real Property Tax Charter Amendment. *Id.* at 49, 165 P.3d at 950.

[93] *Id.* at 49-50, 165 P.3d at 950-51 (Acoba, J., dissenting) (quoting Amended Complaint). The county attorney first filed a complaint looking for *guidance* regarding "'legal issues surrounding the proposed . . . amendment,' because 'the people of Kauai need to know whether this amendment is legal and valid.'" *Id.* (quoting Brief of Petitioner-Appellant at 2). Possibly due to the lack of an alleged injury and the appearance of asking the court to issue an "abhorred" advisory opinion, the attorney general subsequently amended the original complaint. *See id.* at 19, 165 P.3d at 920.

[94] *Id.* at 50, 165 P.3d at 951 (Acoba, J., dissenting) (quoting Amended Complaint ¶ 25.

[95] *Id.* (quoting Amended Complaint ¶ 26 (emphasis omitted).

The corresponding answer then *admitted* nearly all the allegations in the complaint.[96] The answer admitted that the Charter Amendment was in direct conflict of the Kaua'i County Charter and the Kaua'i Code. The answer also admitted the county was entitled to a declaratory judgment.[97]

The court performed legal gymnastics in establishing standing.[98] The majority opinion asserted that, contrary to the amended complaint, the County was not alleging its own injury but was instead alleging injury to the County Council.[99] "[I]t is clear from a plain reading of the allegations in the first amended complaint that the [County] has brought the instant case on behalf of the County Council."[100] Since that conclusion would put the County on both sides of the case, the court then dismissed the County Council as a dispensable defendant, so the County would not be suing itself.[101] After moving the parties around, the court then was able to adjudicate on the merits of the case.

Four Kaua'i landowners entered the suit as intervenors contending that the government parties of the case did not have a sufficient personal stake.[102] The intervenors argued that there was no actual controversy because the parties were not adversaries with antagonistic claims;[103] the same attorneys wrote both the answer and the complaint.[104]

The court was not persuaded by the intervenors' argument and held that the parties did have personal stake in the outcome. The majority reasoned that a politician, no matter how subjective the inclinations, has a personal stake through his role of fairly representing the rights of his constituents.[105] The parties were not collusive because the government adequately represented the

---

[96] *Id.* at 50-51, 165 P.3d at 951-52 (Acoba, J., dissenting).

[97] *Id.* at 51-52, 165 P.3d at 952-53 (Acoba, J., dissenting).

[98] *See id.* at 35-36, 165 P.3d at 936-37.

[99] *Id.* at 29, 165 P.3d at 930.

[100] *Id.* at 28, 165 P.3d at 929.

[101] *Id.* at 35, 165 P.3d at 936.

[102] *See id.* at 23, 165 P.3d at 924.

[103] *See id.*

[104] Brief of Petitioner-Appellant at 5 n.3, County of Kauai *ex rel.* Nakazawa v. Baptiste, 115 Hawai'i 15, 165 P.3d 916 (2007) (No. 27351); *see also* Transcript (unofficial) of Oral Argument at 5, *Baptiste*, 115 Hawai'i 15, 165 P.3d 916 (No. 27351), *available at* http://www.inversecondemnation.com/inversecondemnation/files/Transcript_HAWSCT_2_15_2007.pdf. In oral arguments, the intervenors argued that the complaint and answer were done in the same office of seven people. *Id.* at 8.

[105] *Baptiste*, 115 Hawai'i at 32, 165 P.3d at 933; *see also* United Pub. Workers, AFSCME, Local 646 v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002); Golden Gate Bridge & Highway Dist. v. Felt, 5 P.2d 585 (Cal. 1931).

interests of the taxpayers despite the subjective intent and legal interests of the parties.[106]

Justice Acoba, joined by Justice Duffy, wrote a harsh dissent accusing the majority of subverting the judicial process. Justice Acoba claimed that the majority "manipulat[ed] the lawsuit so as to create a controversy that did not in fact exist" at any stage of the litigation.[107] The dissent asserted that since "both the County and [the mayor and finance director] 'desire precisely the same result,'"[108] no controversy existed. Absent any controversy, any ruling on the merits would be an abhorred advisory opinion.[109] Even with the legal gymnastics performed by the majority, the amended answer alleviated any doubts regarding the collusion of the parties by *admitting* to nearly all the allegations of the complaint.[110] The dissent lastly declared that "[for] the majority to reach the merits suggests an intrusiveness beyond the appropriate and reasoned exercise of judicial power."[111]

B. The Superferry Case[112]

Another recent case dealing with the issue of standing and creating a large local stir is *Sierra Club v. Department of Transportation* (*Superferry*).[113] The Hawai'i Superferry project involves a new inter-island ferry service between several islands of Hawai'i, using harbor facilities on each island.[114] After more than three years of favorable negotiations with the state government, Superferry entered into an agreement with the state legislature and the

---

[106] *See Baptiste*, 115 Hawai'i at 35-36, 165 P.3d at 936-37. Many have questioned the majority's position in light of both the Mayor and the County Council opposing the amendment and having the same attorneys preparing both sides of the case. *See, e.g.*, Walter Lewis, *Ohana Amendment Decision Result of Classic Hawai'i Politics*, THE GARDEN ISLAND, Aug. 25, 2007, at A4, *available at* http://www.kauaiworld.com/articles/2007/08/25/opinion/edit02.txt; Zimmerman, *supra* note 86.

[107] *Baptiste*, 115 Hawai'i at 48, 165 P.3d at 949 (Acoba, J., dissenting).

[108] *Id.* at 49, 165 P.3d at 950 (Acoba, J., dissenting) (quoting Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971)).

[109] *See id.* at 60, 165 P.3d at 961 (Acoba, J., dissenting); *see also* Bremner v. Honolulu, 96 Hawai'i 134, 28 P.3d 350 (App. 2001).

[110] *See Baptiste*, 115 Hawai'i at 50, 165 P.3d at 951 (Acoba, J., dissenting).

[111] *Id.* at 60, 165 P.3d at 961 (Acoba, J., dissenting). The intervenors argued that despite numerous opportunities to do so, the County never alleged an injury and instead simply sought "guidance" from the court. Transcript (unofficial) of Oral Argument at 39-41, *Baptiste*, 115 Hawai'i 15, 165 P.3d 916 (No. 27351), *available at* http://www.inversecondemnation.com/inverse condemnation/files/Transcript_HAWSCT_2_15_2007.pdf.

[112] Sierra Club v. Dep't Transp. (*Superferry*), 115 Hawai'i 299, 167 P.3d 292 (2007).

[113] *Id.*

[114] *Id.* at 305, 167 P.3d at 298. The Hawai'i Superferry is a sea vessel with the capacity to carry up to 866 passengers and 282 cars or trucks, or a combination of twenty-six trucks/buses and sixty-five cars. *Id.*

Department of Transportation ("DOT") concluding that several improvements to the Kahului Harbor on Maui were necessary.[115] In reaction to these extended negotiations, community and environmental groups opposing the improvements filed a lawsuit alleging various injuries.[116]

The plaintiffs in *Superferry* alleged injury because the large ship carrying cars and people from island to island would increase vehicle traffic, damage reefs, endanger sea animals, limit access and use of places to surf, and have other adverse impacts.[117] The court cited various affected individuals including, for example, Gregory Westcott, who surfs in an area near the Superferry's Maui harbor.[118] Mr. Westcott was "'concerned about the effects of Hawai'i Superferry upon the air and water quality in Kahului Harbor and the effects of expanded security zones on limiting access and use of the Kahului Harbor as a surf site.'"[119]

The unanimous Hawai'i court articulated that "clearly . . . demonstrated recreational and aesthetic interests" have been protected in past cases.[120] The court then held that the public interest groups had a personal stake in the outcome of the litigation since they were deemed to have "concrete interests in the Kahalui Harbor area and Superferry's operation there."[121] This holding contrasts with the United States Supreme Court's holding in *Lujan v. Defenders of Wildlife*, that the likelihood of environmental harm was not sufficient to claim personal injury.[122] As general attitudes towards the environment have changed, Hawai'i's "needs of justice"[123] standard has resulted in the firm decision that environmental injury is sufficient to establish a personal stake.[124]

---

[115] *Id.*

[116] *Id.* Plaintiffs included The Sierra Club, a California non-profit corporation; Maui Tommorrow, Inc., a Hawai'i non-profit corporation; and the Kahului Harbor Coalition, an unincorporated association. *Id.*

[117] *Id.* at 328-29, 167 P.3d at 321-22.

[118] *Id.* at 330, 167 P.3d at 323

[119] *Id.*; *see also* Mottl v. Miyahira, 95 Hawai'i 381, 391, 23 P.3d 716, 726 (2001) ("Claims of harm to public trust property is another area where courts are expanding standing.").

[120] *Superferry*, 115 Hawai'i at 323, 167 P.3d at 330; *see also* Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982); Citizens for Prot. of N. Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 101, 979 P.2d 1120, 1127 (1999); Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 70, 881 P.2d 1210, 1216 (1994).

[121] *Superferry*, 115 Hawai'i at 331, 167 P.3d at 324.

[122] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).

[123] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981).

[124] *See, e.g., Citizens for Prot. of N. Kohala*, 91 Hawai'i at 100-01, 979 P.2d at 1126-27. Avis Poai argues that "[t]he most persuasive argument for environmental standing is that it has been constitutionally recognized." Poai, *supra* note 22, at 563 n.214 (citing HAW. CONST. art. XI, § 9). Some believe that the federal judiciary has also recently extended standing for environmental cases. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 181-84 (2000).

Although unsuccessful, the state attempted to analogize the *HTA* case to contend that the appellants' alleged injury was insufficient to confer standing.[125] The state asserted that the Sierra Club relied only on a chain of conjecture to show that the project would increase traffic, or limit the recreational use of areas beyond those already being used for commercial purposes.[126]

The court rejected the state's argument and distinguished the facts from *HTA*. Unlike *HTA* where the Sierra Club alleged injury to the whole environment, the petitioners in *Superferry* "established a geographic nexus to a particular area—the Kahului Harbor—which is the direct site of the challenged activity."[127] The court also found a causal connection between the DOT's decision to make harbor improvements and the asserted injury. "[T]he potential harms alleged . . . do not depend, as in [*HTA*], on the precise number of individuals who choose to use the Superferry service, but on the nature of the operation itself."[128] Although both cases involved the impact of increased traffic and the likelihood of foreign species to be spread in Hawai'i,[129] the court may have been partly persuaded in *Superferry* by a well-orchestrated public outcry.[130]

The court further distinguished *HTA* by claiming that plaintiffs in *HTA* alleged injuries to the environment whereas the plaintiffs in *Superferry* alleged injuries to a group of people.[131] Although this distinction provides plaintiffs with a personal stake in the outcome, it also effectively broadens the doctrine of standing. Organizations like the Sierra Club, which have an extensive network of members across the state, can likely first recognize an unfavorable development or law. The group can then call on one of its many members who could possibly have a personal nexus to an area to allege an injury. By finding one member among the many, standing likely will be found.

---

[125] *Superferry*, 115 Hawai'i at 331-32, 167 P.3d at 324-25.

[126] *Id.* at 332, 167 P.3d at 325.

[127] *Id.* at 333, 167 P.3d at 326.

[128] *Id.* at 311, 167 P.3d at 304.

[129] *See id.*; Sierra Club v. Haw. Tourism Auth., 100 Hawai'i 242, 251, 59 P.3d 877, 886 (2002).

[130] *See* Jan TenBruggencate & Rick Daysog, *Surfers Block Hawaii Superferry*, USA TODAY, Aug. 28, 2007, http://www.usatoday.com/travel/news/2007-08-27-hawaii-superferry_N.htm; Tom Finnegan, *Kauai Protestors Keep Ferry from Dock*, HONOLULU STAR-BULL., Aug. 28, 2007, at A6.

[131] *Superferry*, 115 Hawai'i at 322, 167 P.3d at 315 ("[A]lthough plaintiffs must show that some environmentally-related interest was injured, the ultimate inquiry depends on injury to the plaintiffs themselves, not the environment."); *see also Haw. Tourism Auth.*, 100 Hawai'i at 271, 59 P.3d at 906 (Moon, J., dissenting) (stating that organizational plaintiff must show that its "*plaintiff members*—not the environment—have been or will be harmed").

C. Expanding the Doctrine of Standing

Baptiste and *Superferry* each deal with standing, and with the issue of whether parties have a personal stake in the outcome of a case.[132] Although the courts' holdings in both cases easily fall under the "the needs of justice" standard,[133] both have been criticized for expanding Hawai'i's standing doctrine, and blurring what it means for a party to have a personal stake in the outcome.[134]

The court rearranged the facts in *Baptiste* to create standing and, thus, hear the merits of the case.[135] *Baptiste* held that politicians, even though they may subjectively desire the same result as their opposing counsel, have a sufficient personal stake in the outcome of the litigation to have standing.[136] It appears that the court was willing to tolerate some fiction because the case was being fully litigated on the merits due to the presence of the intervenors.[137] Perhaps without a full understanding of the law, taxpayers are left wondering how, in a democratic system, the judiciary can quash their vote.[138]

The court in *Superferry* held that the state was immediately threatened by the decision to proceed with harbor improvements in anticipation of the Superferry.[139] The court distinguished *HTA*, stating that the nature of the Superferry caused enough injury to aesthetic and recreational interests as to confer standing.[140] To a large extent, by claiming a geographic nexus between the injury and a specific spot people enjoyed, the Sierra Club was able to establish standing in *Superferry*.[141] Because recreational and aesthetic interests are hard to measure, the state must almost presume these types of injury to be true, merely because parties are in court asserting a claim.[142] Although *Superferry*, by itself, may not have actually expanded existing common law, public attention toward the case provided broad community

---

[132] *See* County of Kauai *ex rel.* Nakazawa v. Baptiste, 115 Hawai'i 15, 26, 165 P.3d 916, 927 (2007); *Superferry*, 115 Hawai'i at 321, 167 P.3d at 328.

[133] *See* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981).

[134] *See generally*, Robert H. Thomas, *Superferry EIS Case Summary pt. II: Throwing Open the Barn Door After the Horses Have Been Let Out*, Inversecondemnation.com, Sep. 30, 2007, http://www.inversecondemnation.com/inversecondemnation/2007/09/superferry-ei-1.html (last visited Mar. 1, 2008).

[135] *See Baptiste*, 115 Hawai'i at 29-35, 165 P.3d at 930-36.

[136] *Id.* at 32, 165 P.3d at 933.

[137] *See id.* at 29-35, 165 P.3d at 930-36.

[138] *See, e.g.*, Lewis, *supra* note 106.

[139] Sierra Club v. Dep't Transp. (*Superferry*), 115 Hawai'i 299, 321, 167 P.3d 292, 328 (2007).

[140] *See id.*

[141] *Id.* at 333, 167 P.3d at 326.

[142] Thomas, *supra* note 134.

support, which may result in easing the burden of establishing standing in future environmental disputes.

VI. POSSIBLE IMPLICATIONS OF EXPANDING STANDING

From the early beginnings of the United States, the intent of limiting standing to "cases and controversies" was to encourage the separation of powers within the federal government and leave larger political decisions to those who are more accountable to the public.[143] The doctrine of standing functioned as a gatekeeper to distinguish actual justifiable controversies from advisory opinions.[144] Although Hawai'i does not follow the "twists and turns" of the federal doctrine of standing, Hawai'i courts have used the federal standard as a guiding principle.[145] Having the federal standard recast into the more vague term of "the needs of justice,"[146] the local judiciary currently has subjective discretion in deciding what exactly its view of justice requires.[147] Many question the future limits, if any, of standing in Hawai'i.[148]

A. Negative Implications of Expanding Standing in Hawai'i

If standing were to encompass any dispute where the needs of justice may be reasonably required, standing would no longer serve the original purpose of judicial restraint. As one attorney recently noted, "[t]he difficulty with a standard as amorphous as 'the needs of justice' . . . is that it is nearly impossible to apply in a way consistent with the standing doctrine's supposed gate keeping function."[149] In continuing to expand standing and believing that justice is best served by trying cases on their merits, the legal community must continuously question the position of the outer limits of standing. Recent cases illustrate that the court has been willing to go to great lengths to find standing, including changing around the parties in order to find an injury.[150]

As the sphere of standing has expanded in the last thirty years,[151] the outer bounds of what it means to have a personal stake in the litigation have broadened. Depending on the subject of the litigation and its perception of the

---

[143] *See generally*, BICKEL, *supra* note 19.

[144] *See generally* Allen v. Wright, 468 U.S. 737 (1984); Muskrat v. United States, 219 U.S. 346 (1911).

[145] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 173, 623 P.2d 431, 439 (1981).

[146] *Id.* at 176, 623 P.2d at 441.

[147] *See* Mottl v. Miyahira, 95 Hawai'i 381, 391, 23 P.3d 716, 726 (2001).

[148] *See, e.g.*, Thomas, *supra* note 134.

[149] *Id.*

[150] *See* County of Kauai *ex rel.* Nakazawa v. Baptiste, 115 Hawai'i 15, 32-33, 35, 165 P.3d 916, 933-34, 36 (2007).

[151] *See Mottl*, 95 Hawai'i at 391, 23 P.3d at 726.

public interest involved, a court might not exercise judicial restraint and may lower the barriers of standing.[152] In light of recent cases, litigators may be left asking themselves if it is worth the effort to contest standing when dealing with certain subjects. It may be more prudent to not analyze standing and just pursue the merits of the case because justice will likely allow standing under the broadened interpretations.

Expanding standing puts courts in the forefront of the public's perception of many political processes.[153] In deciding cases requiring public policy questions beyond their legal scope, the courts weaken their legitimacy as neutral arbiters.[154] By leaning more to advisory opinions, the courts also open themselves to more criticism and pressure from the popular whims of Hawai'i's non-legal community.[155] Further, lowering the barriers to justice provides greater opportunity for judicial activism and creates a danger of having the law follow the preferences of judges not directly accountable to the electorate.[156]

Because the "needs of justice" standard allows a broader spectrum of people to raise a claim, courts may become merely another venue for public policy debates after the legislature has failed a particular interest group.[157] If the plaintiffs in *Superferry* can point to the perceived harm of sea animals or the disruption of surfing spots to establish standing, any group should be able to assert a specific interest in some environmental or aesthetic harm caused by another party. As many Hawai'i legal issues involve real estate and the environment, the court potentially opens itself up to hundreds of issues previously left only to the legislature. The judicial branch will expose themselves to the sway and pressure of various special interest groups vying for public policy decisions, just as the legislative and executive branches are

---

[152] *See, e.g.*, Citizens for Prot. of N. Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 100, 979 P.2d 1120, 1127 (1999) ("In so holding, we explained that, although standing principles are governed by 'prudential rules' of judicial self-governance, standing requisites 'may also be tempered, or even prescribed, by legislative and constitutional declarations of policy.'") (quoting Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981)).

[153] *See, e.g.*, Jaymes Song, *Hawai'i Superferry Faces Waves in Court*, ABC NEWS, Aug. 28, 2007, http://abcnews.go.com/Travel/wireStory?id=3530041 (last visited Mar. 1, 2008); Finnegan, *supra* note 130.

[154] *See* Thomas, *supra* note 134.

[155] *See* SHIMON SHETREET, THE ROLE OF COURTS IN SOCIETY 350 (1988); Lewis, *supra* note 106.

[156] *See generally*, BICKEL, *supra* note 19.

[157] *See, e.g.*, Dan Nakaso, *Protests Send Superferry Back to Port*, USA TODAY, Aug. 27, 2007, http://www.usatoday.com/news/nation/2007-08-27-hawaii-ferry_N.htm; Finnegan, *supra* note 130.

influenced by special interest groups.[158] Finally, the court is potentially opening the metaphorical floodgates and inundating itself in disputes that may or may not have an actual controversy.[159]

B. Arguments for Lowering the Barriers of Standing

In contrast, arguments for allowing a broader definition of standing emphasize that state courts would be more serviceable to the public if they take on a more policy-developing function.[160] Critics of the federal standing requirements assert that liberalized rules of standing encourage more people to come to court and plead their case.[161] People who may not have a legal alternative with higher barriers are now in a position to attain results in the judiciary.[162] Just because the injured groups do not have standing under the traditional notions does not mean that the groups do not have in actuality "a personal stake in the outcome."[163]

Although many believe that opening standing would overwhelm the state courts, critics deny that the current amount of public interest litigation is socially optimal.[164] Societal wrongs which have previously gone without a legal remedy, especially involving the public interest, now have an opportunity to be addressed.

Seeing the public need, Hawai'i courts may also justly desire to decide more cases on merit. In assessing the importance of policy issues and whether the litigants are adverse, state court judges who have experience have an opportunity to decide if there is an actual case or controversy.[165] State and local judges may actually enhance policy formation as they usually have a better opportunity to see the contention and balance the competing interests.[166]

The critics of the more stringent federal system bring several valid claims. Their arguments fail, however, because they infringe on the strongest rationale

---

[158] *See* Michael A. Scaperlanda, *In Defense of Representative Democracy*, 54 OKLA. L. REV. 38, 45 (2001).

[159] *See* McBride, *supra* note 2, at 203.

[160] *See* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981); *see also* Richard v. Metcalf, 82 Hawai'i 249, 254 n.12, 921 P.2d 169, 174 n.12 (1996).

[161] Poai, *supra* note 22, at 572-74. In her article, Avis Poai contends that the State of Hawai'i should lower standing barriers to allow more access to the court and permit the court to develop public values. *Id.*; *see also* Stern, *supra* note 8, at 89 ("[Prudential restrictions] are not mandated by the Constitution, and it would be foolhardy to invoke a self-imposed rule when the purposes of the rule would not be served by doing so.").

[162] *See generally* Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1972).

[163] *See* Stern, *supra* note 8, at 85.

[164] *See* McBride, *supra* note 2, at 203 ("Rather than burden the system, reassessing state standing requirements may instead accelerate state courts' participation in dispute resolution.").

[165] *See id.*

[166] *See id.* at 203-04.

behind the core ideals of standing: the separation of powers.[167] In allowing courts to act as institutions that create public policy, courts weaken their legitimacy as neutral arbiters and are more susceptible to corruption.[168]

As Hawai'i's doctrine of standing attempts navigate a difficult line between being both serviceable to the people, and upholding the principles of the separation of powers, the court must continually exercise caution not to significantly tip the balance in one direction or the other. In the interest of the separation of powers in state government, courts must, at a minimum, not continue to expand standing, nor the definition of who has a personal stake in the outcome of a case. To avoid potentially disrupting the separation of state powers, courts must take measures to create a clear definition of which parties have standing.

VII. CONCLUSION

In an attempt to be more serviceable to the public, Hawai'i courts have departed from the strict federal standing doctrine and created a lower standard for plaintiffs to meet in order to invoke the courts' authority. By leaving the standard as an ambiguous "needs of justice," however, the court creates a slippery slope.

Ever-expanding the scope of standing and increasing the number of people who have a personal stake in litigation can lead to drastic consequences. These negative results include increasing the number of frivolous lawsuits clogging the courts, creating a political forum which is not directly accountable to the public, and causing interruptions to the Hawai'i economy and its sub-markets. Fundamentally more important, by expanding the doctrine of standing and hearing a larger spectrum of controversies, the court is blurring the separation of branches of government. The court, in effect, takes away important public decisions from legislators by legislating important decisions from the bench. In the very cases where the public plays an active role, judges are perceivably taking those cases away from governmental bodies accountable to that public. By not using its fundamental role "in the last resort,"[169] the court could be tempted to disrupt the separation of powers.

Kevin Hallstrom[170]

---

[167] *See* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[F]ederal courts may exercise power only . . . when adjudication is 'consistent with a system of separated powers . . . .'") (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

[168] *See* Scaperlanda, *supra* note 158, at 45 (citation omitted).

[169] *Allen*, 468 U.S. at 752 (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

[170] J.D. Candidate 2009, William S. Richardson School of Law, University of Hawai'i at Mānoa.

Public Beach Access: A Right for All? Opening the Gate to Iroquois Point Beach

I. INTRODUCTION

> At a time when noise, crowds, dirt, crime, heat, traffic, and smog make life unpleasant for so many people, the availability of an escape to nature to seek relaxation and renewal of creative energies takes on a new dimension. Recreation in natural surroundings can no longer be considered a luxury for those who can best afford it; it is a social necessity.[1]

Spending time at the beach has long been a favorite pastime for the people of Hawai'i. Surfing, paddling, fishing, swimming, sunbathing and barbequing by the beach are but a small list of numerous ways one could enjoy a stress-free weekend with family and friends. In addition to being important for general recreational purposes, beaches are also fundamental to the lives of many locals.[2] Beaches are, indeed, one of Hawai'i's most important assets.[3]

That the beaches are "open for all" is a norm in this state; they "belong to no one and everyone."[4] But problems involving public beach access are not simple, for they involve a clash of two equally compelling rights: the rights of public to access the beaches, and the rights of landowners to enjoy their private property undisturbed.[5] Over the years, Hawai'i courts have struggled to preserve the public's beach access rights by utilizing various approaches.[6] Some questions, however, remain unanswered. What happens when the traditional framework of "the public vs. private owners" is distorted by the involvement of a third-party; the United States Navy, for instance?

Such was the case at the beach fronting the Iroquois Point development on O'ahu ("Iroquois Point Beach"),[7] which was closed to non-residents from

---

[1] Steve A. McKeon, *Public Access to Beaches*, 22 STAN. L. REV. 564, 564 (1970); *see also* Michael Anthony Town & William Wai Lim Yuen, *Public Access to Beach in Hawaii: "A Social Necessity,"* 10 HAW. B.J. 3, 5 (1973). More than thirty-eight years later, the quote remains applicable.

[2] Town & Yuen, *supra* note 1, at 5. "The beaches of Hawai'i are a functional part of the life of the people of Hawai'i. Beaches provide access to the water for fishing, surfing, swimming, skindiving, bathing, sailing and just plain relaxation." *Id.*

[3] *See* Valerie J. Lam, *Beach Access: A Public Right?*, 23 HAW. B.J. 65 (1991).

[4] Lee Cataluna, *Let Public into Iroquois Point Beach, Just Not by Much*, HONOLULU ADVERTISER, July 8, 2007, http://the.honolulu advertiser.com/article/2007/Jul/08/ln/FP707080360.html.

[5] Lam, *supra* note 3, at 65.

[6] *See* discussion *infra* Part III.

[7] Iroquois Point is located on the southwestern shore of O'ahu, near the entrance channel to Pearl Harbor.

2003, but will open to the public starting April 15, 2008, under a settlement agreement.[8] The problem facing Iroquois Point Beach was not an ordinary beach access case. The issue was further complicated by an important "exception" to the rules of public beach access: military ownership.

Although all beaches in Hawai'i are owned by the state,[9] the federal government has created exemptions known as naval defensive sea areas ("NDSAs") to serve the country's interests in national defense.[10] NDSAs are established by the President to protect coastal military facilities,[11] and within these areas, the National Homeland Security Laws override the state law, unless the military has relinquished its rights.[12] In these areas, the public is generally denied access to the beach.

But the issue at Iroquois Point does not end there. In 2003, the Navy signed a sixty-five year lease with Fluor Hawai'i L.L.C., which partnered with the Hunt Development Group's Hawai'i Division ("Hunt"), forming a joint venture known as Ford Island Properties that created a members-only beach club ("Iroquois Point Island Club").[13] Originally military housing, the units were leased to the general public starting 2003.[14] The result: access to Iroquois Point Beach was denied to "non-residents," while other civilian "residents" were granted the rare benefit of a private beach.

---

[8] Gordon Y.K. Pang, *Lawmakers Debate Iroquois Beach Access*, HONOLULU ADVERTISER, July 7, 2007, at A29 [hereinafter Pang, *Lawmakers Debate Iroquois Beach Access*], *available at* http://the.honolulu advertiser.com/article/2007/Jul/07/ln/FP707070341.html. Access to Iroquois Point Beach was denied to the general public, with the exception of residents of the Iroquois Point Island Club, which started leasing its units to the public in 2003. *Id.* Here, the term "resident" refers to a resident of Iroquois Point Island Club, and not to a resident of the state.

The issue settled, however, in March 2008, as Hunt announced its plan to allow public access to a designated area of the beach upon receiving one-day passes at the front gate. Gordon Y.K. Pang, *Plan Will Open Iroquois Point Beach to the Public*, HONOLULU ADVERTISER, Mar. 19, 2008 [hereinafter Pang, *Plan Will Open Iroquois Point Beach to the Public*], http://the.honoluluadvertiser.com/article/2008/Mar/19/br/hawaii80319045.html; Gene Park, *Iroquois Point Beach to Open to Public*, HONOLULU STAR-BULLETIN, Mar. 20, 2008, http://starbulletin.com/2008/ 03/20/news/ story09.html.

[9] Town & Yuen, *supra* note 1, at 5.

[10] Jeffrey C. Good, *State-Federal Conflict over Naval Defensive Sea Areas in Hawaii*, 14 U. HAW. L. REV. 595, 595 (1992).

[11] *Id.* at 596.

[12] *See id.*

[13] Op-Ed., *Beach-Access Accord Needed at Iroquois Point*, HONOLULU ADVERTISER, July 8, 2007, http://the.honoluluadvertiser.com/article/2007/ Jul/08/op/FP707080333.html; *see also* Pang, *Lawmakers Debate Iroquois Point Beach Access*, *supra* note 8.

[14] Gordon Y.K. Pang, *Public Access in Sight at Iroquois Point Beach*, HONOLULU ADVERTISER, Sept. 10, 2007, at A2 [hereinafter Pang, *Public Access in Sight at Iroquois Point Beach*].

Hunt claims that because the property is military-owned, Iroquois Point Island Club is exempt from the state beach access law.[15] But the purpose of the military exception to the beach laws of Hawai'i was for national defense, not to provide civilian residents with private access to the beach. It is neither sensible nor fair to conclude that the majority of the public can be denied beach access simply because Iroquois Point Island Club's owner happens to be the Navy.

This paper first revisits the history of beach access law of Hawai'i, analyzing the various ways courts have attempted to preserve public beach access. Then it applies these theories to resolve the wrinkle in the law currently present at Iroquois Point Beach.

In Part II, this paper will briefly present the history of public beach access issues in the State of Hawai'i, to outline the historical framework and identify trends. Part III will provide an overview of the available legal theories that provide the basis of public beach access. Part IV summarizes the history of Iroquois Point Beach, and Part V applies legal theories to the issue at Iroquois Point Beach. Possible alternative solutions will be discussed in Part VI, in the event that the aforementioned legal theories fail. Finally, Part VII of the paper will conclude by affirming the courts' continuing efforts to preserve the public's beach access rights in Hawai'i, and will suggest that this trend will likely support public access to Iroquois Point.

II. A BRIEF HISTORY OF PUBLIC BEACH ACCESS IN HAWAI'I

All beaches in Hawai'i are owned by the State, with the exception of the NDSAs, which are owned by the federal government.[16] As demonstrated by legislation and a line of cases, the State has been relatively supportive of granting its people rights of beach access. In 1968, the Supreme Court of Hawai'i in *In re Ashford*[17] held that the boundary between private property and public beach along the coastline was "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves."[18] This holding has allowed the public more beach area compared to many other jurisdictions where the boundary is drawn by the

---

[15] Pang, *Lawmakers Debate Iroquois Beach Access*, *supra* note 8; *see also*, Op-Ed., *Civilian Beach Access Can Be Fair At Iroquois*, HONOLULU ADVERTISER, Sept. 11, 2007, http://the.honoluluadvertiser.com/article/2007/Sep/11/op/hawaii709110301.html.

[16] *See* Town & Yuen, *supra* note 1, at 5; Lam, *supra* note 3, at 67.

[17] 50 Haw. 314, 440 P.2d 76 (1968).

[18] *Id.* at 315, 440 P.2d at 77.

mean high water mark.[19] Five years later, the court in *County of Hawaii v. Sotomura*[20] stated that "[p]ublic policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[21]

More recently, in 2006, the Supreme Court of Hawai'i reaffirmed the decision of *Ashford* regarding the definition of "shoreline" in *Diamond v. State*,[22] ultimately unifying such definitions of the state statutes, common law, and administrative rules.[23]

Not only have the courts in Hawai'i asserted the importance of public use and ownership of the beach areas, the courts have further acknowledged the importance of the public's *access* to these beaches, as exemplified by the holding of the Hawai'i Supreme Court: "[t]he ability to get to a recreational area is as vital for enjoying it as having it in its natural condition."[24]

Furthermore, the State has enacted legislation in favor of public beach access.[25] Together, the statutory laws and the common laws of Hawai'i provide a strong basis for supporting a claim for access rights to the beach.

III. LEGAL THEORIES PRESERVING PUBLIC BEACH ACCESS

Courts in many jurisdictions have applied various doctrines in order to preserve or grant the public access to beaches across the nation. While some are more practical than others, it is worthwhile to summarize the different theories available.

A. Prescriptive Easements

Acquiring public beach access by prescriptive easement presents difficulty because such rights are personal. Generally, easements are not granted to "the public as a whole."[26] However, there are examples in which courts have successfully granted beach access to the public by use of prescriptive easements. In 1964, the Texas Court of Civil Appeals granted public access

---

[19] Town & Yuen, *supra* note 1, at 5; *see also* Catherine E. Decker, In re Banning*: The Hawaii Supreme Court Keeps Hawaiian Beaches Accessible*, 1 OCEAN & COASTAL L.J. 97 (1994).

[20] 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973).

[21] *Id.* at 182, 517 P.2d at 61-62.

[22] 112 Hawai'i 161, 145 P.3d 704 (2006).

[23] Simeon L. Vance & Richard J. Wallsgrove, Casenote, *More than a Line in the Sand: Defining the Shoreline in Hawai'i after* Diamond v. State, 29 U. HAW. L. REV. 521, 522 (2007).

[24] Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982).

[25] *See, e.g.*, HAW. REV. STAT. Ch. 171 (1993 & Sup. 2007); HAW. REV. STAT. Ch. 115 (1993 & Supp. 2007); *see also* Coastal Zone Management Act, HAW. REV. STAT. §§ 205A-2(b)(1)(A), (c)(1)(B)(iii) (2001).

[26] David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 18 A.L.I.-A.B.A. 699, at 702 (1999).

to a beach based on easement by prescription in *Seaway Co. v. Attorney General.*[27] The following year, a similar approach was taken by the New Hampshire Supreme Court, which held in *Elmer v. Rodgers*[28] that the public had acquired the right to access the shore of a lake by prescription.[29] In 1977, the Ninth Circuit Court of Appeals held, in *Jones v. Halekulani Hotel, Inc.*,[30] that a seawall fronting a Hawai'i hotel was a public easement created by prescription.[31]

The doctrine is based on the theory that one's use of land for more than a certain period of time infers that the use is rightful.[32] To establish easement by prescription, the public must show that the use of the property was: (1) adverse; (2) continuous and uninterrupted; (3) open and notorious; and (4) exclusive over the statutory period.[33] Like most jurisdictions, courts in Hawai'i apply the statute of limitation period for adverse possession to the acquisition of prescriptive rights,[34] under which the required time period is twenty years.[35]

The doctrine of prescriptive easement has been controversial for a number of reasons, including its applicability to the general public. Authorities are split on whether the public can acquire access rights by prescriptive easement.[36] As demonstrated by *Halekulani*, courts of Hawai'i may be more likely to grant access as long as the "constant, uninterrupted, and peaceful [public use]"[37] requirements are met.

B. Implied Dedication

Defined as a "deliberate or intentional appropriation of land by the owner to the public,"[38] dedication of land could either be express, when the dedicator makes an oral or written declaration, or implied, when the owner's conduct reasonably implies his or her intention to dedicate.[39]

---

[27] 375 S.W.2d 923 (Tex. Civ. App. 1964).

[28] 214 A.2d 750 (N.H. 1965).

[29] *Id.* at 753.

[30] 557 F.2d 1308 (9th Cir. 1977).

[31] *Id.* at 1310.

[32] 2 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 8.44, 264 (J. Casner ed., 1952).

[33] Tagami v. Meyer, 41 Haw. 484, 487 (1956).

[34] Campbell v. Hipawai Corp., 3 Haw. App. 11, 639 P.2d 1119 (1982).

[35] HAW. REV. STAT. § 657-31 (2007); *see also id.* § 669-1.

[36] Lam, *supra* note 3, at 75.

[37] Jones v. Halekulani Hotel, Inc., 557 F.2d 1308, 1310 (9th Cir. 1977).

[38] BLACK'S LAW DICTIONARY 412 (6th ed. 1990).

[39] WILLIAM E. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 115, 283-84 (3d ed. 1965).

In Hawai'i, the principle was adopted in 1889, in *The King v. Cornwall*,[40] which established the requirements of implied dedication as: (1) the owner's intent to dedicate the property; and (2) the public's acceptance of the dedication.[41] Both requirements, the intent to dedicate and acceptance, may be implied from public use, without formalities.[42] Once the implicit offer is accepted, the owner cannot revoke the dedication.[43]

Originally, the doctrine was frequently utilized to create roadway easements.[44] It was not until the 1960s that courts began applying the implied dedication doctrine for beach access.[45] Over the years, many courts in jurisdictions such as Texas and California have used the doctrine to uphold the public's right to *continue* to access beaches using coastal landowners' private properties,[46] but the doctrine still has not been applied to cases seeking to open new access to the beaches.

Implied dedication has been subject to criticisms similar to that of prescriptive easement.[47] The doctrine may prove to be effective in issues dealing with the *preservation* of public beach access, but cannot be applied to cases such as Iroquois Point Beach, where the public is already denied access to the beach.

C. Doctrine of Custom

1. Common law (Blackstonian) custom

The common law doctrine of custom states: "where there has been a very long and common use of a defined area, that use becomes legally established for that area."[48] The doctrine relies on a legal justification based on the belief that a usage which had lasted for centuries must have been founded on a legal

---

[40] 3 Haw. 154 (1869).

[41] *Id.*; *see also* Town & Yuen, *supra* note 1, at 16.

[42] McKeon, *supra* note 1, at 573.

[43] *Id.*

[44] *Id.* at 574.

[45] *Id.*

[46] *See, e.g.*, Seaway Co. v. Attorney General, 375 S.W.2d 923, 940 (Tex. Civ. App. 1964) (holding that the public had an easement to use private land bordering the Gulf of Mexico for travel and recreational purposes); Gion v. City of Santa Cruz, 465 P.2d 50, 59 (Cal. 1970) (finding implied dedication by adverse use of beach and granting easement of access for the public).

[47] *See* discussion *supra* Part III.A.

[48] Jo Anne C. Long, McDonald v. Halvorson*: Oregon's Beach Access Law Revisited*, 20 ENVTL. L. 1001, 1012 (1990) (quoting D. BROWER, ACCESS TO THE NATION'S BEACHES 28 (1978)).

right conferred in the distant past.[49] Originally, easements of passage or use were the only obtainable rights through custom, and whatever profits yielded by the land, such as wood, fish and minerals, remained with the property owner.[50]

One example in which the court relied on the doctrine of custom to establish public beach access is *State ex. rel. Thornton v. Hay*,[51] decided by the Supreme Court of Oregon in 1969. Finding evidence that the public had been using the dry sand area for recreational purposes since the beginning of the state's political history,[52] the Supreme Court of Oregon based its decision on the English doctrine of custom, holding that the public had "an easement for recreational purposes to go upon and enjoy the dry sand area, and that this easement was appurtenant to the wet-sand portion of the beach which is admittedly owned by the state."[53] Although other means of granting beach access to the public were available, such as the doctrines of prescription and implied dedication, the court applied the doctrine of custom for two reasons: (1) uniformity of application, and (2) unique features of the shoreline.[54] The court noted: "[s]trictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region."[55]

As demonstrated by *Thornton*, the Blackstonian custom requires that the custom in question be: (1) ancient; (2) exercised without interruption; (3) peaceable and free from dispute; (4) reasonable; (5) certain; (6) obligatory; and (7) not repugnant or inconsistent with other law or customs.[56] The requirements for establishing custom are very similar to that of prescriptive easement.[57] In England, the two doctrines differed in that prescriptive easement could grant easements only to individuals, whereas groups of people could acquire easement by custom.[58] As mentioned earlier, prescriptive easement has a limited applicability to public beach access issues compared

---

[49] McKeon, *supra* note 1, at 582.

[50] *Id.*

[51] 462 P.2d 671 (Or. 1969).

[52] *Id.* at 673. As discussed later in this paper, under the common law, a customary right is considered "ancient" only if it existed prior to the beginning of the state's political history. *See infra* Part III.C.2.

[53] *Thornton*, 462 P.2d at 673.

[54] *Id.* at 676-77; *see also* Town & Yuen, *supra* note 1, at 13.

[55] *Thornton*, 462 P.2d at 676.

[56] Town & Yuen, *supra* note 1 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *76-*78); *see also Thornton*, 462 P.2d at 677.

[57] Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1101-02 (1994).

[58] *Id.*

to the doctrine of custom, and for this reason, many courts have applied the customs doctrine for beach access issues. A problematic characteristic of the doctrine of custom, however, is that it requires a longer period to establish compared to prescription and dedication.[59]

2. Ancient Hawaiian custom

The use of ancient Hawaiian custom and usage to secure public beach access is strongly supported by a line of cases that emerged between 1968 and 1970, including *In re Ashford*,[60] *Palama v. Sheehan*,[61] and *State v. Zimring*.[62] In *Ashford*, the Hawai'i Supreme Court recognized that the land laws of Hawai'i are unique in that "they are based on ancient tradition, custom, practice and usage."[63] The court further admitted *kama'āina*[64] testimony as evidence, which is viewed as an attempt to expand customary rights because many customs and traditions predate the introduction of a written Hawaiian language, and records of such customs are available only by word-of-mouth, as passed down generation by generation.[65] In *Palama*, in holding that defendants were entitled to a right-of-way, the court relied on the testimonies of *kama'āina* witnesses who testified that their ancestors had used a trail through plaintiff's property to travel.[66] The Supreme Court of Hawai'i further utilized *kama'āina* testimony in *Zimring*, in which the State of Hawai'i brought a claim of ownership of seaward accretions to beach-front property on the Island of Hawai'i caused by the volcanic eruption in 1955.[67] The court admitted *kama'āina* testimony, based on personal knowledge and knowledge passed down by the witness' parents and grandparents, regarding the Hawaiian practice of granting ownership of new land to the abutting owner.[68]

The ancient Hawaiian custom is also firmly established in the Hawai'i Constitution and statutes.[69] Judge Michael A. Town and William Wai Lim

---

[59] Lam, *supra* note 3, at 76.

[60] 50 Haw. 314, 440 P.2d 76 (1968).

[61] 50 Haw. 298, 440 P.2d 95 (1968).

[62] 52 Haw. 472, 479 P.2d 202 (1970).

[63] *Ashford*, 50 Haw. at 315, 440 P.2d at 77.

[64] *Kama'āina*, in the Hawaiian language, means "Native-born." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 124 (rev. ed. 1986).

[65] *Ashford*, 50 Haw. at 315-17, 440 P.2d at 77-78.

[66] *Palama*, 50 Haw. at 301, 440 P.2d at 97-98.

[67] *Zimring*, 52 Haw. at 475, 479 P.2d at 204.

[68] *Id.*

[69] See HAW. CONST. art XII, § 7, which states:

> [T]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a* [ancient Hawaiian land division which ran from the sea to the mountains] tenants who are

Yuen view the common law custom and ancient Hawaiian custom as "complementary in that they are both devices used to legitimize long-enjoyed land usages which were omitted from modern formal land use controls."[70] In fact, the common law of Hawai'i is an integration of the English common law custom and the ancient Hawaiian custom, as stated explicitly in the Hawai'i Revised Statutes, section 1-1.[71] On November 25, 1892, the English common law officially became the common law of Hawai'i.[72]

The Supreme Court of Hawai'i applied the combined doctrines of ancient Hawaiian custom and common law custom in *McBryde Sugar Co. v. Robinson*[73] to hold that "the right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remain[] in the people of Hawai'i for their common good."[74] The court recognized the public's right to running water, asserting that no private owner could acquire the adverse right to "surplus" water from the state.[75]

As Town and Yuen note, the significance of the *McBryde* case to public beach access lies in the court's use of the 1847 "Principles Adopted by the Land Commission" and the 1850 "Enactment of Further Principles" to prove claims for land patents, which the *McBryde* court determined as representing an authoritative codification of Hawaiian land custom.[76] The 1847 Principles "declared that the King retained certain sovereign prerogatives as rights for the public which he was not authorized to convey to private persons."[77] Included within these principles were the sovereign authority "[t]o provide public thoroughfares and easements by means of roads, bridges, streets, etc. for the common good."[78] The 1850 "Further Principles" declared that roads be free for all, and that people had a right to water and rights-of-way.[79] In essence, the *McBryde* case established "that beach access, if it existed as a

---

descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Id.; *see also* HAW. REV. STAT. § 1-1 (1988) (codifying the doctrine of ancient Hawaiian custom and declaring the common law of England to be the common law of Hawai'i).

[70] Town & Yuen, *supra* note 1, at 13.

[71] *Id.* at 14 (discussing HAW. REV. STAT. § 1-1 (1993 & Supp. 2007)).

[72] HAW. REV. STAT. § 1-1 (1993 & Supp. 2007).

[73] 54 Haw. 174, 504 P.2d 1330 (1973).

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

[75] *Id.* at 185-87, 504 P.2d at 1338-39.

[76] Town & Yuen, *supra* note 1, at 15.

[77] Lam, *supra* note 3, at 82 (quoting Town & Yuen, *supra* note 1, at 15).

[78] *Id.*

[79] *Id.*

customary right, is a public right and, like the water right, is held by the state for the public."[80]

For a period after statehood, however, courts in Hawai'i still limited recognizable customary rights to gathering certain plant products as listed in section 7-1 of the Hawai'i Revised Statutes.[81] Attempts to expand protected customary rights[82] was rejected by the federal district court in *Sotomura v. County of Hawaii*,[83] but was later recognized by the Hawai'i Supreme Court in *Kalipi v. Hawaiian Trust Co.*,[84] in which the court held that customary rights could go beyond the statutory list as long as the Hawaiian practice does not harm and can be demonstrably shown to have been continuous within a certain land division.[85] It was reaffirmed in *Zimring* that a Hawaiian usage must have existed before November 25, 1892.[86]

In 1995, the Supreme Court of Hawai'i ruled in the famous case, *Public Access Shoreline Hawaii v. Hawaii County Planning Commission (PASH)*[87] that Native Hawaiian customary rights could be practiced on public and private land, as long as undeveloped or substantially (but not fully) developed, anywhere within the state.[88] In *State v. Hanapi*[89] the court explained that there are three factors. A claimant must: (1) show that the claimant qualifies as a Native Hawaiian in accordance with the *PASH* guidelines (descendant of Native Hawaiians who inhabited the islands prior to 1778); (2) establish that the right is constitutionally protected as a customary or traditional Native Hawaiian practice, although it does not need to be enumerated in the statute or constitution; and (3) prove that the right was exercised on undeveloped or less than fully developed property.[90]

The court in *Hanapi* did hold that if a property is zoned and used for residential purposes with established dwellings, improvements and infrastruc-

---

[80] Michael D. Tom, Note, *Hawaiian Beach Access: A Customary Right*, 26 HASTINGS L.J. 823, 839 (1975).

[81] Callies, *supra* note 26, at 727; HAW. REV. STAT. § 7-1 (1993 & Supp. 2007) ("[T]he people . . . shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf.").

[82] *See, e.g.*, *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968) (admitting the use of *kama'āina* testimony).

[83] 460 F. Supp. 473 (D. Haw. 1978).

[84] 66 Haw. 1, 656 P.2d 745 (1982).

[85] *Id.* at 10, 656 P.2d at 751.

[86] State v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 204 (1970).

[87] (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995).

[88] *Id.* at 451, 903 P.2d at 1272.

[89] 89 Hawai'i 177, 970 P.2d 485 (1998).

[90] *Id.* at 185-86, 970 P.2d at 493-94.

ture, it is "always inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property.[91]

Whether by using common law or the Native Hawaiian doctrine of customs, claimants must show that the exercised customary rights are "ancient." The two doctrines differ on the definitions of "ancient": under the common law, a customary right is considered ancient if it existed prior to the beginning of a state's political history, which in Hawai'i would be 1846.[92] The date under the Native Hawaiian doctrine is November 25, 1892.[93] Either way, it would be necessary to prove, most likely by use of *kama'āina* testimony, that the descendants of Native Hawaiians have been practicing their traditional customary rights at Iroquois Point. The customs need not be limited to fishing and gathering; it may include other activities such as swimming, as long as they relate to subsistence, religious or cultural uses, and are non-commercial.[94]

D. Public Trust Doctrine

The public trust doctrine originated from the ancient English concept that the king owned the submerged lands, but for use by the public.[95] The first case to adopt public trust in Hawai'i was *King v. Oahu Railway & Land Co.*,[96] an 1899 case in which the court followed the reasoning of *Illinois Central Railroad Co. v. Illinois*[97] to hold that the title to the submerged lands of Honolulu Harbor was "held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[98] In 1940, the public trust doctrine was firmly established in Hawai'i by *In re Bishop*,[99] in which the Supreme Court of Hawai'i held that the Makalawena fishery, which was owned by the United States, was held in trust for the public.[100]

In early days, the public trust doctrine was used solely to protect navigation, commerce, and fishing interests.[101] Today, however, many courts have

---

[91] *Id.* at 186-87, 970 P.2d at 494-95 (internal quotation marks and emphasis omitted).

[92] *See* State *ex. rel.* Thornton v. Hay, 462 P.2d 671, 673 (Or. 1969).

[93] *See* State v. Zimring, 52 Haw. 472, 475, 479 P.2d 202, 204 (1970).

[94] *See* Haw. CONST. art. XII, § 7; *supra* note 69 and accompanying text.

[95] Town & Yuen, *supra* note 1, at 26.

[96] 11 Haw. 717 (1899).

[97] 146 U.S. 387 (1892).

[98] *King*, 11 Haw. at 723.

[99] 35 Haw. 608 (1940).

[100] *See id.* at 652.

[101] Long, *supra* note 48, at 1009 (citing Mary Kyle McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L.J. 683, 685-86 (1989)).

extended the doctrine to interests beyond those originally protected.[102] In other jurisdictions, courts have recognized that public trust applies to recreational activities.[103] Similarly, the Supreme Court of Hawai'i has implied such application in *State v. Zimring*,[104] when it recognized the State's obligations to protect and maintain public trust "implemented by devoting the land to actual public uses, e.g. *recreation*."[105]

Furthermore, two cases in the 1970s used the public trust doctrine to deny the discrimination of residents and non-residents pertaining to beach access.[106] In *Neptune City v. Avon-by-the-Sea*,[107] for example, the Supreme Court of New Jersey stated: "A modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference."[108] The court further went on to declare that:

> the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.[109]

The court in *Neptune City* held that while a municipality may charge reasonable fees for upland beach areas, it may not charge higher fees to non-residents.[110] Although the facts differ, such reasoning may be applicable to the case at Iroquois Point Beach because the non-residents are discriminated against in an even more severe manner: being denied access to the beach completely. Without protected access, the beach at Iroquois Point is not "open to all on equal terms without preference," as the court in *Neptune City* required it to be.

---

[102] *Id.*

[103] *See, e.g.*, Weden v. San Juan County, 958 P.2d 273, 283-84 (Wash. 1998) (acknowledging that public trust "encompasses the rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the to the right of navigation and the use of public waters") (citation, emphasis and internal quotation marks omitted); Hixon v. Public Service Comm., 146 N.W.2d 577 (Wis. 1966) (holding that courts have extended the doctrine to include "all public uses of water including pleasure boating, sailing, fishing, swimming, hunting, skating and enjoyment of scenic beauty").

[104] 58 Haw. 106, 566 P.2d 725 (1977).

[105] *Id.* at 121, 566 P.2d at 735 (emphasis added).

[106] Town & Yuen, *supra* note 1, at 28.

[107] 294 A.2d 47 (N.J. 1972).

[108] *Id.* at 54.

[109] *Id.*

[110] *Id.* at 55.

In *Gewirtz v. City of Long Beach*,[111] the Supreme Court of New York, Nassau County Division, similarly held that the city could not deny admission of non-residents to its beach parks.[112] The court found that the maintenance of facilities and the long acquiescence to public use meant that the city had subjected the beach park to public trust for the benefit of the general public.[113] The court held that it could not encroach on its trust responsibilities by excluding the public at large and limiting use only to local inhabitants, stating that "it was beyond the governmental power of the Council of the City . . . to restrict the use of the beach . . . to residents of the city and their invited guests."[114]

A more recent case is *In re Waiola O Molokai, Inc.*,[115] in which the Hawai'i Supreme Court took a step further from *Zimring*, and went as far as to declare the State's affirmative duty to protect the public trust.[116] Notably, the court also stated that "any balancing between public and private purposes [shall] begin with a presumption in favor of public use, access, and enjoyment."[117]

Over the years, various courts have utilized the public trust doctrine in creative ways. One such example is *Leydon v. Town of Greenwich* (*Leydon II*),[118] in which plaintiff Leydon sued a town for its ordinance banning out-of-towners from the beach. The plaintiff argued that he had a right, rooted in the public trust doctrine, to jog on the beach.[119] Although the trial court declined to apply the doctrine to the case, the appellate court recognized that "[f]or almost two centuries, our Supreme Court has discussed the concept that land held by a municipality as a public park or public beach is held for the use of the general public and not solely for use by the residents of the municipality."[120] After the town appealed, the Supreme Court of Connecticut, relying not only on the public trust doctrine but also the public forum doctrine, concluded that Leydon had a constitutional right to access the beach.[121]

---

[111] 330 N.Y.S.2d 495 (N.Y. Sup. Ct. 1972).

[112] *Id.* at 508-11.

[113] *Id.* at 509.

[114] *Id.* at 514.

[115] 103 Hawai'i 401, 83 P.3d 664 (2004).

[116] *Id.* at 430, P.3d at 693.

[117] *Id.* at 432, P.3d at 695 (quoting *In re* Water Use Permit Applications, 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000)).

[118] (*Leydon II*), 777 A.2d 552 (Conn. 2001).

[119] Leydon v. Town of Greenwich (*Leydon I*), 750 A.2d 1122, 1125 (Conn. App. Ct. 2000), *rev'd*, 777 A.2d 552 (Conn. 2001).

[120] *Id.* at 1126.

[121] *Leydon II*, 777 A.2d at 558.

The Connecticut Supreme Court announced a new theory by which the public can claim beach access: the "public access doctrine."[122] This doctrine asserts that because beaches are within the scope of the public trust doctrine, the state has sufficient property interest to invoke the public forum doctrine, which protects places where people have traditionally gathered to exchange ideas.[123] Under this doctrine, recreation is a form of expression, and any restriction on beach access must pass the constitutionality test regarding time, place and manner restrictions.[124] By prohibiting access of non-residents to the beach, the *Leydon II* court noted that the town infringed upon the plaintiff's First Amendment right to be at the beach, which is a place of public expression.[125] The court further stated that it was not necessary for a person to seek access to the beach in order to express his or her views to a crowd, but would be sufficient to go there simply to relax.[126] "Relaxation" and "self-fulfillment" are considered expressions sufficient to invoke constitutional protection.[127] Applying the strict scrutiny test, the court found that the town's ban of non-residents from the beach failed.[128]

It must be noted that restrictions on freedom of expression only apply to the government, and not to private parties or individuals,[129] thus the public access doctrine is applicable only against the state or federal government. While the effectiveness of the doctrine is yet unknown, it could be considered an alternative approach to the issue at Iroquois Point Beach.

The long stream of cases utilizing the public trust doctrine seem to be in support of "public use, access, and enjoyment."[130] It seems clear and undisputed that the public should be entitled to enjoy the beach, whether for sunbathing, swimming, surfing, fishing, or other recreational uses. The issue to consider, then, is how to apply this protection to Iroquois Point Beach, where the beach is allegedly owned not by the state government, but rather by the military and is thus exempt from the state's public trust.

---

[122] Robert George, *The "Public Access Doctrine": Our Constitutional Right to Sun, Surf, and Sand*, 11 OCEAN & COASTAL L.J. 73, 91 (2006).

[123] *Id.*

[124] *Id.*

[125] *Leydon II*, 777 A.2d at 562 n.13.

[126] *Id.* at 563.

[127] George, *supra* note 122, at 98.

[128] *Leydon II*, 777 A.2d at 572-73.

[129] George, *supra* note 122, at 95.

[130] *In re* Waiola O Molokai, Inc., 103 Hawai'i 401, 432, 83 P.3d 664, 695 (2004).

IV. HISTORY OF IROQUOIS POINT BEACH

The construction of new housing at Iroquois Point Beach was part of a large-scale redevelopment project which planned to improve the infrastructure on Ford Island, where Iroquois Point is located.[131] Iroquois Point is a military housing area near Ewa Beach, beside the entrance channel to Pearl Harbor. Built in the 1960s, the original homes on the property were empty when renovations began in August 2003.[132]

The eighty-four-million-dollar project was made possible through special legislation passed by the United States Congress in 1999, which allows for the sale or lease of under-utilized Navy properties on O'ahu for private development using the proceeds for design-built projects on such properties.[133] As such, the Navy signed a sixty-five year lease of the Ford Island with Hunt Development Group in 2003, including the thirty-four acre Iroquois Point parcel, in exchange for construction and renovation.[134]

According to Hunt Hawai'i division president, Steve Colon, there had been several talks with the military and government officials about providing public access to the beach.[135] Colon commented in July 2007: "[t]he access has been an issue; it's something that we've been talking about for a while. We continue to talk about it, and we're talking to the Navy about it."[136] But for a while, no progress was made on the issue. Has it not been firmly established that private owners do not have the right to restrict public beach access? In addition to the general public, it would not be fair to the rest of Hawai'i's beachfront property owners if the residents of Iroquois Point Beach Club were exempt from providing public beach access. In March 2008, a long-overdue plan to open Iroquois Point Beach to the public was finally announced.[137]

---

[131] Terrence Sing, *Navy Digs into $84M Ford Island Project*, PAC. BUS. NEWS, Oct. 29, 2004, http://www.bizjournals.com/pacific/ stories/2004/11/01/focus2.html.

[132] William Cole, *2,000 Military Homes to Go on Rental Market*, http://www.ghspaulding.com/barbers-iroquois.htm.

[133] 10 U.S.C.A. § 2814 (Supp. 2007).

[134] *See* Press Release, Keith DeMello, (Hunt Building Co., Ltd.) (June 18, 2004), *Contractors for Ford Island Master Development Project Announce Name Change*, http://www.mcneilwilson.com/text/print_release.jsp? docid=40 (last visited Mar. 7, 2008).

[135] Pang, *Lawmakers Debate Iroquois Beach Access*, *supra* note 8, at 1A.

[136] *Id.*

[137] Pang, *Plan Will Open Iroquois Point Beach to the Public*, *supra* note 8.

V. APPLICATION OF LEGAL THEORIES TO IROQUOIS POINT

A. Iroquois Point, Whose Property?

Established during World War I and both before and during World War II, NDSAs aim "to protect military installations and other facilities within their limits, as well as to promote other national defense functions."[138] There are three NDSAs in the State of Hawai'i: the Pearl Harbor NDSA, the Honolulu NDSA, and the Kaneohe Bay NDSA.[139] Iroquois Point is located within the Pearl Harbor NDSA. The Pearl Harbor NDSA is to this date fully operative, but the Honolulu NDSA is suspended in its entirety and the Kaneohe Bay NDSA is suspended except for a 500-yard "buffer zone" surrounding the Mokapu Peninsula.[140]

Sovereignty over NDSAs in Hawai'i has been at issue since their creation.[141] One reason is because both of the parties refuse to compromise and admit the other party's ownership of the areas in question.[142] Another reason is the reluctance on both sides to test the ownership theories in court; according to Major Carl J. Woods, both seem to prefer the flexibility of uncertainty over the risk of an adverse judicial decision.[143] A third major factor contributing to the dispute is the imprecise language of the Executive Order which established the NDSAs.[144]

Executive Order No. 8143, pertaining to the Pearl Harbor NDSA, states: "the area of water in Pearl Harbor, Island of Oahu, Territory of Hawai'i, lying between extreme high-water mark and the sea and in and about the entrance channel to said harbor, . . . is hereby established as a defensive sea area for purposes of national defense."[145] The Executive Order fails to define whether the "water" included submerged lands, and what exactly was meant by the "purposes of national defense."[146] Furthermore, in light of the Hawai'i Organic Act, the Hawai'i Statehood Act, or the Submerged Lands Act, the interpretation of the Executive Order becomes even more complicated.[147]

The Organic Act of Hawai'i, for example, states that the public property ceded and transferred to the United States by the Republic of Hawai'i "shall

---

[138] Major Carl J. Woods USMC, *State and Federal Sovereignty Claims Over the Defensive Sea Areas in Hawaii*, 39 NAVAL L. REV. 129, 130 (1990).

[139] *Id.* at 131.

[140] *Id.*

[141] *Id.* at 134.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* (citing 3 C.F.R. § 504 (1938-1943)).

[146] *Id.*

[147] *See id.* at 135 (citing 32 C.F.R. § 761.4(d) (1985)).

be and remain in the possession, use, and control of the government of the Territory of Hawai'i" until it is "taken for the uses and purposes of the U.S. by direction of the President."[148] Because the Executive Order was issued when Hawai'i was still a territory of the United States, it must be determined whether the Executive Order constituted a "taking" of the NDSAs "'for the uses and purposes of the United States.'"[149]

The State of Hawai'i contends that it has complete sovereignty over the NDSAs except for national defense purposes, citing *Feliciano v. United States*,[150] which held that an NDSA "is a congressionally authorized regulation of navigable waters for the purpose of national defense."[151] The State has maintained this position, asserting that full sovereignty over the NDSAs rests with the state and that the federal government has retained only a narrow power to regulate the navigable waters contained within, if necessary for national defense.[152]

The federal government, on the other hand, contends that it has ownership of the navigable waters and submerged lands within the NDSAs located in Hawai'i.[153] The federal government's argument is that the Executive Order "sets aside" both the waters and submerged lands for the benefit of the United States.[154]

Even if the Hawaiian NDSAs are under the sovereignty of the federal government, an issue remains regarding what exactly is included within the NDSAs. Furthermore, it is questionable whether the use of lands as private housing complies with the initial purpose or intent, which was to promote "national defense functions." Private housing clearly does not fall under such category.

Even where it can be more easily assumed that NDSAs serve its purpose of promoting national defense, there are examples in which accommodations have been made for public beach access.[155] Bellows Air Force Station is used as a military recreational area accommodating civilian access.[156] Civilian access to Bellows Beach is limited on occasions when the Marine Corps hold

---

[148] 48 U.S.C.A. § 511 (West 1984 & Supp. 1989), *cited in* Woods, *supra* note 138, at 135.

[149] Woods, *supra* note 138, at 136.

[150] 297 F. Supp. 1356 (D.P.R. 1969), *aff'd* 42 F.2d 943 (2d Cir. 1970), *cert. denied*, 400 U.S. 823 (1970), *noted in* Woods, *supra* note 138, at 137.

[151] *Id.* at 1364.

[152] Woods, *supra* note 138, at 137.

[153] *Id.*

[154] *Id.* at 137-38.

[155] Op-Ed., *Beach-Access Accord Needed at Iroquois Point*, *supra* note 13.

[156] *Id.*

training exercises.[157] Similar usage has been adopted at the Pacific Missile Range Facility on Kaua'i's Barking Sands.[158]

An issue also remains regarding the fact that the Navy *leased* the property to Hunt, which now leases the units at the housing complex to the public.[159] Technically, the Navy (or the federal government) is considered the original "owner" of the property. But is it fair to apply federal laws when the property is clearly in the hands of a private entity, used for purposes other than national defense?

B. Applying Legal Theories to Iroquois Point Beach

Putting aside the issue of "who owns the property," it is necessary to legally establish the rights of the public to access Iroquois Point Beach, like any other public beach access claim. Perhaps a sound legal resolution may be to utilize the customs doctrine, along with public trusts, to argue for access to Iroquois Point Beach. Although more difficult to prove compared to some of the other available doctrines because of the longer time period of proof, the customs doctrines, both common law and ancient Hawaiian, are effective in establishing a long-standing rights of public beach access. In making an argument, it would be necessary to acquire the testimonies of *kama'āina* witnesses, who would testify that their ancestors had traditionally been accessing Iroquois Point Beach to practice their cultural rights, such as fishing, swimming, surfing and paddling. One of the obstacles that will arise in arguing customary rights is that the property at Iroquois Point is already "fully developed," or at least, "somewhat fully developed." If the courts were to follow the precedents such as *PASH* and *Hanapi*, the Hawaiian customs claims will most likely fail in the developed areas of the property.

Courts around the nation, especially in the State of Hawai'i, already acknowledge the importance of access as a means of reaching public trusts. As in *Leydon II*, it may be effective to claim constitutional rights along with the public trust doctrine. In *Leydon II*, the Supreme Court of Connecticut invented a new theory, the "public access doctrine," which asserts that because beaches are within the scope of the public trust doctrine, the state has sufficient property interest to invoke the public forum doctrine.[160] Using a similar approach, it could be argued that denying non-residents at Iroquois Point Beach is a violation of the equal access doctrine. Equal access was argued in *United States v. Allen*,[161] in which the Ninth Circuit recognized that

---

[157] *Id.*

[158] *Id.*

[159] *See* Pang, *Public Access in Sight at Iroquois Point Beach*, *supra* note 14.

[160] *See generally*, George, *supra* note 122, at 92.

[161] 341 F.3d 870 (9th Cir. 2003).

parks are places of public accommodation which had to remain accessible to all, regardless of race, religion, color, or national origin.[162] The fact that Iroquois Point Beach is accessible only to those renting units at Iroquois Point Island Club is in and of itself arguably discriminatory, because not everyone could afford to live at the club. Accessing the beach should "no longer be considered a luxury for those who can best afford it; it is a social necessity."[163] Strong precedents applying various doctrines to maintain and preserve public beach access demonstrate the growing need for recognizing and affirmatively protecting such rights.

Whatever arguments are made, the issue probably cannot be resolved using one legal theory, or by tackling it from simply one direction. Instead, several theories could be utilized together in order to make an effective, successful claim.

VI. ALTERATIVE LEGAL SOLUTIONS

Beach access issues have often been described in terms of a clash between public and private rights. The public wants unlimited access to the beach. The private beachfront property owners, on the other hand, want to limit access by the public, to enjoy privacy. But the issue does not necessarily have to be resolved in terms of a winner and a loser; compromise could be achieved.

The Navy argues that there are issues of safety and liability.[164] Concerning safety, measures could be taken to limit civilian access in times of military activities. Regarding liability, it is a generally agreed rule that a private beach-front property owner will not be held liable for the injuries or accidents that occur at the beach.[165]

Unconditional access to Iroquois Point Beach would be ideal. The issue, however, demonstrates a complicated situation involving disputes not only between the public and the private property owners but also between the federal government and the state, thus drawing a clear-cut solution may not be easy. A softer approach may yield a quicker, more practical outcome. Steven Colon, Hunt senior vice president, noted that Hunt considered the idea of limited public access: "We have been investigating ways to enable the public to access the area."[166]

---

[162] *Id.* at 878.

[163] McKeon, *supra* note 1, at 564.

[164] Pang, *Public Access in Sight at Iroquois Point Beach*, *supra* note 14, at A2.

[165] George B. Apter & James Krueger, *Surfbreaks: Ocean Injury Law in Hawaii*, 1993-JUL HAW. B.J. 6, 10-11 (1993) (citing Viess v. Sea Enterprises Corp., 634 F.Supp. 226 (D. Haw. 1986)).

[166] Pang, *Public Access in Sight at Iroquois Point Beach*, *supra* note 14.

As Major Richard M. Lattimer, Jr. states in his article: "One aspect of federal-state relations for which military attorneys should be prepared is accommodation . . . . Assertion of superior federal authority over coastal lands and waters runs counter to a visible federal policy that seeks to accommodate state interests."[167] Even if the NDSA in which Iroquois Point is located fell under federal jurisdiction, "[f]ederal courts have subordinated federal rights to states through narrow rules of preemption."[168] For instance, states have been permitted to: "build bridges that interfere with navigation; regulate fishing in United States territorial waters; and control the anchorage and moorings of boats in areas subject to Coast Guard authority."[169]

Perhaps, using Bellows Beach as a model would provide a reasonable solution. Bellows is generally open to the public, except on occasions when the Marine Corps hold training exercises. This approach makes more sense than outright beach closure; public access is maintained and protected to the extent that it does not interfere with military activities. Such measures could easily be taken at Iroquois Point Beach, where "national defense functions" do not occur on a regular basis. Access could simply be limited on those occasions.

VII. CONCLUSION

Issues at Iroquois Point remain, but the discussions seem to weigh in favor of the public. According to the *Honolulu Advertiser*, Navy spokeswoman Terri Kojima admitted that "[t]he Navy no longer controls the leased areas," and the decision about access to the beach was in the hands of Ford Island Housing.[170] Kojima further stated, "[w]e don't have an issue should Ford Island Housing decide to allow public access at Iroquois Point housing area, which continues to be the shoreline."[171] "From the shoreline, the Navy is then responsible for managing the Pearl Harbor Naval Defensive Sea Area, which includes both the waters of Pearl Harbor and its approaches."[172] If such is the case, Hunt is no different from any other private beachfront property owner. Although a settlement has yielded public access to Iroquois Point, this

---

[167] Major Richard M. Lattimer, Jr., *Myopic Federalism: The Public Trust Doctrine and Regulation of Military Activities*, 150 MIL. L. REV. 79, 149 (1995).

[168] *Id.*

[169] *Id.* at 149-50 (citing Gilman v. Philadelphia, 70 U.S. 713 (1865), and Skiriotes v. Florida, 313 U.S. 69 (1941), and Murphy v. Dept. of Natural Res., 837 F. Supp. 1217 (S.D. Fla. 1993)) (footnotes omitted).

[170] Pang, *Lawmakers Debate Iroquois Beach Access*, *supra* note 8.

[171] *Id.*

[172] *Id.*

agreement may be tenuous. Why could access to Iroquois Point Beach be kept closed, when other beaches in the state are open for all?

Asami Miyazawa[173]

[173] J.D. Candidate 2009, William S. Richardson School of Law, University of Hawai'i at Mānoa.

The "Hawaiianness" of Same-Sex Adoption

I. INTRODUCTION

Between 2000 and 2005, the number of same-sex couples in Hawai'i increased by more than thirty percent, from 2389 to 3262.[1] At the same time, more than thirty-nine percent of same-sex couples nationwide were raising children under the age of eighteen.[2] Extrapolating from national data, one might expect to find at least 1200 same-sex couples raising children in Hawai'i; however, only an estimated ninety-five children under the age of eighteen have been legally adopted by gay and lesbian parents in the state.[3] This suggests that while increasing numbers of same-sex couples have been raising children in Hawai'i, many of the parents in these households have not established legal parental rights and duties through adoption.

One such parent is Ku'umeaaloha Gomes. Gomes and her partner had raised her partner's biological granddaughter in the Hawaiian *hānai*[4] tradition for ten years.[5] When Gomes' partner passed away, the child's biological mother attempted to assert her rights, and Gomes' relationship to her daughter became suddenly uncertain.[6] Only when the child refused to move did her biological mother reluctantly agree that Gomes could retain custody.[7] Gomes feels that a legally recognized relationship would be ideal because it would secure her relationship with her daughter and provide her daughter better access to Gomes' resources, including health care benefits and "connections

---

[1] Gary J. Gates, *Same-sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey*, app. 1 (Oct. 2006), http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf (last visited Feb. 15, 2008).

[2] *See* R. Bradley Sears, Gary Gates & William B. Rubenstein, *Same Sex Couples and Same Sex Couples Raising Children in the United States: Data from Census 2000*, at 1 (Sep. 2005), http://www.law.ucla.edu/williamsinstitute/publications/USReport.pdf (last visited Feb. 15, 2008).

[3] Gary Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 10, tbl. 5 (Mar. 2007), http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf (last visited Feb. 15, 2008).

[4] *Hānai*, literally "to feed," most often refers to "a child who is taken permanently to be reared, educated, and loved by someone other than a natural parent . . . traditionally a grandparent or other relative." MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, 1 NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 49 (1972).

[5] *See* E-mail from Ku'umeaaloha Gomes to author (Sep. 7, 2007) [hereinafter Gomes E-mail I] (on file with author); E-mail from Ku'umeaaloha Gomes to author (Sep. 24, 2007) [hereinafter Gomes E-mail II] (on file with author).

[6] Gomes E-mail I, *supra* note 5.

[7] *Id.*

to the Hawaiian community."[8] Says Gomes: "There are so many ways that she could definitely benefit, and perhaps indirectly so could her mom."[9]

Another parent, Dora Dome, broke new ground in Hawai'i in 1997 when she successfully petitioned to adopt her same-sex partner's son as a "co-parent."[10] When she and her partner separated, however, the presiding family court judge refused to sign a stipulated custody agreement, stating that he lacked jurisdiction because the court had no proceeding established for hearing disputes between co-parents.[11] Not until the child moved to Vermont and lived there for six months, so that that state became his "home state" under the Uniform Child Custody Jurisdiction Act, was Dome able to obtain a court-ordered custody decree.[12] Recognizing the importance of same-sex adoption to her, Dome observes: "If I didn't adopt, I probably would never be able to see my son."[13]

The stories of these two women and their children illustrate that the parental rights and duties of same-sex partners are important both to an increasing number of children who would otherwise be deprived of tangible and emotional benefits, and to parents who seek security for their relationships with their children. They further suggest that Hawai'i's adoption law does not always meet those needs. This article aims to address this deficiency by drawing upon Hawai'i's unique history and legal landscape. In particular, it contends that the rights of same-sex partners to adopt should be protected under the state laws designed to protect the exercise of native Hawaiian cultural practices.

Part II discusses Hawai'i's adoption statute, noting the absence of controlling authority protecting the rights of same-sex partners to adopt. This section discusses possible interpretations of the statute and how it has been construed by Hawai'i family court judges. Part III explores the potential for

---

[8] Gomes E-mail II, *supra* note 5.

[9] *Id.* Legal recognition of parents also increases children's emotional security; allows parents to provide essential care by signing consent forms and taking leave under the Family Medical Leave Act; and provides financial benefits to children through child-support, social security, retirement, state workers compensation, inheritance, and wrongful death and other tort actions. AMERICA BAR ASSOCIATION, STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, REPORT TO THE HOUSE OF DELEGATES, 3-5 (Aug. 12, 2003), http://www.abanet.org/irr/annual2003/finalsecondparent.doc [hereinafter ABA Report] (last visited Feb. 15, 2008).

[10] *See* Telephone Interview with Dora J. Dome, Esq., National Center for Lesbian Rights, in San Francisco, Cal. (Sep. 18, 2007) [hereinafter Dome Interview] (notes on file with author). Co-parent (or second-parent) adoption is "a legal procedure that allows an unmarried partner in a family relationship to adopt the child of her partner without terminating the first legal parent's rights." ABA Report, *supra* note 9, at 3.

[11] Dome Interview, *supra* note 10.

[12] *See* E-mail from Dora Dome to author (Jan. 15, 2008) (on file with author).

[13] Dome Interview, *supra* note 10.

construing same-sex adoption as a "native Hawaiian right." This section argues that relevant constitutional and statutory provisions are not limited to protecting rights in land, but should broadly operate to preserve all vestiges of Hawaiian culture, including traditionally accepted family arrangements. Part IV presents a proof of custom, including evidence that same-sex couples historically raised children in family units and that they continue to do so in modern times without posing a threat to different-sex couples. Finally, Part V concludes that the Hawai'i State Legislature should amend the adoption statute to expressly acknowledge same-sex couples' rights to adopt. Alternatively, Hawai'i courts should adopt a broad statutory construction to protect same-sex adoption as a traditional native Hawaiian cultural practice.

II. OVERVIEW OF HAWAI'I ADOPTION LAW

Can an individual in Hawai'i petition to adopt the child[14] of his or her same-sex partner as a co-parent? Can a same-sex couple petition to adopt jointly?[15] Can an individual petition to adopt the child of his or her same-sex partner as a third parent?[16] Hawai'i's adoption statute offers no clear answers to these questions. With respect to who may adopt, Hawai'i Revised Statutes ("HRS") section 578-1 provides:

> Any proper adult *person, not married*, or any *person married* to the legal father or mother of a minor child, or a *husband and wife jointly*, may petition the family court . . . for leave to adopt an individual toward whom the person or persons do not sustain the legal relationship . . . .[17]

As to the effect of adoption on pre-existing parental rights, HRS section 578-16 contains the following "cut-off" provision:

> [A]ll legal duties and rights between the individual and the individual's former legal parent or parents shall cease from the time of the adoption; provided that if the individual is adopted by a *person married* to a legal parent of the individual, the full reciprocal rights and duties which theretofore existed between

---

[14] In this article, "child" means biological or legally adopted minor child.

[15] Joint adoption refers to a "legal procedure in which both adults in a family relationship simultaneously adopt a child who has no prior legal relationship to either parent." ABA Report, *supra* note 9, at 3.

[16] Third-parent adoption contemplates adoptions by same-sex partners while allowing a donor or surrogate to retain parental rights. *See* Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 212 (2001); Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 406 (2007).

[17] HAW. REV. STAT. § 578-1 (2006) (emphasis added).

> the legal parent and the individual, and the rights of inheritance . . . shall continue, notwithstanding the adoption . . . .[18]

A narrow and perhaps intuitive reading of these provisions suggests that individual petitioners may be either married or unmarried, but that joint petitioners must have the status of "husband and wife." Same-sex couples should not be able to petition jointly because they cannot legally marry in the State of Hawai'i.[19] Further, while an individual need not be married to be eligible under HRS section 578-1, marriage seems to be the very thing required in order to avoid the cut-off provision in HRS section 578-16. Notably, appellate courts in four states—Colorado, Ohio, Nebraska, and Wisconsin—have denied co-parent adoptions under such a narrow reading of statutory cut-off provisions.[20]

On the other hand, many state courts have more expansively construed their statutes to allow joint and co-parent adoptions, giving primary consideration to the "best interests of the child."[21] For example, the Vermont Supreme Court became the first appellate court in the nation to approve a co-parent adoption in 1993.[22] In interpreting Vermont's adoption statute, the court remained "mindful that the state's primary concern is to promote the welfare of children . . . and that the application of the statutes should implement that purpose."[23] The court then found it "unreasonable and irrational" to rigidly apply the statute's cut-off provision, where the underlying rationale for exempting biological parents in stepparent adoptions applied equally well in the context of co-parent adoptions.[24] In both situations, held the court, it

---

[18] *Id.* § 578-16(d) (emphasis added).

[19] *See* HAW. CONST. art. I, § 23 (authorizing the legislature to reserve marriage to "opposite-sex couples"); HAW. REV. STAT. § 572-1 (2006) (reserving marriage to a man and a woman).

[20] *See In re* Lace, 516 N.W.2d 678, 681, 683-84 (Wis. 1994) (denying co-parent petition despite evidence it would be in the best interest of the child and inferring legislative intent to exclude all exceptions to the cut-off provision except the singularly enumerated step-parent exception); *In re* Luke, 640 N.W.2d 374, 378 (Neb. 2002) (denying co-parent adoption petition where the state's adoption statute did not specifically permit co-parent adoption and the first parent did not relinquish her parental rights); *In re* Adoption of T.K.J., 931 P.2d 488, 493 (Colo. Ct. App. 1996) (construing the married-stepparent exception as the "only exception" to the cut-off provision); *In re* Adoption of Doe, 719 N.E.2d 1071, 1072-73 (Ohio Ct. App. 1998) (strictly construing cut-off provision and finding that best interests analysis would "place the 'cart before the horse'").

[21] *See* William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787, 787 (2003) (noting the "best interests of the child" standard was included in the first United States adoption statute and has since become the policy in every jurisdiction); *In re* Adoption of M.A., 930 A.2d 1088, 1095 n.6 (Me. 2007) (citing cases favoring broad construction that promotes the best interests of the child).

[22] *See In re* Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993).

[23] *Id.* at 1273.

[24] *Id.* at 1274.

defies "common sense to terminate the biological parent's rights when that parent will continue to raise and be responsible for the child."[25]

With respect to joint adoption, the Supreme Judicial Court of Maine held in 2007 that a state law allowing adoption by "a husband and wife jointly or an unmarried person" did not bar a same-sex couple from jointly adopting their two foster children.[26] Initially, the couple argued that "unmarried person" should be read to include the plural "unmarried persons" in light of statutory language that provided, "[w]ords of the singular number may include the plural."[27] The court declined to adopt this reasoning, fearing it may allow an "indefinite number of persons to join in a single adoption petition."[28] However, the court ultimately construed the statute liberally to allow joint petitions by unmarried *couples* in order to "protect the rights and privileges of the child"[29] and to provide for permanency "at the earliest possible date."[30] The court also observed practically that disallowing such petitions would merely "elevate[] form over substance" because same-sex couples could reach the same result by simply filing successive or consolidated individual petitions.[31]

In Hawai'i, there is reason to believe that concern for the "best interests of the child" should lead to a similarly liberal construction of the state's adoption statute. For example, when Dora Dome filed her first co-parent adoption petition three years after Vermont's landmark case, she also submitted to the court a brief that was substantially based on the brief used in that case.[32] Judge Michael Town, then senior Family Court judge, reportedly "granted the petition outright," believing that "even though the law didn't explicitly allow it, it could be done in the context of the best interest of the child."[33] Later, Dome represented clients in ten to twenty other co-parent adoption cases in courts throughout Hawai'i, including those in Hilo, Kona, and Maui, and she came to conclude that "there [simply] was not a problem."[34]

---

[25] *Id.*

[26] *See* 930 A.2d 1088.

[27] *Id.* at 1092.

[28] *Id.* (bracket in original).

[29] *Id.* at 1096.

[30] *Id.* at 1097.

[31] *Id.* at 1093.

[32] Dome Interview, *supra* note 10.

[33] *Id.*

[34] *Id.* Other Hawai'i lawyers concur that that the state's family court judges have consistently approved co-parent adoptions in recent years. *See, e.g.*, E-mail from Susan K. Hippensteele, Director, University of Hawai'i Women's Studies Program, to author (Aug. 30, 2007) (on file with author).

A short co-parent adoption decision rendered by a different Hawai'i family court judge provides a further glimpse into the court's methods of construing the adoption statute. In relevant part, the court found:

> The clear paramount concern of Haw. Rev. Stat. Ch. 578 is the best interest of the child. Section 578-1 provides that "any proper adult person, not married . . . . [sic] may petition for adoption." Haw. Rev. Stat. § 571-2 provides "the singular includes the plural . . . when consistent with the intent of this chapter." Haw. Rev. Stat. § 1-17 provides: "words . . . in the singular or plural number signify both the singular and plural number." The paramount focus of Haw. Rev. Stat. Chapter 571 and § 571-16(e) is inheritance rights rather than family composition[.][35]

These findings plainly indicate that the court intends to be guided primarily by its concern for the child-adoptee's welfare rather than the particular nature of the adopters' "family composition."

Significantly, this language also sanctions the singular-person-includes-plural-persons theory of statutory construction rejected by the Maine court in *In re Adoption of M.A.*[36] This theory has the clear, intended effect of allowing same-sex *couples* to file joint adoption petitions.[37] As the Maine court suggested, it may also do more than that; that is, it may also provide a mechanism for dispensing with traditional numerical limits and allowing adoption to create legal rights in more than two parents.[38] This would arguably serve the best interests of children—particularly those of an increasing number of gay and lesbian couples that enter into non-traditional

---

[35] *In re* Adoption of a Male Child, FC-A No. 02-1-0307 (Haw. Fam. Ct. Oct 15, 2002) (Findings and Decision of the Court Granting Petition For Adoption by Co-Parent) (redacted copy on file with author).

[36] *See* 930 A.2d at 1092.

[37] *See In re* Adoption of Tammy, 619 N.E.2d 315, 318-19 (Mass. 1993) (construing statutory provision for adoption by "any person" to mean by "any persons" so as to allow an unmarried same-sex couple to adopt jointly); *In re* K.M., 653 N.E.2d 888, 893 (Ill. Ct. App. 1995); *In re* Hart, 806 A.2d 1179, 1185 (Del. Fam. Ct. 2001) ("[T]he term 'unmarried person' though stated in the singular can be read to include the plural 'unmarried persons.'").

This approach, however, stops short of justifying avoidance of the statutory cut-off provision, typically at issue in co-parent cases. Notably, the provision could be avoided if the first legal parent were allowed to join in an adoption, as in *In re Adoption of Tammy*; however, in Hawai'i, this is not likely possible insofar as the statute explicitly contemplates adoption of individuals "toward whom the person or persons do not sustain the legal relationship of parent and child." HAW. REV. STAT. § 578-1 (2006).

[38] Notably, third-parent adoptions have been recognized by the Ontario Court of Appeals, as well as trial courts in California, Massachusetts, Alaska, and Washington. *See* DENIS CLIFFORD, FREDERICK HERTZ & EMILY DOSKOW, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 87 (2007); Wald, *supra* note 16, at 406-07.

parenting arrangements—by providing them with additional sources of financial and emotional security.[39]

While the mandate for considering the best interest of the child seems clear, it remains true that the threshold question of whether Hawai'i's adoption statute allows same-sex couples to adopt has not been answered conclusively. There is still no authority compelling a Hawai'i judge to hear a same-sex co-parent, joint, or third-parent adoption petition. Trial court decisions are confidential[40] and tend to be of little value as precedent, and the legislative record is completely silent on the matter. But are there other bases in law for compelling Hawai'i courts to hear same-sex adoption petitions?

III. SAME-SEX ADOPTION AS A NATIVE HAWAIIAN RIGHT

In addition to the best interest of the child, this article contends that the rights of same-sex couples to adopt are supported by laws designed to protect customary native Hawaiian rights. In particular, HRS section 1-1 and article XII, section 7 of the Hawai'i Constitution reflect a strong impulse to preserve and protect the vitality of traditional Hawaiian cultural practices in the face of rapid environmental and social change.[41] But does the scope of their protection extend to traditional understandings of who may legally adopt? The following discussion presents persuasive authority suggesting that it does.

A. Protection of Customary Rights Under HRS Section 1-1

Section 1-1 was originally enacted in substantially the same form as it exists today by the legislative assembly of the Kingdom of Hawaii in 1892. In relevant part, it provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, *except* as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or *established by Hawaiian usage*.[42]

This provision essentially operates to incorporate pre-1892[43] Hawaiian custom into Hawai'i's modern common law. Case law construing the statute has

---

[39] *See* Gatos, *supra* note 16, at 211-12.

[40] *See* HAW. REV. STAT. § 578-15 (2006).

[41] *See* discussion *infra* Part III.A-B.

[42] HAW. REV. STAT. § 1-1 (2006) (emphasis added).

[43] *See* State *ex rel.* Kobayashi v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 205 (1970) ("[T]he Hawaiian usage mentioned in H.R.S § 1-1 is usage which predated November 25, 1892.").

demonstrated the Hawai'i court's willingness to depart widely from the Anglo-American common law in order to preserve customary rights, including those of adoptive children.

For example, in *O'Brien v. Walker*,[44] the court preserved the right of adoptive children to inherit under the terms of a trust deed. In that case, a couple executed a deed giving the income from an estate to their four children and the principal to the surviving "lawful issue" of the last remaining child.[45] The question arose as to whether the legally adopted child of one of the four named children qualified as "lawful issue." Though the general common law rule was that "issue" refers only to "children of the blood,"[46] the court defined the term in light of "ancient Hawaiian custom and usage," which the court described as a "statutory exception" to the Anglo-American common law.[47] Ultimately, the court held that "issue" included adoptive children, finding sufficient evidence that adoptive children were customarily regarded in Hawai'i as equivalent to children of the blood.[48]

Significantly, the court also held that the enactment of adoption statutes should not be viewed as a "development" in the law of adoption, but a "mere codification or crystallization of rights already in existence."[49] In particular, the court noted that the purpose of the 1841 adoption statute[50] was to "provide[] methods whereby the terms of adoption could be written and recorded," and the 1915 adoption statute[51] was meant to "defin[e] the legal effect of adoptions and clearly set[] out the status of adopted children."[52] The court clearly did not view the adoption statute as abrogating or limiting rights associated with customary adoption. As such, if same-sex couples were allowed to adopt under customary rules, there is little reason to believe that a

---

[44] 35 Haw. 104 (1939).

[45] *Id.* at 106-07.

[46] *Id.* at 115.

[47] *Id.* at 132.

[48] *Id.* at 123.

[49] *Id.* at 117.

[50] Hawai'i's first adoption statute, promulgated in 1841, read simply:

> If parents wish to commit their child to the care of another, it is well for them to go before an officer, and make their agreement in writing, and he being a witness to the correctness of the transaction, and signing his name as such, the writing shall be legal. If there be no writing or no officer sign his name, the child can not be transferred. The true parents still have the direction of the child.

MELODY K. MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 275 (1991) (citing L. THURSTON, THE FUNDAMENTAL LAW OF HAWAII 73 (1904)).

[51] The more comprehensive 1915 statute significantly laid out who may adopt: "Any proper person not married, or a husband and wife jointly, may petition . . . to adopt a minor child . . . ." Act of Apr. 6, 1915, No. 47, § 1, 1915 Haw. Sess. Laws 49-50.

[52] *O'Brien*, 35. Haw. at 119.

statutory "crystallization" should change those rules absent explicit legislative intent to do so.

Having located customary adoption rights conceptually within range of section 1-1 protection, the court later identified evidentiary standards for proving the existence of specific customary rights. In *State ex rel. Kobayashi v. Zimring*,[53] the court looked to native custom to assign ownership over land created by a 1955 lava flow on the southern shoreline boundary of Maurice and Molly Zimring's Big Island property.[54] In support of the Zimrings' claim, William K. Kamau, Sr., a Puna native born in 1892, testified on the basis of knowledge gained through work as a surveyor and transmitted to him though his parents that Hawaiian usage would operate to give the land to the Zimrings so as to preserve their access to the sea.[55] Ruling in favor of the state, the court ultimately determined that Kamau's testimony might have had reference to post-1892 observations, and as such did not clearly establish section 1-1 Hawaiian usage.[56] In this manner, the court expressed a need for clear, first-hand *kama'āina*[57] witness testimony in order to prove the existence of pre-1892 custom.

In addition, in the landmark case *Kalipi v. Hawaiian Trust Co.*,[58] the court began to develop spatial and temporal criteria for determining what practices constitute protectable customary practices. In that case, William Kalipi sought to exercise traditional gathering rights on undeveloped, privately owned land in an *ahupua'a*[59] on Moloka'i where he owned property but no longer resided.[60] Purportedly attempting to strike a balance between traditional Hawaiian usage and modern expectations of exclusive ownership,[61] the court first outlined a narrow interpretation of gathering rights protected under section HRS section 7-1.[62] In particular, the court required: (1) that

---

[53] 52 Haw. 472, 479 P.2d 202 (1970).

[54] *Id.* at 472, 479 P.2d at 203.

[55] *Id.* at 473, 479 P.2d at 203.

[56] *Id.* at 475, 479 P.2d at 204.

[57] *Kama'āina* means: "Native-born, one born in a place . . . ." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 124 (rev. and enlarged ed. 1986). It has also been translated "a child of the Land, referring to one belonging to a Land." LILIKALĀ KAME'ELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES 389 (1992).

[58] 66 Haw. 1, 656 P.2d 745 (1982).

[59] *Ahupua'a* refers to a "[l]and division usually extending from the uplands to the sea." PUKUI & ELBERT, *supra* note 57, at 9.

[60] *Kalipi*, 66 Haw. at 3, 656 P.2d at 747.

[61] *Id.* at 7, 656 P.2d at 749.

[62] Section 7-1 provides:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The

persons must "resid[e] within the *ahupua'a* in which they seek to exercise gathering rights";[63] (2) that "gatherable items [are limited] to those enumerated in the statute";[64] (3) that gathering rights may only be exercised on undeveloped land;[65] and (4) that they must be utilized to practice native customs.[66] Because Kalipi did not reside in the *ahupua'a*, he failed to meet the first criteria and was not entitled to exercise section 7-1 rights there.[67]

Though it narrowly construed section 7-1, the *Kalipi* court notably indicated a willingness to expand the scope of rights available to *ahupua'a* tenants under section 1-1. In particular, the court held that "[section] 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interest of others."[68] The court further described the second prong of its analysis as requiring a "balancing [of] the respective interests and harm once it is established that the application of the custom has continued in a particular area."[69] Under *Kalipi*, therefore, it becomes important to the present argument not only that the practice of same-sex adoption is aligned with traditional norms, but also that it has continued to modern times and causes no significant harm to other legal interests.

B. The Constitutional Mandate for Cultural Preservation

In addition to creating a mechanism for expanding the scope of native Hawaiian rights, the *Kalipi* court also located its mandate for maintaining traditional cultural rights against a conflicting western system of land tenure in article XII, section 7 of the Hawai'i Constitution.[70] Adopted at the Constitutional Convention of 1978, article XII, section 7 reads:

---

people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1 (1993).

[63] *Kalipi*, 66 Haw. at 8, 656 P.2d at 749.

[64] *Id.* at 8, 656 P.2d at 750.

[65] *Id.* at 8-9, 656 P.2d at 750. This limitation on exercising gathering rights on developed property, the court noted, is based on an "understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture." *Id.* Thus, even while restricting the scope of customary rights, the court still elevated customary principles.

[66] *Id.* at 9, 656 P.2d at 750.

[67] *Id.*

[68] *Id.* at 12, 656 P.2d at 751-52.

[69] *Id.* at 10, 656 P.2d at 751.

[70] *Id.* at 4-5, 656 P.2d at 748.

> The State reaffirms and shall protect all *rights, customarily and traditionally exercised* for subsistence, *cultural* and religious *purposes* and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 . . . .[71]

Like *Kalipi*, this provision appears to be primarily concerned with protecting traditional rights in land; however, there is much evidence from the proceedings of the convention that its authors intended it to protect a broader range of rights. The Committee of the Whole recognized the importance of cultural practices to the identity and value system of the native Hawaiian people[72] and expressed its intent for the provision to be "an important and indispensable tool in preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State."[73] While access, gathering, and other rights appurtenant to land were certainly of primary concern to many delegates, the Hawaiian Affairs Committee emphasized that the provision was intended "to encompass all rights of native Hawaiians" and that the provision should not be "narrowly construed or ignored by the courts."[74]

In the debates of the Committee of the Whole, many delegates also expressed a desire to protect elements of culture not necessarily connected to land. Delegate De Soto testified that the provision protected Hawaiians' "inherent and fundamental rights to the free exercise of ancient activities."[75] Delegate Barnard saw it as a "chance to perpetuate . . . culture and traditions and to help restore pride" to native Hawaiians.[76] Finally, Delegate Wurdeman proclaimed "[a]ll we seek is the opportunity to do what we have always done[,]" and that the alternative would be a "joyless life."[77]

In addition, at second reading, Delegate Ka'apu stated his view that the provision would "reestablish for . . . Hawaiians any rights which they once had which were never properly given up."[78] Similarly, Delegate Hoe "sought to protect and reaffirm . . . rights that were threatened, challenged or

---

[71] HAW. CONST. art XII, § 7 (emphasis added).

[72] COMM. WHOLE REP. No. 12, *reprinted in* 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1016 para. 6 (1980).

[73] *Id.* at 1016 para. 8.

[74] STAND. COMM. REP. NO. 57, *reprinted in* 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 640 para. 3 (1980).

[75] 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 426 para. 2 (1980).

[76] *Id.* at 433 para. 1.

[77] *Id.* at 434 paras. 3, 4.

[78] 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 276 para. 2 (1980).

eroded."[79] Delegate Waihe'e conceived of the amendment as providing individuals a "vehicle" to "prove the existence of traditional rights" so that they may be subjected to state regulation.[80] Significantly, Delegate Barr viewed the language of article XII, section 7 as giving recognition to native Hawaiian views on the "laws of relationships, to humans and to the land."[81]

Ultimately, insofar as legislative history and floor speeches may be indicative of original intent, these comments imply a strong desire among the delegates to draft a constitutional provision that would enable native Hawaiians to continue to live in traditional ways, so as to counteract the rapid erosion of Hawaiian culture and identity. With this broad charge, article XII, section 7 can operate to preserve a right to adopt children in traditional and culturally significant ways. The Hawai'i Supreme Court has further lent support to this proposition by liberally construing its criteria for identifying protectable "traditional and customary practices" and expanding the means of proving their existence.

1. Liberalized residency and continuity criteria

While residency in a particular *ahupua'a* was critical to asserting customary rights in *Kalipi*, the Hawai'i Supreme Court has clearly avoided such a limitation in subsequent cases. In *Pele Defense Fund v. Paty*,[82] Pele Defense Fund ("PDF") alleged that the Campbell Estate violated article XII, section 7 by denying native Hawaiian residents of an adjacent *ahupua'a* the right to access the Wao Kele 'O Puna Forest Reserve on the Big Island.[83] Revisiting the residency requirement laid out in *Kalipi*, the court paid special attention to evidence that the framers of article XII, section 7 had contemplated rights extending beyond *ahupua'a* boundaries and explicitly intended to protect the "broadest spectrum of native rights."[84] The court ultimately held that constitutionally protected customary rights may "extend beyond the *ahupua'a* in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[85] The court further suggested that PDF would meet the more expansive tenancy requirement if it were able to show on remand that Wao Kele 'O Puna was a traditional gathering area utilized by the tenants of the abutting *ahupua'a*.[86] Similarly, if same-sex

---

[79] *Id.* at 276 para. 3.
[80] *Id.* at 278 para. 2.
[81] *Id.* at 276 para. 4.
[82] 73 Haw. 578, 873 P.2d 1247 (1992).
[83] *Id.* at 584, 873 P.2d at 1253.
[84] *Id.* at 619, 873 P.2d at 1271.
[85] *Id.* at 620, 873 P.2d at 1272.
[86] *Pele Defense Fund*, 73 Haw. at 621, 873 P.2d at 1272.

adoption is shown to be a traditional practice giving rise to culturally important relationships, the right to continue to engage in that practice should not be limited by the boundaries of any particular *ahupua'a*.

In addition, while the court contemplated custom as a "vehicle" to protect rights that "continued to be practiced" in *Kalipi*, it has also articulated a relatively relaxed standard for continuity under article XII, section 7. In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*,[87] the citizens' group Public Access Shoreline Hawai'i ("PASH") contested Nansay Hawaii's application for a Special Management Area Use Permit ("SMAP") to develop a Big Island property that contained anchialine ponds traditionally used for gathering *'ōpae*.[88] Ultimately, the Hawai'i Supreme Court concluded that article XII, section 7 obligated the Hawai'i Planning Commission to "'preserve and protect' native Hawaiian rights to the extent feasible."[89] Refining its criteria for protectable native rights, the court also departed from its earlier requirement that they be continuously exercised, finding that customary rights remain intact "notwithstanding arguable abandonment of a particular site."[90] In this way the court suggested it would extend protection even to rights that have not been exercised over an extended period of time.[91] With respect to the posited right of same-sex adoption, it should follow that the government has an affirmative duty to minimize adverse impacts on the practice even if it cannot be shown that the right has been exercised continuously for a period of time.

2. Expanded evidentiary standards

In addition to relaxing standards with respect to residency and continuity, the court has also recognized that customary practices may be proved with fairly minimal evidence. In *Public Access Shoreline Hawai'i*, for example, the court considered: (1) Marcel Keanaina's testimony that his family talked about seeing two fishermen from Honokohau who went to the *'ōpae* ponds to get bait and fish; (2) Malani Pai's testimony that he and his ancestors had gathered *'ōpae* and maintained the ponds for generations; and (3) PASH

---

[87] 79 Hawai'i 425, 903 P.2d 1246 (1995).

[88] *Id.* at 429, 900 P.2d at 1250. *'Ōpae* is a "general name for shrimp." PUKUI & ELBERT, *supra* note 57, at 291.

[89] *Pub. Access Shoreline Haw.*, 79 Hawai'i at 452, 903 P.2d at 1273.

[90] *Id.* at 450, 903 P.2d at 1271.

[91] *See* Laura C. Harris, Public Access Shoreline Hawaii v. Hawaii County Planning Commission: *Expanding Hawaii's Doctrine of Custom*, 3 OCEAN & COASTAL L.J. 293, 304 (1997) (distinguishing Hawaiian custom under *Public Access Shorline Hawai'i* from traditional English custom, which requires uninterrupted use and noting that the court reasoned despite interrupted use, the right to perform traditional practices was "never taken away").

representative Jerry Rothstein's statement referencing traditional harvesting and maintenance of the ponds that Hawaiian families had engaged in for decades.[92] This testimony, held the court, sufficiently established that *'ōpae*-gathering in the ponds was a customary right protected under article XII, section 7.[93]

The court also made it easier to establish customary rights in *State v. Hanapi*.[94] In that case, a Moloka'i man named Alapai Hanapi went onto his neighbor's property to observe and monitor the restoration of an area where land containing fishponds had been illegally graded and filled.[95] When Hanapi was arrested for second degree criminal trespass, he claimed he had a right as a native Hawaiian to be on the property to exercise a customary religious practice of "healing the land."[96] Ultimately, the court found that Hanapi failed to provide an adequate foundation "connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice."[97] In particular, Hanapi did not "offer any explanation of the history or origin of the claimed right" or a "description of the 'ceremonies' involved in the healing practice."[98]

Significantly, however, in order to lay such a foundation, the court noted that a claimant may put forth "specialized knowledge" that the claimed right is a traditional or customary native Hawaiian practice.[99] In addition to *kama'āina* testimony, the court recognized that this knowledge may come from expert testimony pursuant to rule 702 of the Hawai'i Rules of Evidence.[100] Though Hanapi failed to establish a customary practice, his case is important in that it suggests new methods for doing so. In addition to first-hand knowledge of customary practices relied upon in *Zimring* and *Public Shoreline Access Hawai'i*, the court now appears willing to accept testimony of "experts," which may include academic experts or whomever judges feel have "specialized knowledge" based on a trustworthy mode of analysis.[101] In the context of same-sex adoption, this means that modern research about traditional norms, such as that discussed below, may take on greater significance in establishing that the practice is constitutionally protected.

---

[92] 79 Hawai'i at 251, 900 P.2d at 1318.

[93] *Id.* at 253, 900 P.2d at 1320.

[94] 89 Hawai'i 177, 970 P.2d 485 (1998).

[95] *Id.* at 178, 970 P.2d at 486.

[96] *Id.* at 181, 970 P.2d at 489.

[97] *Id.* at 187, 970 P.2d at 495.

[98] *Id.*

[99] *Id.* at 187 n.12, 970 P.2d at 495 n.12.

[100] *Id.*

[101] *See* HAW. R. EVID. 702.

3. Exclusion of non-native Hawaiians

Finally, though expanded in many ways, the scope of protection for customary practices under article XII, section 7 has arguably narrowed in that the provision concerns only those rights "possessed by . . . descendents of native Hawaiians who inhabited the Hawaiian Islands prior to 1778."[102] In *Public Access Shoreline Hawai'i*, the court clarified that this section protects the rights of such descendants regardless of blood quantum.[103] While attempting to be as inclusive as possible, this interpretation still clearly stops short of extending constitutional protection to non-native Hawaiians, even though they may be engaging in essentially traditional Hawaiian practices. For the present argument, this is significant, as adoptions by non-native Hawaiian couples or perhaps even those couples in which only one parent is of native Hawaiian descent may not be afforded the same constitutional protection.

On the other hand, even in the absence of constitutional protection, there is reason to believe HRS section 1-1 would offer protection to non-native Hawaiians. In discussing section 1-1, the *Kalipi* court made no distinction between native and non-native rights, requiring only that the protected custom be one that continues to be practiced and that causes no harm.[104] At least one commentator further suggests that, unlike article XII, section 7, "section 1-1 protects Hawaiian tradition without limits according to person or class."[105] As such, "Hawaiian tradition must be upheld for Hawaiians and non-Hawaiians alike."[106] In this way, the rights advocated in this article may be grounded in different provisions depending on one's ancestry, but they ultimately should be accorded the same protection.

IV. PROOF OF CUSTOMARY PRACTICE OF SAME-SEX ADOPTION

The cases discussed above demonstrate an increasing respect in the Hawai'i Supreme Court for native Hawaiian customary rights.[107] The court has emphasized the government's obligation to protect these rights to the extent

---

[102] HAW. CONST. art. XII, § 7.

[103] Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995).

[104] *See supra* note 68 and accompanying text.

[105] Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 YALE J.L. & HUMAN. 105, 139 (1996).

[106] *Id.*

[107] *See* Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771, 785-87 (2006) (citing *Kalipi*, *Pele Defense Fund* and *Public Access Shoreline Hawaii* as evidence of increased judicial recognition of native Hawaiian rights).

feasible, and it has broadened the scope of protectable practices by removing strict requirements that they be confined to *ahupua'a* boundaries or limited by temporal discontinuity. Further, the court has made it fairly easy to prove the existence of customary practice by indicating it would rely on minimal eye witness or expert testimony. Based on the court's broad mandate for preserving customary rights and its nod to customary adoption in *O'Brien*, the court should extend protection to adoptions that conform to traditional norms. But is adoption by same-sex couples included in those traditional norms? Is there sufficient evidence that same-sex adoption was a historically accepted practice in Hawai'i?

Historical evidence indicates at least that same-sex, or *aikāne*,[108] relationships were commonplace and accepted in pre-1778 Hawaiian society.[109] Many male *ali'i*[110] were reportedly bisexual.[111] In the 1700s, Big Island Chief Lonomakahiki lived in a marriage-like relationship with his *aikāne* Kapa'ihi.[112] In the 1830s, Kauikeaouli (Kamehameha III) maintained a relationship with his half-Tahitian *aikāne* Kaomi.[113] Early western observers also noted the prevalence of these relationships and the complete lack of stigma associated with them. According to Captain Cook's successor Charles Clerke:

> [E]very Aree according to his rank keeps so many women and so many young men (I'car'nies as they call them) for the amusement of his leisure hours; they talk of this infernal practice with all the indifference in the world, nor do I suppose they imagine any degree of infamy in it.[114]

In fact, rather than stigma, *aikāne* relationships were often a source of enhanced social status. Kapa'ihi and Kaomi became Kuhina Nui (prime ministers or premiers) through their relationships.[115] *Aikāne* partners of Kamehameha the Great also held such positions as "governor, King's Privy Council member, ambassador to Europe, and deputy of the King."[116] In addition to status, *aikāne* also obtained rights in the land of their partners, they

---

[108] *Aikāne*, literally "to make love with a male," usually refers to the "male lover of a male Ali'i [chief]." KAME'ELEIHIWA, *supra* note 57, at 161, 388 (1992).

[109] Morris, *supra* note 105, at 111-12.

[110] *Ali'i* is defined alternatively as "chief, chiefess . . . ruler, [or] monarch." PUKUI & ELBERT, *supra* note 57, at 20. *Ali'i nui* means "high chief." *Id.*

[111] *See* KAME'ELEIHIWA, *supra* note 57, at 161.

[112] *See* Morris, *supra* note 105, at 144.

[113] *See* KAME'ELEIHIWA, *supra* note 57, at 160.

[114] Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. Haw. L. Rev. 185, 197 (2000) (quoting journal entries from Captain Cook's third voyage to Hawai'i).

[115] Morris, *supra* note 105, at 144; KAME'ELEIHIWA, *supra* note 57, at 157.

[116] Morris, *supra* note 105, at 133.

were widely accepted into their partners' extended families, and they were even recognized in probate proceedings as "part and parcel of the Hawaiian extended family."[117]

There is evidence that *aikāne* partners in traditional times raised children together as well. As an example, Professor Morris cites the 1873 probate case *Estate of Kami'i*, which described a situation in which a household contained two adult brothers, the *aikāne* of the younger brother, and the *aikāne*'s adopted child.[118] Significantly, the *aikāne* testified in the case about the relationship between his adopted son and the younger brother Kamomokuali'i. In particular, he stated: "I knew Kamomokuali'i. He was my aikāne. He lived at Waikīkī. We all then lived there. Kameahaiku was a child I brought up, and gave her to Kamomokuali'i."[119] According to Morris, this case demonstrates that a same-sex couple was not only "part and parcel of the family, but that a child, whom they did not of course mutually procreate, was entrusted to their care for upbringing."[120]

Further, the raising of that child was not simply an informal arrangement. Morris notes that this "gift" was a reference to the customary practice of *hānai*.[121] In this practice, a child taken into the home of *hānai* parents was typically reared as their offspring, and the *hānai* parents "assumed complete social rights and obligations in raising [the child]."[122] Such arrangements were often formalized and made binding by ceremonial utterances, commonly understood to invoke the support of supernatural forces.[123] Birth parents could not then reclaim the child unless the *hānai* parents died or were incapacitated.[124] Because they were basically permanent and associated with parental rights and responsibilities, these kinds of traditional *hānai* arrangements are considered to be the near equivalent to modern legal adoption.[125] As such, insofar as the Kamomokuali'i and his *aikāne* became *hānai* parents in succession, depending on whether or not the child's biological parents were still alive, this case represents a traditional precursor to modern co-parent or third-parent adoption.

---

[117] *Id.* at 132-33.

[118] *Id.* at 136.

[119] *Id.* (quoting JOCELYN LINNEKIN, SACRED QUEENS AND WOMEN OF CONSEQUENCE: RANK, GENDER, AND COLONIALISM IN THE HAWAIIAN ISLANDS 140 (1990)).

[120] *Id.*

[121] *Id.* at 136 n. 147.

[122] Alan Howard et al., *Traditional and Modern Adoption Patterns in Hawaii*, *in* ADOPTION IN EASTERN OCEANIA 24 (Vern Carroll ed., 1970).

[123] *Id.* at 25. An example of such an utterance is translated: "We give the child to you, excrement, intestines and all." *Id.*

[124] *See* MACKENZIE, *supra* note 50, at 274.

[125] *Id.*

V. CONCLUSION

Because *aikāne* relationships were common in ancient times, and some scholarly research suggests that *aikāne* partners traditionally raised children together, with both partners enjoying parental rights and duties, Hawai'i courts should be satisfied that same-sex adoption is a viable customary and traditional practice. To the extent that it still needs to be established that this practice has continued to the present day and poses no particular threat of harm, one may simply recall the stories of Ku'umeaaloha Gomes and Dora Dome from the introduction to this article. Gomes and her daughter are one clear example of how the practice endures, particularly among persons of native Hawaiian descent, even without official recognition of parental rights and duties. Dome and her son, as well as others that have followed in their footsteps, illustrate how little the rest of society has to lose from allowing same-sex adoptions. Though there may in fact be some minimal public cost, this is certainly outweighed by the benefits of providing children with greater financial and emotional security.

As in Dome's case, these benefits may inform the "best interests" analysis so as to justify a broad reading of the adoption statute that allows for same-sex adoptions. In Hawai'i, however, there is a constitutional mandate as well, at least pertaining to the adoption rights of persons of native Hawaiian descent. Article XII, section 7 has been construed as requiring the state to act affirmatively to preserve and protect the broadest possible range of traditional native Hawaiian practices. In order to fulfill that duty with respect to the practice of *aikāne* adoption, the Hawai'i State Legislature should amend the adoption statute to expressly allow and support the kinds of adoptions *aikāne* couples are likely to seek, namely co-parent, joint and third-parent adoptions. The statute may also include language that the adoption statute should be construed broadly to give effect to both the best interests of children and the interests of cultural preservation. Alternatively, at the very least, the courts should continue of their own accord to construe the statute broadly, seeking opportunities to do so in light of Hawai'i's unique obligations to preserve and protect the cultural rights of the native Hawaiian people.

Sean M. Smith[126]

---

[126] J.D. Candidate 2009, William S. Richardson School of Law, University of Hawai'i at Mānoa. Special thanks to Dora Dome, Ku'umeaaloha Gomes, Lisa Ayabe, Professor Linda Krieger, Professor Jill Ramsfield, and Kale Taylor for inspiring and supporting me.