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ENSURING THE RIGHT TO EQUAL REPRESENTATION: *HOW TO PREPARE OR CHALLENGE LEGISLATIVE REAPPORTIONMENT PLANS**

by Anne F. Lee** and Peter J. Herman†

The purpose of this article is to present a clear and up-to-date discussion of the major issues that legislators, attorneys and public interest groups must address in fashioning or challenging reapportionment plans. The article also attempts to identify problems which are likely to arise in reapportionment cases and to offer suggestions on how to overcome such problems. The key issues relate to population deviations between districts, definitions of population bases, gerrymandering and multimember districting. With minimal updating of the latest cases, it is hoped that this article will prove to be a useful tool for legislators, attorneys and the public, both now and in the future.

I. BACKGROUND

A. Introduction

In our representative democracy, legislators are elected to represent the individuals who reside in defined districts. Each individual has a right to representation whether or not he or she participates in the political process. Just as one need not vote, or register to vote, in order to enjoy such

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rights as freedom of speech and freedom of religion, voter status is not a prerequisite to representation in Congress or in the various state and local legislative bodies.

There can be little question that reapportionment[1] has a considerable impact on the right to legislative representation. The power to redraw district boundary lines, as well as to reapportion the number of legislators representing each district, is a potent one. Determination of district boundary lines is, in effect, the determination of who may vote for each candidate and who each legislator represents once elected. Reapportionment decisions may also control the ability of various groups to elect a candidate who will represent their views; lacking this ability, they may find themselves in a submerged position without any chance of having an effective voice in the legislature. Indeed, it has been stated that "a legislative system based upon an unequal allocation of popular strength yields special advantages to certain interest groups and makes the articulation of other groups more difficult."[2]

All states and their subdivisions must undertake the periodic process of redefining the boundaries of their congressional, state and local legislative districts. As populations increase or decrease, adjustments must be made in order to satisfy a basic principle: all people must be represented equally.[3] States were not always required to carry out the periodic reap-

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[1] Used narrowly, the terms "apportionment" and "reapportionment" refer to the process of allocating seats in a legislative body among political sub-units, and "districting" and "redistricting" refer to the drawing of district boundary lines. In this article, the former terms are used broadly to describe the process which includes allocating seats as well as drawing district boundaries.

[2] Baker, *Rural versus Urban Political Power: The Nature and Consequences of Unbalanced Representation*, in REAPPORTIONMENT 27 (G. Schubert ed. 1965).

[3] Supreme Court recognition of this basic principle is apparent from Wesberry v. Sanders, 376 U.S. 1 (1964) and Reynolds v. Sims, 377 U.S. 533 (1964). For additional discussion of this principle, see Baker, *Bases of Representation* in REAPPORTIONMENT, *supra* note 2, at 25; and Conference of Research Scholars and Political Scientists, *One Man—One Vote*, in REAPPORTIONMENT, *id.* at 42.

The right to representation is commonly referred to with the catchy slogan, "one man, one vote" or "one person, one vote." However, this phrase is somewhat misleading in that it does not mean that "voters" are the only people that matter. *Reynolds* and *Wesberry* make it clear that all people have the right to representation. Thus, in the view of one writer, the phrase refers to the relative weight of individuals' votes, and it requires that those votes be weighted equally.

> The 'one person, one vote' principle is basic to all reapportionment issues. It holds that the vote of one citizen of a state should be worth exactly as much as the vote of any other citizen of that state. If one district is more populous than another, then the vote of a resident of that district will be worth less than the vote of a resident of a less populous district.

Guido, *Deviations and Justifications: Standards and Remedies in Challenges to Reapportionment Plans*, 14 URB. LAW. 57, 58 (1982). Note, however, that Guido's analysis of the "one person, one vote" concept entails an additional fallacy: *viz.*, that the votes of residents of equally populated districts will in fact be equally weighted. Those votes would be equally weighted only if equal numbers of people actually voted in each district. The number of

portionment process, however; even when they were so required by state constitutional provisions, legislatures frequently failed to carry out the mandate. As a result, urban areas with rapid population growth did not receive proportionate increases in representation, and rural areas were thus greatly overrepresented. Such disproportionate representation was not necessarily an accident of history but rather a reflection of the efforts of incumbent legislators to maintain their power.[4]

The earliest significant Supreme Court reapportionment decision was *Colegrove v. Green*,[5] decided in 1946. Justice Frankfurter, writing for the majority, concluded that reapportionment was not a justiciable issue, coining the oft-quoted phrase, "[c]ourts ought not to enter this political thicket."[6] In 1962, the Supreme Court recognized that an actual majority of the Justices in *Colegrove* (four of seven)[7] had found reapportionment to be a justiciable issue. Thus, in *Baker v. Carr*,[8] the Court opened the door to subsequent cases which would have a more direct impact throughout the nation. Two of the most significant decisions which followed were

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votes cast per district depends upon the number of eligible voters in each district and upon the number of votes cast by those eligible voters. Thus, ensuring equal representation through a mandate of equally populated districts does not necessarily ensure equally weighted votes.

An additional slogan which perhaps should be used in conjunction with the "one person, one vote" slogan is "to each legislator, equal numbers of constituents." This would help to clarify some unnecessary ambiguity. *See infra* note 11 regarding the origin of the phrase, "one man, one vote."

[4] Much has been written on the imbalance between urban and rural representation throughout America's history. REAPPORTIONMENT, *supra* note 2, contains several selections dealing with this historical phenomenon. In particular, see Baker, *Rural versus Urban Political Power: The Nature and Consequences of Unbalanced Representation*, at 27; Lukas, *Barnyard Government in Maryland*, at 55; Baker, *Reasons for Unbalanced Representation*, at 60; Congressional Quarterly Weekly Report, *Rural Overrepresentation Apportionment and the Federal Courts*, at 83; and Crane, *Tennessee: Inertia and the Courts*, at 92, and The New Republic, *Pigs and People*, at 101. *Pigs and People* aptly illustrates the consequences of a failure to reapportion:

> Mayor Ben West of Nashville has described a rural county in his state: It has 8,611 cows, 4,739 pigs and horses, 3,948 people and one state representative. Nashville's county had 381,412 people in 1950—and seven state representatives, meaning that each representative spoke for 54,487 people, but not, of course, for as many cows, horses and pigs.

Id.

[5] 328 U.S. 549 (1946).

[6] *Id.* at 556. For a complete discussion of cases prior to *Colegrove*, and of the developments leading up to the landmark cases of Baker v. Carr, 369 U.S. 186 (1962), Wesberry v. Sanders, 376 U.S. 1 (1964), and Reynolds v. Sims, 377 U.S. 533 (1964), see R. DIXON, DEMOCRATIC REPRESENTATION, REAPPORTIONMENT IN LAW AND POLITICS 99-182 (1968).

[7] In his *Colegrove* opinion, Justice Frankfurter was joined by Justices Reed and Burton, concurring. Justice Rutledge concurred in a separate opinion. Justice Black wrote a dissenting opinion in which Justices Douglas and Murphy concurred. Justice Jackson took no part in the consideration. Chief Justice Stone died on April 22, 1946, a month and a half prior to the date of the decision.

[8] 369 U.S. 186 (1962).

Wesberry v. Sanders[9] and *Reynolds v. Sims*.[10] In *Wesberry*, the Court held that congressional apportionments are governed by the "one person, one vote" principle,[11] and in *Reynolds*, the Court held that this principle applies to state legislative districts as well. *Baker, Wesberry*, and *Reynolds* thus provide the foundation upon which subsequent reapportionment cases have been decided.[12]

B. Overview

The Court has clearly held that legislators must represent equal numbers of people. Absolute numerical equality is practically impossible to achieve, however; therefore, certain deviations have been allowed. We address the question of population deviations in section III. The question of relevant population bases (i.e., determining who must be counted in calculating the "population" of an electoral district) is addressed in section II. Even if an acceptable population base is arrived at, and district boundaries are drawn in such a way as to include equal numbers of people, still other problems may arise. These problems are enunciated in

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[9] 376 U.S. 1 (1964).

[10] 377 U.S. 533 (1964).

[11] The "one person, one vote" phrase was first used by the Supreme Court in Gray v. Sanders, 372 U.S. 368, 381 (1963). The original phrase, "one man, one vote," was apparently coined one year earlier by Anthony Lewis, a staff correspondent for the New York Times. Lewis had reported on the Twentieth Century Fund's conference on legislative apportionment on June 15, 1962. The Fund subsequently published Lewis' report of the proceedings as a pamphlet entitled "One Man—One Vote." This genesis is described in Silva, *One Man, One Vote and the Population Base*, in REPRESENTATION AND MISREPRESENTATION 54-55 n.7 (R. Goldwin ed. 1968).

[12] Upon his retirement as Chief Justice, Earl Warren was asked to name the most important issue that arose during his tenure on the Court. His response identified the reapportionment decisions as the most significant "because they nourished democracy at its roots." Dixon, *The Court, the People, and "One Man, One Vote,"* in REAPPORTIONMENT IN THE 1970's 7-8 (N. Polsby ed. 1971).

It is interesting to note that in 1948, while a Republican candidate for the U.S. vice presidency, then California Governor Warren said:

> Many California counties are far more important in the life of the State then their population bears to the entire population of the State. It is for this reason that I have never been in favor of restricting the representation in the senate to a strictly population basis.
>
> It is the same reason that the Founding Fathers of our country gave balanced representation to the States of the Union—equal representation in one house and proportionate representation based on population in the other.
>
> Moves have been made to upset the balanced representation in our State, even though it has served us well and is strictly in accord with American tradition and the pattern of our National Government.

W. MENDELSON, THE AMERICAN CONSTITUTION AND CIVIL LIBERTIES 394 (1981). Sixteen years later, Chief Justice Warren wrote the Court's historic decision in Reynolds v. Sims, in which he noted that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." 377 U.S. at 562.

charges commonly levelled against those who reapportion: gerrymandering to protect incumbents or to lessen the impact of minority voting blocs, and submergence of minority interests by the determination of how many representatives will serve each district. These issues are discussed in sections IV. and V., respectively.

The key issues in any reapportionment dispute touch upon the very nature of the relationship between citizens and their elected officials. Gordon E. Baker, a leading authority on reapportionment, wrote of this relationship in 1955, emphasizing the notion of "political morality":

> The problem of representation . . . involves more than just the institutions of government, whether state, local, or national. There is a less tangible and less publicized element involving psychological attitudes of the public. It seems clear that a continual disregard of professed ideals (and often of constitutional principles as well) engenders a sense of frustration and injustice. Double standards of political morality throughout much of the nation contribute to a climate of public cynicism and apathy.
>
> In recent years the whole question of ethics in relation to government has come forcibly to public view. Attention has usually centered upon the more dramatic examples, such as overt or subtle bribery, and seeking and dispensing of favors, quick profits from government loans, and similar incidents. Often overlooked is the more general problem which involves conflicting and contradictory codes of conduct in all parts of society. While it has seldom been considered in such a light, the variance between democratic theory and undemocratic practices involved in state legislative representation indicates a deeper ethical problem. Its solution constitutes an important challenge to contemporary American institutions and values.[13]

Reapportionment issues thus affect the very foundation of our elective democracy because reapportionment may be used to protect or to undermine the integrity of our right to vote and our right to equal representation.

II. The Permissible Population Bases for Reapportionment Plans

Summary: the Supreme Court has allowed the use of two different population bases in determining the degrees of permissible deviation in state and local reapportionment plans. The first is total census population, and the other is a less than total census population which excludes certain defined groups. Although the Court has yet to address the issue of permissible population bases for congressional reapportionments, lower courts have recently held that only total census population may be considered.

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[13] Baker, *supra* note 2, at 33.

A showing of significant population deviations between districts is one of the most commonly used and successful means with which to challenge reapportionment plans. The term "deviation," as used by the courts, refers to the difference—expressed in percentage terms—between the populations of the least and most populous districts. For example, let us assume that a state has 10 districts, with a total population of 100,000; eight districts each contain 10,000 people, one contains 9,000 and one contains 11,000. The maximum deviation may be computed as follows:

(a) Ideal population per district = 10,000.

$$\frac{\text{100,000 (total state population)}}{\text{10 (number of districts)}} = \text{10,000}$$

(b) "Properly" represented district = 10,000 inhabitants.

$$\frac{\text{10,000 (actual population of district)}}{\text{10,000 (ideal population of district)}} = 100\%$$

(c) "Underrepresented" district (too many people per legislator) = 10% deviation above ideal district.

$$\frac{\text{11,000 (actual population of district)}}{\text{10,000 (ideal population of district)}} = 110\%$$

(d) "Overrepresented" district (too few people per legislator) = 10% deviation below ideal district.

$$\frac{\text{9,000 (actual population of district)}}{\text{10,000 (ideal population of district)}} = 90\%$$

(e) Total maximum deviation = 20%.

$$110\% - 90\% = 20\%$$

The threshold inquiry into population deviations must be, "Who is to be counted in determining the population of a district for purposes of reapportionment?" or, more precisely, "What is the relevant population base to be used in determining the deviations between electoral districts?" This section will discuss ways in which the courts have answered this preliminary question. The next section considers the range of permissible deviations.

A. Historical Background

Since 1962, when the courts entered the "political thicket"[14] of reapportionment, they have followed the principle of "one person, one vote."[15] For purposes of state and local reapportionment plans, *Reynolds v. Sims*[16] defined the "fundamental principle of representative government in this country [as] one of equal representation for equal numbers of people."[17] The Court emphasized that *population* was the significant criterion for apportionment purposes, holding "that as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[18] The Supreme Court has since reaffirmed this principle in recent decisions.[19]

A significant amount of litigation has surrounded the meaning of the phrase, "one person, one vote."[20] Various courts have grappled with the issue of whether that phrase requires that legislative districts contain equal numbers of eligible, registered or actual voters, or equal numbers of *people*—regardless of their age or eligibility to vote. The courts have made it clear that the "one person, one vote" principle refers to *all* people, with certain limited exceptions discussed below.

A legislator represents not only voters, but also those who neither vote nor register to vote, such as minors, illiterates and patients in mental institutions. This is consistent with the long-held belief that political participation entails more than just casting one's vote. "Equal representation" means that each legislator should represent the same number of people regardless of the number of people in his or her district who are eligible, registered or actual voters. If people do not vote or register to vote, the principle of "one person, one vote" still guarantees them equal representation.

This principle has been further confirmed by the Supreme Court's refusal to approve the use of eligible, registered or actual voters as population bases for the apportionment of state legislative districts.[21] Indeed, it has been argued that use of eligible or registered voters as the *sole* apportionment base would effectively overrule *Reynolds*.

If the Supreme Court ever affirms a standard of apportionment based on

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[14] *See supra* notes 5-8 and accompanying text.

[15] *See supra* note 3 and accompanying text.

[16] 377 U.S. 533 (1964).

[17] *Id.* at 560-61.

[18] *Id.* at 568.

[19] *See, e.g.*, Town of Lockport v. Citizens for Community Action, 430 U.S. 259, 264 (1977); and Conner v. Finch, 431 U.S. 407, 416 (1977).

[20] For a general discussion, see Bilzin, *Reapportionment on the Sub-State Level of Government: Equal Representation of Equal Vote?*, 50 B. U. L. Rev. 231 (1970).

[21] *Id.* at 241, n.50, citing Burns v. Richardson, 384 U.S. 73, 92-93 (1966).

> voters or those who may be eligible to vote, it will necessarily represent a determination that the use of total inhabitants as a base, as was demanded in *Reynolds*, is unconstitutional since, for example, if a district contains a university or mental institution which has people who are not eligible to vote, those eligible to vote in that district will necessarily be unconstitutionally overrepresented.[22]

B. *The Population Base for State and Local Reapportionment Plans*

In implementing the requirement of equally populated legislative districts, the Court has found two population bases permissible for state and local legislative reapportionments: (1) total population based on the federal census, and (2) a less than total census population which could exclude some or all of several categories of people.[23]

1. *The Leading Case*: Burns v. Richardson

Burns v. Richardson,[24] decided in 1966, challenged Hawaii's apportionment scheme on the ground that it was based upon numbers of registered voters rather than total population. The original suit was filed close on the heels of *Reynolds v. Sims*,[25] and the challengers argued that *Reynolds* proscribed the use of registered voters as a population base. The Court held, however, that Hawaii's apportionment scheme satisfied the Equal Protection Clause. This holding rested on the fact that the challenged plan "produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."[26]

The Court acknowledged *Reynolds'* mandate that state legislatures be apportioned substantially on the basis of population, but it went on to state that the Equal Protection Clause "does not require the States to use total population figures derived from the federal census"[27] in drawing reapportionment plans. In fact, the Court noted that states need not include "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured."[28]

While the Court upheld Hawaii's apportionment scheme, its holding was carefully limited in view of the circumstances. First, the Court recog-

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[22] Bilzin, *supra* note 20, at 245 n.71.
[23] *See* Burns v. Richardson, 384 U.S. 73 (1966).
[24] *Id.*
[25] 377 U.S. 533 (1964).
[26] *Id.* at 93.
[27] *Id.* at 91.
[28] *Id.* at 92.

nized the peculiar difficulties which Hawaii would face were it required to use federal census figures in apportioning its representative districts. The census figures were distorted by the large number of tourists and military personnel who were merely "short-term" or "temporary residents." Thus, if census figures were used, permanent residents of districts containing a substantial non-voting transient population would have weightier votes than residents of other districts.[29] Second, the Court observed that a "high proportion of the possible voting population is registered and 'strong drives to bring out the vote have resulted in a vote of from 88 to 93.6% of all registered voters during the elections of 1958, 1959, 1960 and 1962.' "[30] Third, Hawaii's apportionment scheme was merely an interim measure and a permanent reapportionment was imminent.[31] Thus, the Court emphasized that it was "not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."[32]

The Court cited several reasons why registered voters should not be used as a population base for purposes of reapportionment. The initial and most obvious problem is the likelihood of disparity between an apportionment using registered voters as a base and one using total population as a base.[33] Further, a registered voters base is

> susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process. . . . Moreover, "fluctuation in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitious factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions."[34]

At the same time, the Court suggested various ways in which such inherent weaknesses be overcome.

> It may well be that reapportionment more frequently than every 10 years, perhaps every four or eight years, would better avoid the hazards of its use. Use of presidential election year figures might both assure a high level of participation and reduce the likelihood that varying degrees of local interest

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[29] *Id.* at 94-95.

[30] *Id.* at 96 (citation omitted).

[31] *Id.* at 97.

[32] *Id.* at 96.

[33] *Id.* at 90-91. The plan challenged in *Burns* apportioned 37 representatives to the island of Oahu; if a total population base were used, Oahu would be entitled to 40 of the 51 seats in the State House. Further, if a total population base were used, "Oahu's ninth and tenth representative districts would be entitled to 11 representatives, and the fifteenth and sixteenth representative districts would be entitled to eight. On a registered voter basis, however, the ninth and tenth districts claim only six representatives and the fifteenth and sixteenth districts are entitled to 10." *Id.* (footnote omitted).

[34] *Id.* at 92-93 (citation omitted).

> in the outcome of the election would produce different patterns of political activity over the State. Other measures, such as a system of permanent personal registration, might also contribute to the stability and accuracy of the registered voters figure as an apportionment basis.[35]

To summarize, *Burns* pointed out that the Equal Protection Clause does not require reapportioning bodies to consider the total populations of state and local political subdivisions in establishing electoral districts. The decision indicated that a permissible population base may exclude certain defined groups. While the Court refused to sanction the use of registered voters as a base in all circumstances, it did so in *Burns* because the resultant apportionment was not substantially different from one which would have resulted from the use of total population or another permissible base. Apparently, permissible bases for purposes of state and local reapportionments include: (1) census population, or (2) census population minus aliens, transients, short-term or temporary residents, persons denied the vote for conviction of crime or any combination of these groups.

2. *Subsequent Application of* Burns

When *Burns* was decided, the Court did not conduct a district-by-district comparison of population figures and registered voter figures. Instead, it relied on the lower court record which included a general comparison of statistical data for the State of Hawaii. Over the last fifteen years, the majority of courts interpreting *Burns* have held that a district-by-district comparison is necessary, and in almost all such cases, the use of registered voters as a population base has been found unconstitutional.[36]

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[35] *Id.* at 96-97.

[36] Marshall v. Edwards, 582 F.2d 927 (5th Cir. 1978); Zimmer v. McKeithen, 485 F.2d 1297, 1302 n.11 (5th Cir. 1973); Cohen v. Maloney, 410 F. Supp. 1147, 1152 n.9 (D. Del. 1976); Preisler v. Mayor of City of St. Louis, 303 F. Supp. 1071 (E.D. Mo. 1969); Kapral v. Jensen, 271 F. Supp. 74 (D. Conn. 1967); D'Adamo v. Cobb, 27 Cal. App. 3d 448, 103 Cal. Rptr. 813 (Cal. Ct. App. 1972); Calderon v. City of Los Angeles, 4 Cal. 3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971); In Re Township of Penn Hills, County of Allegheny, 216 Pa. Super. 327, 264 A.2d 429 (1970); Warren v. City of North Tonawanda, 60 Misc. 2d 593, 303 N.Y.S.2d 945 (Sup. Ct., Niagra County, N.Y. 1969); Hartman v. City and County of Denver, 165 Colo. 563, 440 P.2d 778 (1968); Opinion of the Justices, 353 Mass. 790, 230 N.E.2d 801 (1967). The above cases have interpreted *Burns* as requiring a comparison of permissible population and registered voters on a district-by-district basis. *But see* Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982), which found that *Burns* did not require such a comparison "as an absolute prerequisite to validating a registered voter based apportionment." *Id.* at 564-65. *See also* Note, *Student Voting and Apportionment: The "Rotten Boroughs" of Academia*, 81 Yale L.J. 35, 50 (1971), which observes that lower courts have rejected "a majority of the apportionment plans based on voter registration."

In post-*Burns* cases which compared registered voters and total census population, it ap-

Since 1966, the United States Supreme Court has directly considered *Burns* only once, in *Ely v. Klahr*,[37] where it reiterated *Burns'* requirement that a registered voters base must not produce a substantially different apportionment from that which would have resulted from the use of a permissible base.[38] Three additional decisions—one by the California Supreme Court and two by the Federal District Court for the District of Hawaii—are here worth mentioning.

In the leading case of *Calderon v. City of Los Angeles*,[39] a unanimous California Supreme Court held that the City of Los Angeles' reapportionment plan, which used registered voters as its base, was unconstitutional as violative of *Burns*. The court began with the proposition that "an apportionment plan based on registered voters will satisfy the equal protection clause only if it produces *districts* containing roughly equal numbers of people."[40] According to the court, the Los Angeles plan demonstrated how a voter-based apportionment could be very different from one based on total population. "The number of voters in each district is roughly similar. . . . Yet in terms of population [the districts] are grossly unequal. . . . In light of repeated United States Supreme Court decisions that electoral districts must contain substantially equal numbers of people . . . this variation is simply unacceptable."[41] The California court concluded that the "essence of *Burns*, and of nearly every other apportionment decision, has been the repeated assertion of the primacy of population as the keystone of electoral districting."[42]

In *Travis v. King*[43] and *Shipley v. Mita*,[44] the State of Hawaii and the City and County of Honolulu reapportionment commissions had used registered voters as the population bases in their respective plans. The district court found this violative of the Equal Protection Clause because

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pears that census tracts were compatible with legislative districts. Calculation of district populations was thus a simple matter for both the apportioning bodies and those challenging the plans. However, where such lines do not correlate, the Supreme Court has recognized that extrapolations and estimates may be valid. In Conner v. Finch, 431 U.S. 407 (1977), the Court conceded that

> [t]he census is itself at best an approximate estimate of the State's population at a given moment in time. Because it is taken by census tract rather than along supervisory district or voting precinct lines, relevant population figures for these political districts have to be extrapolated. . . . [O]n remand . . . the District Court should explain the genesis of the population figures on which it relies.

Id. at 416 n.13. *See also* Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) (order appointing special masters); and Pelzer v. City of Bellevue, 200 Neb. 541, 264 N.W.2d 653 (1978).

[37] 403 U.S. 108 (1971).

[38] *Id.* at 115 n.7 (citations omitted).

[39] 4 Cal.3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971).

[40] *Id.* at 254, 481 P.2d at 490, 93 Cal. Rptr. at 362.

[41] *Id.* at 261-62, 481 P.2d at 495-96, 93 Cal. Rptr. at 367-68.

[42] *Id.* at 262, 481 P.2d at 496, 93 Cal. Rptr. at 368.

[43] 552 F. Supp. 554 (D. Hawaii 1982).

[44] No. 82-0217 (D. Hawaii June 18, 1982).

the requirements set forth in *Burns* had not been met. Special masters were appointed to draft reapportionment plans that would pass constitutional muster. The court expressed a preference for plans based on "citizen population" (i.e., a base that excluded aliens, nonresidents and convicted felons from total census population). Because of time limitations, however, the court enunciated a willingness to allow the use of either of the following bases: (1) total census population, or (2) a base that excluded nonresident military personnel and their dependents.[45]

The *Travis* court acknowledged that in challenges to state voter-based reapportionment plans, *Burns* requires the state to bear "the initial burden of coming forth with some evidence that the proposed apportionment substantially duplicates the results of one based on a permissible population base."[46] The court assumed, without deciding, that Hawaii had met this initial burden, but found that the burden was successfully rebutted by a "strong showing that the plan [was] in fact fatally flawed."[47]

Travis rejected the notion that *Burns* requires district by district comparisons of registered voter and population figures in order to show that a voter-based plan is not substantially different from one which used a permissible base. According to the court, such a comparison is not "an absolute prerequisite to validating a registered voter based apportionment."[48] Inexplicably, the court distinguished *Travis* from cases citing *Burns* as a mandate for district-by-district comparisons.[49]

3. How Specified Groups May Be Constitutionally Excluded From the Bases Used in State and Local Reapportionments

Where a reapportionment scheme uses a population base which excludes identifiable groups, it must be determined whether such exclusion has been rationally and reasonably implemented. The usual target groups for exclusion are military personnel, college students, aliens and "transients" or short-term residents.

Burns prohibits exclusion from total population of *all* military personnel or any defined occupational group for the purpose of computing a permissible population base. Only those members of the military who are "transients, short-term or temporary residents" may be constitutionally excluded. In rendering its decision in *Burns*, the Court relied heavily on *Davis v. Mann*.[50] There the Court held that "[d]iscrimination against a

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[45] Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) (order implementing apportionment plan recommended by special masters).

[46] Travis v. King, 552 F. Supp. at 565.

[47] *Id.*

[48] *Id.* at 564-65.

[49] *Id.*

[50] 377 U.S. 678 (1964). In *Davis*, a reapportioning body had attempted to justify underrepresentation in certain districts by noting that they contained a large number of military

class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible."[51] Quoting *Davis*, the *Burns* Court noted that "[t]he difference between exclusion of all military and military-related personnel, and the exclusion of those not meeting a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification."[52] Of course, at the time of *Burns* (1966), Hawaii and other states imposed lengthy residency requirements for voting which have since been challenged and ruled invalid.[53]

Alaska, like Hawaii, has a large military population. The "problem" of excluding some of that population from the base employed by a reapportioning body was addressed in the Alaska case of *Groh v. Egan*.[54] There, the Alaska Supreme Court approved a formula which excluded *transient* military personnel from the apportionment population base. The court first described a formula, used in Washington, which had been upheld by the United States Supreme Court.[55] Using a similar method, Alaska excluded 89% of all military personnel as nonresidents. However, the court refused to apply this formula to military dependents, all of whom were included in the apportionment base.[56]

In contrast, *Travis v. King*[57] involved the exclusion of all unregistered military personnel and their dependents from the apportionment base. The Hawaii Reapportionment Commission had assumed that voter registration was the only indicator of residency. The district court, however, drew up its own plan and approved a formula for estimating the number of nonresident military and their dependents. As a result, 67.5% (83,392 of the 123,631 total military population) were considered nonresidents for purposes of reapportionment.[58]

Decisions involving exclusion of college students from reapportionment population bases seem to echo the cases involving military personnel.[59] Students who fall into one of the groups set out in *Burns*[60] may be ex-

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personnel.

[51] *Id.* at 691.

[52] 384 U.S. at 92 n.21.

[53] *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 260-81 (1975).

[54] 526 P.2d 863 (Alaska 1974).

[55] *Id.* at 873, describing the formula used in Washington State Labor Council AFL-CIO v. Prince, 409 U.S. 808 (1972).

[56] In toto, 36% of all military personnel counted in the 1970 census were excluded. 526 P.2d at 874. *See also* In Re Opinion of Justices, 111 N.H. 146, 276 A.2d 825, 827 (1971) ("a reliable and systematic method" must be used regarding exclusion of nonresident students and military); Dubois v. City of College Park, 286 Md. 677, 410 A.2d 577 (1980).

[57] 552 F. Supp. 554 (D. Hawaii 1982).

[58] Final Report by the Masters, Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982).

[59] *See supra* note 56.

[60] I.e., aliens, transients or short-term or temporary residents. Burns v. Richardson, 384 U.S. 73, 91-92 (1966).

cluded on the basis of a "reliable and systematic method"[61] which indicates the proportion of students who are temporary residents. Presumably, the same rules will be applied whenever any transient group is sought to be excluded from a population base.

C. *The Population Base for Congressional Reapportionment Plans*

Article I, section 2, clause 3 of the United States Constitution (as amended by the fourteenth amendment) mandates that "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Additional provision is made for a decennial enumeration of the population of the United States; this enumeration forms the basis for apportionment of congressional representatives. The decennial enumeration is governed by the Census Act.[62] Although the number of representatives from each state is determined by the Secretary of Commerce, states are free to establish the districts from which their representatives are elected.

As a basic proposition, "all" people must be included in population bases for congressional reapportionments. However, it is as yet unclear whether specific groups of individuals may be excluded from congressional reapportionment bases. The federal census, which is used to apportion congressional representatives among the states,[63] includes "the whole number of persons in each State, excluding Indians not taxed."[64] Thus, the census includes legal and illegal aliens, transients, short-term and temporary residents and persons denied the vote for conviction of crime—all of those classes which *Burns v. Richardson* considered excludable in the context of state and local reapportionments. The question thus arises as to whether the federal census must also be used for the establishment of congressional districts *within* as well as among the states.

Since *Wesberry v. Sanders*,[65] in which the Court established that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," the Supreme Court has not permitted states to exclude any population group from a congressional reapportionment

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[61] *Opinion of Justices*, 276 A.2d at 827.

[62] 13 U.S.C. § 141 (a) and (b) (1976) charges the Secretary of Commerce with the responsibility of counting the number of residents of each state, calculating the number of representatives to which each state is entitled, and transmitting those figures to the President. The President then delivers this information to the Clerk of the House of Representatives, who officially notifies each state of the size of its delegation. 2 U.S.C. § 2a (1976).

[63] Article I, § 2, cl. 3 of the U.S. Constitution states that no more than one representative will be apportioned for each 30,000 residents of each state.

[64] U.S. CONST. amend. XIV, § 2.

[65] 376 U.S. 1 (1964).

base. In *Young v. Klutznick*,[66] the Court was presented with an opportunity to address this issue, but denied certiorari. Nevertheless, that case provides some important insights.

One of the issues posed in *Young* was whether, under article I, section 2, states must utilize census bureau certified figures in determining the population bases for congressional districting, or whether each state may adjust census bureau figures or make independent determinations of "population." Detroit's Mayor Coleman A. Young had challenged the constitutionality of the Census Bureau's refusal to adjust the 1980 census figures in response to an alleged undercount of urban Blacks and Hispanics. Although the district court agreed with Young's contention, it concluded:

> It is clear that the framers of the Constitution could not have intended that the census provide the standard for apportionment among the states while simultaneously intending that a different and possibly conflicting assessment of state population govern apportionment within the state. . . . It is therefore clear that the Constitution *commands* that the data taken from the decennial census govern apportionment within the states.[67]

Adjusted census figures would provide a more accurate reflection of actual population.[68] Therefore, the court held that such adjustment was constitutionally mandated.[69] The Court of Appeals for the Sixth Circuit reversed, holding that Young lacked standing and that the case was not ripe since the Michigan Legislature could adjust census data to prevent the anticipated harm.[70] The Supreme Court denied certiorari on the basis that the action lacked ripeness, due to the fact that the Michigan Legislature had not acted on reapportionment since the 1980 census.[71]

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[66] 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied, sub nom.* Young v. Baldridge, 455 U.S. 939 (1982).

[67] 497 F. Supp. at 1324-25. The court further stated that *"[a]ll* of the 50 states are required to use census data for the purpose of congressional districting." *Id.* at 1325. Hawaii did not apply census data to a congressional reapportionment until 1982, however, when Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) was decided.

[68] 497 F. Supp. at 1333.

[69] *Id.* at 1336.

[70] 652 F.2d 617 (6th Cir. 1981). In a dissenting opinion, Judge Keith noted that Michigan had always used unadjusted, federally-supplied, sub-state population figures for its congressional reapportionments and that the "Bureau should know that in recent American history the states have almost invariably used federally-supplied figures for reapportionment." *Id.* at 631. In a footnote, Judge Keith made the following observations:

> The government points out that Hawaii apparently does not use federally supplied sub-state totals for state reapportionment. [Citing Appellant's reply brief.] However, there is no question that this is a very unusual state practice. . . . It is so unusual that the Bureau must expect and be able to foresee that in almost every instance its sub-state totals will in fact be used by the states for reapportionment.

Id. at 631 n.7.

[71] Young v. Baldridge, 455 U.S. 939 (1982).

Between *Wesberry* and *Young*, the Supreme Court indirectly addressed the issue of whether census figures must be used as the relevant population base in congressional reapportionments. *Kirkpatrick v. Preisler*[72] considered whether, for purposes of a 1967 reapportionment, Missouri could adjust 1960 census figures to account for intervening population shifts. Although the attempted adjustment was invalidated, the Court set forth guidelines for subsequent adjustments. "Where these shifts can be predicted with a high degree of accuracy, states that are redistricting may properly consider them. . . . Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner."[73]

Significantly, the *Kirkpatrick* Court noted that "[t]here may be a question whether distribution of congressional seats except according to total population can ever be permissible under Article I, §2."[74] In defense of the population variances in its 1967 reapportionment plan, Missouri argued unsuccessfully that several districts contained large numbers of military personnel and students who were not eligible voters, persons who were thus not part of the required population base. Assuming without deciding "that apportionment may be based on eligible voter population rather than total population," the Court found Missouri's plan unacceptable nonetheless. The State had made "no attempt to ascertain the number of eligible voters in each district and to apportion accordingly."[75] Mr. Justice Fortas, concurring, characterized the majority opinion as allowing modifications of census to reflect population movements,[76] but observed that states should also be allowed to "discount the census figures to take account of the presence of significant transient or nonresident population in particular areas (*an adjustment as to which the Court indicates doubt*)."[77]

It is, undoubtedly, no accident that Mr. Justice Brennan, author of the majority opinions in *Kirkpatrick* and *Burns*, did not cite *Burns* or imply that any figures other than the census (whether or not adjusted for population trends) could be used for reapportionment of congressional districts. Thus, it appears that the Court has declined to sanction a *Burns*-like interpretation of "population" in the context of congressional reapportionments. By the same token, however, the Court has made no attempt to distinguish between permissible population bases for purposes of state and local reapportionments on the one hand, and congressional

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[72] 394 U.S. 526 (1969).

[73] *Id.* at 535. *See also* Dixon v. Hassler, 412 F. Supp. 1036, 1040 (W.D. Tenn. 1976), *aff'd sub nom.* Republican Party of Shelby County v. Dixon, 429 U.S. 934 (1976); Graves v. Barnes, 446 F. Supp. 560, 568 (W.D. Tex. 1977); and Exon v. Tiemann, 279 F. Supp. 609 (D. Neb. 1968). Only in *Exon* was the use of "adjusted" census figures upheld.

[74] 394 U.S. at 534.

[75] *Id.* at 534-35.

[76] 394 U.S. 537 (Fortas, J., concurring).

[77] *Id.* at 537.

reapportionments on the other.

Ironically, the three-judge lower court in *Kirkpatrick*[78] discussed but did not decide the issue of permissible population bases. In a well-reasoned appendix, the court stated:

> [The] history of Art. I, §2 would seem to make it apparent that the founders included the decennial census in that section as a central instrument specifically designed to control and adjust the constitutionally required future apportionments of [Congress]. It would seem historically incongruous not to require the use of the constitutional decennial census in the establishment of congressional districts within the State.[79]

The court noted that the founders' insistence on a federal census was designed to prevent states from manipulating their own census figures; such conduct "would obviously have a drastic impact on the composition [of Congress]."[80]

Apparently, only one federal court has approved the exclusion of specified population groups from a state's congressional reapportionment plan. In *Meeks v. Avery*,[81] decided two years after *Wesberry*, a three-judge Kansas district court approved the use of a state census as the population base in a congressional reapportionment plan, specifically rejecting proffered arguments that the Kansas Legislature was required by article I, section 2 of the United States Constitution to use the latest federal census figures instead. The court noted that all parties had agreed upon the accuracy of Kansas' 1964 enumeration, which counted only those persons who "had established residence in the county."[82] The state enumeration excluded unmarried college students, military personnel and their dependents living on base, persons in institutions and convicts. Military personnel and their dependents living off base were counted as residents, while all members of excluded groups were considered as having residence in the places where they lived prior to their entrance into the military,

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[78] Preisler v. Secretary of State of Missouri, 279 F. Supp. 952 (W.D. Mo. 1967).

[79] *Id.* at 1002. A similar point was made in the case of Wilkins v. Davis, 205 Va. 803, 139 S.E.2d 849 (1965), where the Virginia Supreme Court held that "total population" was the relevant basis for Virginia's congressional reapportionment. The court was "not convinced that . . . military personnel constitute a permissible exclusion. There was evidence that the military-related personnel were included in ascertaining that Virginia's population entitled her to ten Congressmen." *Id.* at 808, 139 S.E.2d at 852. Identical reasoning in Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) led a U.S. district court to reach the same result. Some persons might argue that this reasoning does not take into account the possible situation where a congressman is elected by a relatively small minority of residents in a district which contains a large number of military personnel; the congressman could cater largely to the needs of those actually responsible for his election, at the expense of his non-voting constituents. Nonetheless, the weight of judicial authority appears to favor inclusion of military personnel in congressional reapportionment bases.

[80] 279 F. Supp. at 1003.

[81] 251 F. Supp. 245 (D. Kan. 1966).

[82] *Id.* at 249.

schools or institutions. Convicts simply were not considered citizens. The court noted that the state's enumeration "excluded individuals who were unlikely to be interested in the political, social and economic problems of the state."[83]

The *Meeks* court saw the legislature's choice of the 1964 enumeration over the 1960 federal census as nothing more "than the exercise of judgment in the legislative process. We find no constitutional fault with the choice made."[84] The court also noted that references in article I, section 2, as amended by section 2 of the fourteenth amendment, to the enumeration of population "have to do with the apportionment of representatives *among* the states, not within them."[85] An appendix to the court's decision included the state Attorney General's opinion, which observed that the "United States Supreme Court has not been called upon to rule specifically on the question of what particular census figures are to be used in drawing up congressional districts."[86]

In contrast to *Meeks*, the 1982 case of *Travis v. King*[87] held that article I, section 2 requires the states to "depend on total federal census figures to apportion congressional districts within their boundaries."[88] The *Travis* court was unpersuaded by the argument that inclusion of Hawaii's large military population in the congressional apportionment base would be unfair to the state's citizens. Military personnel had been included in Hawaii's population for federal census purposes and had thereby "aided the state in achieving its two congressional seats. Equity alone argues that it therefore should be included in the base used to draw the congressional districts within the state."[89]

Meeks notwithstanding, constitutional history, logic and equity all seem to support the conclusion that the federal census is the proper population base for purposes of congressional redistricting. There is as yet no indication that the Supreme Court would permit exclusion of specific

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[83] *Id.* at 250. *But see* Federation for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980), where the district court discussed the legislative history of the fourteenth amendment relating to its modification of art. I, § 2. The court noted that the 39th Congress retained the original language of art. I—"the whole number of *persons*"—after "considerable debate" over the use of the terms "voters" or "citizens." This legislative decision was prompted in part by the fact that certain non-voting groups were considered to have vital interests in the conduct of the government.

[84] 251 F. Supp. at 250.

[85] *Id.* at 249-50.

[86] *Id.* at 259. *Meeks* was criticized in Preisler v. Secretary of State of Missouri, 279 F. Supp. 952 (W.D. Mo. 1967) as being decided "without the benefit of Supreme Court guidance." *Id.* at 1003. The *Preisler* court suggested that *Meeks'* reliance on *Burns* was misplaced, emphasizing that *Burns* "was significantly limited to state apportionments and should not be indiscriminately read as the establishment of a principle applicable to congressional apportionment cases." *Id.*

[87] 552 F. Supp. 554 (D. Hawaii 1982).

[88] *Id.* at 571.

[89] *Id.*

population subgroups from consideration in congressional reapportionment plans, and such a decision seems rather unlikely. However, arguments can be—and have been—made on both sides of this issue, and it may take an unequivocal Supreme Court decision to lay the issue to rest.

III. How "Equal" Is "Equal"?

Summary: With very limited exceptions, congressional districts must be virtually equal in population; allowable deviations are usually less than 1%. For state and local legislative districts, the courts have applied a three-tiered analysis, resulting in approval of deviations as high as 18.6%.

A. Historical Background

The Supreme Court first addressed the question of population deviations[90] in the landmark cases of *Wesberry v. Sanders*,[91] which involved congressional districts, and *Reynolds v. Sims*,[92] which involved state legislative districts.

Wesberry held that "as nearly as is practicable," congressional districts must be equal in terms of population.[93] The decision was later characterized as establishing "that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."[94] In *Reynolds*, the Court reiterated *Wesberry*'s practicability standard and emphasized that the "overriding objective must be substantial equality of population among the various [state legislative] districts."[95]

Wesberry and *Reynolds* left unanswered the basic question of the precise meaning of articulated standards such as "as nearly as is practicable" and "substantial equality." Moreover, it remains unclear whether congressional and state legislative reapportionments must conform to identical standards.

Theoretically, it is possible to draw districts with equal populations. Practically, however, such line-drawing may ignore factors, such as protection of minority interests and preservation of traditional political boundaries, which are relevant to ensuring the right to representation.

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[90] For an explanation of how population deviations are calculated, see Section II of this article.

[91] 376 U.S. 1 (1964).

[92] 377 U.S. 533 (1964).

[93] 376 U.S. at 7-8.

[94] 377 U.S. at 560-61.

[95] *Id.* at 579.

Even before the Court first considered whether some deviations are permissible, it summarily struck down state legislative reapportionment plans which involved deviations of up to 33.55%,[96] and congressional plans with maximum deviations of 20%[97] and 31%.[98]

In a series of subsequent cases, decided between 1969 and 1973, the Court drew a dichotomy between the applicable standards for congressional reapportionment plans and state or local plans. Congressional apportionments are governed by article I, section 2, clause 3 of the United States Constitution, as amended by section 2 of the fourteenth amendment: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." State and local apportionments, on the other hand, fall under the Equal Protection Clause found in section 1 of the fourteenth amendment: "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." According to the Court, this section of the Constitution does not necessitate as strict an interpretation of equality as does section 2 of the fourteenth amendment. Hence, the Equal Protection Clause allows more flexibility in terms of permissible deviations between districts.

In 1973, the Court explicitly made this distinction in *Mahan v. Howell*,[99] noting that while "population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, section 2, broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting. . . . The dichotomy between the two lines of cases has consistently been maintained."[100] Two years later, in *Chapman v. Meier*,[101] the Court reaffirmed this position:

> [W]e have acknowledged that some leeway in the equal-population requirement should be afforded States in devising their legislative reapportionment plans. As contrasted with congressional districting, where population equality appears now to be the preeminent, if not the sole, criterion on which to adjudge constitutionality, when state legislative districts are at issue we have held that minor population deviations do not establish a prima facie constitutional violation.[102]

The underlying rationale for this position has not gone without criticism. However, while the dichotomy arguably lacks adequate justification,[103]

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[96] Swann v. Adams, 385 U.S. 440 (1967).

[97] Duddleston v. Grills, 385 U.S. 455 (1967) (per curiam).

[98] Lucas v. Rhodes, 389 U.S. 212 (1967) (per curiam).

[99] 410 U.S. 315 (1973).

[100] *Id.* at 322.

[101] 420 U.S. 1 (1975).

[102] *Id.* at 23 (citations omitted).

[103] *See* Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 858 n.121 (1981).

this critical distinction must be recognized by all who prepare, challenge or defend reapportionment plans.

B. Permissible Deviations in Congressional Reapportionment Plans

The phrase, "as nearly as is practicable," used in *Wesberry v. Sanders*,[104] has been interpreted to mean that the population of congressional districts may not vary by more than a "very small" amount. In *Kirkpatrick v. Preisler*,[105] the Court rejected a maximum deviation of 5.97%; similarly, in *Wells v. Rockefeller*,[106] the Court rejected a plan with a maximum deviation of 13.1%. Four years later, the Court rejected an even smaller maximum deviation of 4.1% in *White v. Weiser*.[107]

In establishing a very strict standard for congressional apportionments, the Court has expressly rejected the notion of "de minimis" deviations.[108] Thus, it appears that no deviation is too small to require justification. One commentator, analyzing relevant district court cases through 1980, justifiably concluded that "we still cannot be sure what level of deviation is permissible, although it is surely something less than 4 percent and probably less than 1 percent."[109] Notwithstanding the Court's insistence on virtual equality, at least three Justices have indicated a willingness to reconsider *Kirkpatrick* and *White* so as to allow "modest variations."[110] However, it remains to be seen whether decisions based on the 1980-81 reapportionments will reveal any changes in the Court's policy.

The following tables illustrate how very minor deviations have been approved by U.S. district courts since *Kirkpatrick*.

Table 1. Congressional Apportionments Approved by District Courts

Case	*Maximum % Deviation Accepted*
Wells v. Rockefeller (1970)[111]	0.002
Skolnick v. State Electoral Board of Illinois (1971)[112]	1.14
Drum v. Scott (1972)[113]	3.79

[104] 376 U.S. at 7-8.
[105] 394 U.S. 526 (1969).
[106] 394 U.S. 542 (1969).
[107] 412 U.S. 783 (1973).
[108] *See* Kirkpatrick v. Preisler, 394 U.S. at 530-31.
[109] Guido, *supra* note 3, at 64.
[110] *See* White v. Weiser, 412 U.S. at 798 (Powell, J., concurring). This opinion was joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist.
[111] 311 F. Supp. 48 (S.D.N.Y. 1970), *aff'd mem.*, 398 U.S. 901 (1970).
[112] 336 F. Supp. 839 (N.D. Ill. 1971).
[113] 337 F. Supp. 588 (M.D.N.C. 1972).

Preisler v. Secretary of State of Missouri (1972)[114]	0.6291
Dunnel v. Austin (1972)[115]	0.00257
Donnelly v. Meskill (1972)[116]	0.04
David v. Cahill (1972)[117]	0.15
West Virginia Civil Liberties Union v. Rockefeller (1972)[118]	0.78
Travis v. King (1982)[119]	0.012

Table 2. Congressional Apportionments Rejected by District Courts

Case	*Maximum % Deviation Rejected*
Skolnick v. Illinois State Electoral Board (1969)[120]	13.6
Klahr v. Williams (1970)[121]	14.1
David v. Cahill (1972)[122]	51.54
Doulin v. White (1982)[123]	1.87
Travis v. King (1982)[124]	3.0 (estimated)[125]

In the reapportionment plans drawn in 1980-81, almost all states kept maximum deviations below 1% in their congressional plans; the highest deviation is less than 3%.[126] The various justifications for deviations are discussed in section III.E. of this article.

C. *Permissible Deviations in State and Local Reapportionment Plans*

The Supreme Court has also defined the "as nearly as is practicable" standard for purposes of state and local legislative apportionments. The

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[114] 341 F. Supp. 1158 (W.D. Mo. 1972).
[115] 344 F. Supp. 210 (E.D. Mich. 1972).
[116] 345 F. Supp. 962 (D. Conn. 1972).
[117] 342 F. Supp. 463 (D.N.J. 1972).
[118] 336 F. Supp. 395 (S.D. W. Va. 1972).
[119] 552 F. Supp. 554 (D. Hawaii 1982).
[120] 307 F. Supp. 698 (N.D. Ill. 1969).
[121] 313 F. Supp. 148 (D. Ariz. 1970), *aff'd sub nom.* Ely v. Klahr, 403 U.S. 108 (1971).
[122] 342 F. Supp. 463 (D.N.J. 1972).
[123] 528 F. Supp. 1323 (E.D. Ark. 1982).
[124] 552 F. Supp. 554 (D. Hawaii 1982).
[125] This estimated maximum deviation was based on census population figures calculated in March 1982 by Sharon H. Nishi, staff elections researcher of the Office of the Lieutenant Governor. Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) (affidavit of Sharon H. Nishi).
[126] Reapportionment Information Update, May 10, 1982, at 7. This newsletter is a joint publication of the Council of State Governments and the National Conference of State Legislatures.

following table illustrates the treatment given these cases by the Supreme Court.

Table 3. State and Local Apportionments Considered by the U.S. Supreme Court

Case	*Maximum % Deviation Accepted*
Abate v. Mundt (1971)[127]	11.9
Mahan v. Howell (1973)[128]	16.4
Gaffney v. Cummings (1973)[129]	7.83
White v. Regester (1973)[130]	9.9
	Maximum % Deviation Rejected
Chapman v. Meier (1975)[131]	20.0
Conner v. Finch (1977)[132]	16.5 (senate); 19.3 (house)

In essence, the Court has developed a *three-tiered standard* for determining the constitutionality of state and local reapportionment plans.[133] At the first level, maximum deviations of less than 10% are considered de minimis and therefore facially constitutional. At the next level, deviations between 10% and approximately 16.4% must be adequately justified by the reapportioning body before they will be upheld.[134] Finally, at the third level, deviations over approximately 16.4% are presumptively unconstitutional.[135]

Since 1973, district courts have followed this three-tiered approach and have not rejected any legislative (as opposed to court-ordered) plans with deviations of less than 10%. Plans with deviations in excess of 10% have been approved only where they are supported by acceptable justifications. The courts have flatly rejected plans involving deviations of more than 18.6%. The following table illustrates these holdings.

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[127] 403 U.S. 182 (1971).

[128] 410 U.S. 315 (1973).

[129] 412 U.S. 735 (1973).

[130] 412 U.S. 755 (1973).

[131] 420 U.S. 1 (1975).

[132] 431 U.S. 407 (1977).

[133] The concept of a three-tiered standard has been employed by other writers in describing the Court's rulings. *See, e.g.*, NATIONAL CONFERENCE OF STATE LEGISLATURES, REAPPORTIONMENT: LAW AND TECHNOLOGY 15 (A. Wollock ed. 1980); and Guido, *supra* note 3, at 66.

[134] See generally the discussion in Section III.E., *infra*, concerning justification of deviations.

[135] In Mahan v. Howell, the Court commented that the 16.4% deviation approved there "may well approach tolerable limits." 410 U.S. at 329. In fact, the Court has approved only two reapportionment plans since Reynolds v. Sims, 377 U.S. 533 (1964) with deviations in excess of 10%: in *Mahan* and in Abate v. Mundt, 403 U.S. 182 (1971). See Table 3.

Table 4. State and Local Apportionments Addressed by U.S. District Courts

Case	*Maximum % Deviation Accepted—Tier One*
Chapman v. Meier (1975)[136]	6.26
Graves v. Barnes (1977)[137]	less than 2.0
	Maximum % Deviation Accepted—Tier Two
Goines v. Heiskell (1973)[138]	16.179
Travis v. King (1982)[139]	18.6
	Maximum % Deviation Rejected—Tier Three
Chapman v. Meier (1975)[140]	20.17
Sullivan v. Crowell (1978)[141]	21.78; 35.57
Cosner v. Dalton (1981)[142]	22-28
Travis v. King (1982)[143]	43.18

In the plans drawn during 1980-81, almost all states kept maximum deviations below 10%; only nine states exceeded 10% in at least one house, and only two exceeded 20%.[144]

D. Court-Ordered Plans

When a court has invalidated a legislative plan but, due to time restrictions, assumes responsibility for drawing a new plan, it must minimize deviations under more stringent guidelines than those applied to legislatures. In *Chapman v. Meier*,[145] the Supreme Court rejected a court-ordered plan with a 20% maximum deviation. The Court distinguished between state legislative plans and court-ordered plans, concluding that "[a] court-ordered plan . . . must be held to higher standards than a State's

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[136] 407 F. Supp. 649 (D.N.D. 1975).

[137] 446 F. Supp. 560 (W.D. Tex. 1977).

[138] 362 F. Supp. 313 (S.D. W. Va. 1973).

[139] 552 F. Supp. 554 (D. Hawaii 1982).

[140] 407 F. Supp. 649 (D.N.D. 1975).

[141] 444 F. Supp. 606 (W.D. Tenn. 1978).

[142] 522 F. Supp. 350 (E.D. Va. 1981).

[143] 552 F. Supp. 554 (D. Hawaii 1982). The 43.18% deviation was calculated using registered voters as the population base. *Id.* at 558.

[144] *See* Reapportionment Information Update, *supra* note 126, at 7. Of the two plans involving deviations of over 20%, one is an 89% deviation that results from the apportionment of a representative to one small county in Wyoming. The plan was challenged by members of the League of Women Voters of Wyoming, and upheld, in Brown v. Thompson, 536 F. Supp. 780 (D. Wyo. 1982), *prob. juris. noted*, 51 U.S.L.W. 3253 (U.S. Oct. 5, 1982) (No. 82-65).

[145] 420 U.S. 1 (1975).

own plan."[146]

In *Conner v. Finch*,[147] decided two years later, the Court again faced a court-ordered plan involving substantial deviations of 16.5% for the state senate and 19.3% for the house. Quoting at length from *Chapman*, the Court found these deviations unacceptable for a court-ordered plan, stating that deviations in excess of 10% in court-ordered plans require "compelling justifications," or the "enunciation of historically significant state policy or unique features."[148] Moreover, for deviations of less than 10%, the Court declined to assume prima facie constitutionality as it had for legislatively-drawn plans. Thus, while *Conner* seemed to employ a traditional three-tiered approach, it articulated much lower percentage guidelines than had been applied to legislative plans.

E. Justification of Deviations

The courts have accepted certain justifications for population deviations between electoral districts. While some justifications require further development, a few might be used successfully in defense of challenged plans. A thorough understanding of each justification is vital for both defenders and challengers of reapportionment plans.

Additionally, it is crucial in weighing the viability of launching any challenge to remember that the reapportioning body bears the burden of justifying any deviation between congressional districts. In the context of state or local legislative districts, however, the burden falls upon the reapportioning body only if the challenged plan contains deviations over 10%.[149] Where court-ordered plans involve substantial deviations, the burden falls on the court to "elucidate the reasons necessitating *any* departure from the goal of population equality. . . ."[150]

1. Justification for Deviations Between Congressional Districts

Justifications supporting very minor deviations between congressional districts were recognized for the first time in *Kirkpatrick v. Preisler*.[151] There, the Court rejected a 5.97% maximum deviation. However, the Court conceded that *unavoidable* deviations may be accepted if: (1) the

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[146] *Id.* at 26. The Court cited "several years of redistricting confusion" in North Dakota as its reason for applying a stricter standard to the district court's plan. *Id.* The Court also noted that a court-ordered reapportionment of a state legislature need not "attain the mathematical preciseness required for congressional redistricting." *Id.* at 27 n.19.

[147] 431 U.S. 407 (1977).

[148] *Id.* at 417 (quoting Chapman v. Meier, 420 U.S. at 26).

[149] As noted above, deviations under 10% in state and local plans are considered de minimus and thus require no justification. *See supra* notes 133 and 134 and accompanying text.

[150] Chapman v. Meier, 420 U.S. at 24 (emphasis added).

[151] 394 U.S. 526 (1969).

state can demonstrate that a good faith effort was made to achieve absolute equality; *or* (2) the state can justify deviations in terms of a rational state interest.[152]

a. "Good Faith"

In *Kirkpatrick*, the Court found that Missouri had not made a good faith effort to achieve absolute equality of population among electoral districts because: (1) "the leadership of both political parties in [Missouri's legislature was] given nothing better to work with than a makeshift bill produced by what has been candidly recognized to be no more than . . . an expedient political compromise;"[153] (2) "the Missouri Legislature relied on inaccurate data in constructing the districts;"[154] and (3) the legislature "rejected without consideration a plan which would have markedly reduced population variances among the districts."[155]

District courts relied upon the "good faith" test of *Kirkpatrick* to justify deviations of 0.78% in *West Virginia Civil Liberties Union v. Rockefeller*,[156] and 3.79% in *Drum v. Scott*.[157] In *West Virginia Civil Liberties Union*, the district court found that a good faith effort had been made where: (1) the reapportionment was free of partisan politics and had been adopted with genuine bipartisan support; (2) the plan took into account the latest federal census; and (3) the state adequately justified its nonacceptance of plans with smaller deviations. In *Drum*, the major factor that led to a district court finding of good faith was the legislature's consideration and debate of alternate plans that would have reduced population deviations among the districts; no plan had been rejected without prior consideration.

To summarize, several factors are critical in determining whether a legislative body has made a good faith effort in reaching the lowest possible deviations between congressional districts: (1) genuine bipartisan support for the plan; (2) application of reliable and accurate data; and (3) genuine consideration and debate over alternate plans. If none of these factors are present, it is unlikely that the reapportioning body will satisfy the "good faith" test of *Kirkpatrick*.

b. Valid State Interests

The *Kirkpatrick* Court offered examples of "valid state interests"

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[152] *Id.* at 531.
[153] *Id.* at 531-32.
[154] *Id.* at 532.
[155] *Id.*
[156] 336 F. Supp. 395 (S.D. W. Va. 1972).
[157] 337 F. Supp. 588 (M.D.N.C. 1972).

which might justify deviations. First, the Court found acceptance of large or small population variances, "to create districts with specific interest orientations, . . . antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people."[158] Second, although Missouri saw its reapportionment plan as a "[r]easonable legislative compromise,"[159] the Court noted that "problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster."[160] Third, the Court rejected the argument that "variances are justified if they necessarily result from a state's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."[161] Fourth, the Court noted that in taking into account the number of eligible voters in comparison to the total population within districts, Missouri had not relied on accurate estimates and, at best, had made haphazard adjustments.[162] Fifth, the Court found that Missouri's consideration of potential population shifts during the post-reapportionment decade was invalid for lack of thoroughly documented data.[163] Finally, the Court rejected geographical compactness as a valid justification for deviations.[164] Of this list, only the fourth and fifth justifications *might* have been acceptable to the Court; nonetheless, these justifications were rejected because the state had not met its burden of proof.

In *White v. Weiser*,[165] the Supreme Court reversed district court approval of a plan with a 0.284% deviation and remanded the case, noting its preference for an alternative plan with a 0.149% deviation. According to the Court, the preferred plan adhered to "the districting preferences of the state legislature while eliminating population variances."[166] The *White* opinion emphasized that deviations must be *unavoidable* and that preservation of political subdivision lines will not justify congressional district deviations. Although it failed to resolve the issue, the Court did recognize that deviations might be justified by a state's interest in maintaining the existing relationship between incumbents and their constituents or in preserving incumbents' seniority rights in Congress.

To summarize, a state's interest in (1) maintaining subdivision lines, (2) maintaining compactness of districts, (3) maintaining districts of specific interests, and (4) overcoming problems created by partisan politics are *not* valid justifications for population deviations between congres-

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[158] 394 U.S. at 533.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 533-34.
[162] *Id.* at 534-35.
[163] *Id.* at 535.
[164] *Id.* at 535-36.
[165] 412 U.S. 783 (1973).
[166] *Id.* at 796.

sional districts.[167] However, the following interests are *possibly* acceptable: (1) taking into account the relationship of eligible voters to total population, provided it is done in a statistically reliable manner; (2) taking into account projected population shifts, provided it is done in a statistically reliable manner; and (3) taking into account the existing relationship between incumbents and their constituents.

To date, there are only two reported district court decisions considering challenges to congressional plans based upon the 1980 census. Those cases are *Travis v. King*[168] and *Doulin v. White*.[169]

c. *Recent Application of* Kirkpatrick *and* Weiser *by District Courts*

In *Travis*, the district court rejected a congressional plan which had a maximum deviation of 3%. Five masters were appointed and charged with redrawing Hawaii's two congressional districts "as close as possible to mathematical equality."[170] The masters considered two plans with respective maximum deviations of 0.012% (57 people out of 964,691 total census population) and 0.018%. Upon the recommendation of the masters, the court adopted the former plan because it adhered more closely to the "traditional pattern of urban-rural separation."[171]

Doulin, decided by an Arkansas district court, perhaps best illustrates the current state of the law relating to congressional plans. *Doulin* rejected a legislative plan with a maximum deviation of 1.87%, largely because the extent of the deviation was not "unavoidable"; the legislature "had before it two other plans with a substantially smaller variance—0.78% and 0.75% respectively."[172] Although the *Doulin* plan apparently was *not* actuated by improper motives or considerations, the court nevertheless concluded that the "good faith" test of *Kirkpatrick* had not been satisfied:

> [T]he use of the term "good faith" in *Kirkpatrick* cannot mean that every State plan that involves no invidious motives and comes reasonably close to equality is to be upheld. Rather, when population variances can be greatly reduced simply by moving counties of known population between contigu-

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[167] It should be noted that between the time of *Kirkpatrick* and *Weiser*, several lower courts recognized that preservation of subdivision lines and compactness of districts may be valid justifications for deviations between congressional districts. *See, e.g.*, Preisler v. Secretary of State of Missouri, 341 F. Supp. 1158 (W.D. Mo. 1972); David v. Cahill, 342 F. Supp. 463 (D.N.J. 1972); Donnelly v. Meskill, 345 F. Supp. 962 (D. Conn. 1972).

[168] 552 F. Supp. 554 (D. Hawaii 1982).

[169] 528 F. Supp. 1323 (E.D. Ark. 1982).

[170] Appointment of Special Masters at 7, Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982).

[171] Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) (order adopting recommendation of special masters).

[172] 528 F. Supp. at 1324.

> ous districts, the disparity is [not] unavoidable, and there can be no "good faith" in the special sense in which *Kirkpatrick* uses that phrase. We repeat that the Legislature here in no sense acted in bad faith in any commonly accepted sense of that term.[173]

The *Doulin* court rejected proferred justifications of similarity of economic interests, history, accessibility of voters to their congressional delegates and the necessity of reaching a solution that would command a majority of votes in both houses.[174] The court noted that "[e]ach of these justifications was considered and rejected in *Kirkpatrick*, prompting Mr. Justice Fortas to complain that the Court rejected 'every type of justification that has been—possibly, every one that could be—advanced.' "[175] Under *Kirkpatrick*, the legislature *could* justify deviations based on projected population shifts in the decade of the 1980's. However, the court found that the state had failed in this case to document projected shifts and to apply relevant data in a systematic manner.

The *Doulin* court found the state's reliance on *West Virginia Civil Liberties Union*[176] and *Drum*[177] misplaced. *West Virginia Civil Liberties Union* had involved plans with deviations of less than 1%; the plan approved in that case had a 0.78% deviation—only slightly higher than other available plans. In *Doulin*, on the other hand, the legislature had rejected two plans that would have reduced the deviations by more than 1%. The court also distinguished *Drum*, which upheld a 3.79% deviation in spite of an alternative plan with one-half that deviation. It noted that *Drum* had found that "*Kirkpatrick*, and *Wells* curtail, but do not destroy, the 'de minimis' concept."[178] however, the court disagreed with *Drum*'s reading of *Kirkpatrick*, commenting:

> [W]e doubt that *Drum* can survive *White v. Weiser*, in which a 4.13% variance was condemned, and the fact that the Legislature had considered and rejected a more nearly equal plan was relied on virtually as proof positive that the variances occasioned by the plan adopted were not "unavoidable."
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> In sum, this case is governed by the opinions of the Supreme Court in *Kirkpatrick* and *White*. We have read, marked, learned and inwardly digested them, and hold that they require a judgment declaring [the plan] unconstitutional.[179]

2. *Justifications for Deviations in State and Local Reapportionment*

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[173] *Id.* at 1329.

[174] *Id.* at 1330.

[175] *Id.* (quoting Kirkpatrick v. Preisler, 394 U.S. at 537 (Fortas, J., concurring)).

[176] 336 F. Supp. 395 (S.D. W. Va. 1972). *See supra* note 156 and accompanying text.

[177] 337 F. Supp. 588 (M.D.N.C. 1972). *See supra* note 157 and accompanying text.

[178] 528 F. Supp. at 1332 (quoting Drum v. Scott, 337 F. Supp. at 590) (referring to Kirkpatrick v. Preisler, 394 U.S. 526 (1969) and Wells v. Rockefeller, 394 U.S. 542 (1969)).

[179] *Id.*

Plans

The U.S. Supreme Court has accepted several justifications for deviations in state and local legislative apportionments which it has rejected in the context of congressional plans. In *Reynolds v. Sims*,[180] for example, the Court noted that in devising a plan for state legislative districts, a state may legitimately seek to: (1) maintain the integrity of various political subdivisions; (2) provide for compact districts of contiguous territory; and (3) use or avoid single-member, multi-member or floterial districts.[181] While *Reynolds* establishes that the underlying rule regarding state and local reapportionment plans is "one person-one vote," the opinion notes that deviations may be constitutionally permissible:

> [s]o long as . . . divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[183]

In cases decided since *Reynolds*, the Court has repeatedly recognized state interest in preserving the integrity of political subdivisions as a legitimate justification for population deviations in state and local reapportionment plans. *Mahan v. Howell*,[183] which validated a Virginia reapportionment plan under this rationale, stated that "[t]he policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature . . . is a rational one."[184]

In accepting the 16.4% deviation in *Mahan*, the Court identified three significant factors: first, there was uncontradicted evidence that the plan produced the lowest deviation while keeping political boundaries intact; second, the state had adopted a consistent policy of maintaining the integrity of political subdivisions in its reapportionment process; and finally, since Virginia's Constitution vested the state legislature with responsibility for passing local legislation on political subdivisions, the plan effectuated the state's interest by respecting local lines.

Subsequent Supreme Court and lower court cases have followed *Mahan*'s approach. For example, *Chapman v. Meier*[185] referred to the "ra-

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[180] 377 U.S. 533 (1964).

[181] "The term 'floterial district' refers to a legislative district within whose boundaries are included several separate districts or political subdivisions that independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned." 25 AM. JUR. 2d *Elections* § 25 n.11 (1966).

[183] 377 U.S. at 579.

[183] 410 U.S. 315 (1973).

[184] *Id.* at 329.

[185] 420 U.S. 1 (1975).

tional state policy of refraining from splitting political subdivisions between [legislative] districts. . . ."[186] In *Conner v. Finch*,[187] the Court again recognized that a state may seek to protect such subdivisions or other political lines without running afoul of the constitution.[188] It should be noted, however, that both *Chapman* and *Conner* involved court-ordered plans. Thus, while recognizing the legitimacy of such a state policy, the *Conner* Court added an important caveat:

> [t]he policy of maintaining the inviolability of county lines . . . if strictly adhered to, must inevitably collide with the basic equal protection standard of one person, one vote. . . .
>
> Recognition that a State may properly seek to protect the integrity of political subdivision or historical boundary lines permits no more than "minor deviations" from the basic requirements that legislative districts must be "as nearly equal as practicable."[189]

It is clear from *Chapman* and *Conner* that a state's interest in maintaining subdivision lines may not, *in the context of court-ordered plans*, justify deviations as large as those which might otherwise be permitted in legislative plans. Further, *Mahan*[190] rejects the notion that extreme deviations in legislative plans may be justified by this same state interest; indeed, the Court noted that the 16.4% deviation in *Mahan* may well approach tolerable limits.[191]

Several lower courts have accepted a state's interest in maintaining subdivision lines as a justification for deviations in excess of 10%. Specifically, *Goines v. Heiskell*[192] approved a plan involving a 16.17% deviation, and *Travis v. King*[193] allowed a deviation of 18.6%.[194] In a similar vein,

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[186] *Id.* at 23.

[187] 431 U.S. 407 (1977).

[188] *Id.* at 419.

[189] *Id.* (quoting Roman v. Sincock, 377 U.S. 695, 710; Reynolds v. Sims, 377 U.S. at 577).

[190] 410 U.S. 315 (1973).

[191] *Id.* at 329.

[192] 362 F. Supp. 313 (S.D. W. Va. 1973).

[193] No. 81-0433 (D. Hawaii Oct. 13, 1982).

[194] In Travis v. King, a three-judge district court found the maximum deviations of 16.02% in the House and 43.18% in the Senate to be in violation of the Equal Protection Clause. These deviations were calculated using registered voters as the population base. Relying on *Chapman*, the court set forth the following guidelines for its five appointed masters:

> *Population deviations.* The Supreme Court has consistently stated that, in terms of permissible population deviations, court-ordered reapportionments of state legislatures are held to a higher standard than legislatively enacted plans [citing *Chapman*]. Courts must articulate precise reasons why population deviations cannot be kept to an absolute minimum. While this remains a question of degree, the following are rough estimates for the masters to keep in mind in drafting their proposed plans:
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> a. Anything less than 2% will be presumed to be *de minimis*.
>
> b. Any deviation between 2-10% must be supported by clearly articulated state

the Supreme Court in *Abate v. Mundt*[195] held that a long-standing tradition of overlapping functions and dual personnel between county and municipal units sufficiently justified a deviation of 11.9% between county legislative districts. The Court found that New York had a long history of respecting the integrity of local governmental units within counties, and the plan in question did not involve built-in biases favoring particular political interests or geographical areas.[196] *Graves v. Barnes*,[197] which involved deviations of less than 10%, acknowledged not only the preservation of political subdivision lines as a legitimate state interest, but also the maintenance of compact districts as well as identifiable communities.[198]

Another justification which has received implicit acceptance from the Supreme Court is that of "political fairness" or efforts to achieve a legislative composition which reflects the proportion of total statewide votes received by each major party.[199]

Significantly, the Supreme Court has emphasized that a state's policy "urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality."[200] Thus, if the maximum deviation in a legislatively-drawn plan exceeds 10%, one should examine closely the plan itself and any alleged "state policies" to determine whether these can support such deviations in light of this limited Supreme Court approval. Note that the *only* clear-cut justification for deviations above 10% is the maintenance of political subdivision lines.

Certain state interests may *not* be used to justify population variances among state legislative districts. *Reynolds v. Sims*[201] rejected justifications based solely upon history, geography, economic interests or group interests. The Court has also rejected justifications based on the following

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policy or unique geographic or political reasons.

c. Any deviation over 10% must be supported by compelling reasons and must effect [sic] only a small number of districts.

d. Variations of more than 20% should be avoided and will be considered *prima facie* unconstitutional.

Appointment of Special Masters at 7, No. 81-0433 (D. Hawaii Apr. 7, 1982). The court then adopted the masters' plan which contained a maximum deviation of 8.6% in the House and 18.6% in the Senate. The plan was justified by the rationale of maintaining island units. Thus, out of 76 districts, only two (one in each house) included parts of two different counties. Note that each of Hawaii's four counties is an island or group of islands; therefore, these two districts included parts of two separate islands.

[195] 403 U.S. 182 (1971).

[196] *Id.* at 187.

[197] 446 F. Supp. 560 (W.D. Tex. 1977).

[198] *Id.* at 569-70.

[199] Gaffney v. Cummings, 412 U.S. 735 (1973).

[200] Mahan v. Howell, 410 U.S. at 326.

[201] 377 U.S. 533 (1964).

state interests: discriminating against a group of citizens,[202] striking a balance between different areas of a state (such as urban/rural),[203] having one chamber based on population while the other is based on a different criterion, such as geography.[204]

In *Chapman v. Meier*,[205] where the Court invalidated a court-ordered plan with a 20% deviation, the following proffered justifications were held invalid: (1) the absence of "electorally victimized minorities;" (2) sparseness of population; and (3) the fact that a river divided the state. The district court, on remand,[206] rejected a legislatively drawn plan with a deviation of 20.17% for the same reasons. In addition, the district court emphasized that while the state had a valid interest in maintaining subdivision lines, that interest could not justify such a large deviation because the districts which broke county lines caused *more* of the deviations than those which did not; therefore, the plan did not implement the state policy.

These same issues were addressed in the recent consideration of a Virginia reapportionment based upon the 1980 census. *Cosner v. Dalton*,[207] like *Mahan*,[208] involved a Virginia legislative reapportionment. This time, however, the maximum deviations ranged from 22% to 28%. The district court found the plan "facially unconstitutional because the deviation among the populations of the districts that it creates exceeds the limits tolerated by the Equal Protection Clause."[209] The state argued that, as in *Mahan*, the "preservation of the integrity of political subdivision boundaries"[210] justified the deviations. However, the court distinguished *Mahan*, noting that alternatives available to the legislature demonstrated that such boundaries could be retained while substantially reducing deviations.[211] Other interests were asserted by the state to justify the 20%-plus deviation: retaining existing districts, expressing concern for incumbents, and recognizing communities of interest. While the *Cosner* court found that these policies might justify a plan with a deviation slightly in excess of 10%, they could not justify the gross deviations there involved.

E. Conclusion

While the required goal of any reapportionment plan is to achieve ab-

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[202] Davis v. Mann, 377 U.S. 678 (1964).

[203] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964).

[204] *Id.* For a more detailed list of "rejected" justifications, see Padilla & Gross, *Judicial Power and Reapportionment*, 15 IDAHO L. REV. 263, 302-03 (1979).

[205] 420 U.S. 1 (1975).

[206] 407 F. Supp. 649 (D.N.D. 1975).

[207] 522 F. Supp. 350 (E.D. Va. 1981).

[208] 410 U.S. 315 (1973).

[209] 522 F. Supp. at 358.

[210] *Id.*

[211] 522 F. Supp. at 359.

solute equality of population among districts, certain deviations may be permitted. The first step in challenging or defending a reapportionment plan is to calculate the maximum deviation between the most populous and the least populous districts. The next step is to ascertain whether the plan in question involves congressional districts or state and local districts. At the same time, one should note whether the plan was court-ordered or was drafted by a legislative body; court-ordered plans are more strictly scrutinized than legislative plans, and any departure from population equality must be justified by the court.

In the case of congressional plans drafted by the states, no deviation is too small to require justification by the reapportioning body. State and local plans drafted by legislatures, on the other hand, may entail deviations of up to 10% before justification will be required. Deviations between 10% and 18.6% have been held to be justifiable, but the 18.6% deviation allowed in *Travis v. King* probably strains the upper limit of permissible deviations.

"Unavoidable" deviations between congressional districts will be allowed upon a showing that (1) a good faith effort was made to achieve absolute equality of population among electoral districts, and (2) any deviations are supported by a rational state interest. "Good faith" entails genuine bipartisan support for the plan, the application of reliable data in formulating the plan and genuine consideration and debate over alternate plans. Rational state interests would seem to include consideration of the following: the relationship of eligible voters to total population, if done in a statistically reliable manner; projected population shifts, if done in a statistically reliable manner; and the relationship between incumbents and their constituents. State interests which have been rejected with regard to congressional reapportionment plans include: maintaining political subdivision lines, maintaining compactness of districts, maintaining districts of specific interests and overcoming "[p]roblems created by partisan politics."[213]

The strongest justification for deviations between state and local districts is the preservation of existing political subdivisions. Other justifications that have been suggested, albeit not specifically accepted by the courts, include the maintenance of compact districts of contiguous territory, the use or avoidance of multimember districts and the attempt to ensure that composition of the legislature reflects the proportion of total statewide votes received by each major party. Rejected justifications for population variances among state and local districts include the absence of electorally victimized minorities, sparseness of population, existence of geographical boundaries and preservation of historical, economic or group interests.

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[213] Kirkpatrick v. Preisler, 394 U.S. at 533.

IV. GERRYMANDERING: "THE THORNIEST NETTLE IN THE POLITICAL THICKET"[213]

Summary: Although the Supreme Court has cited gerrymandering as a possible ground for invalidating reapportionment plans, it has yet to strike down a plan on that basis. Indeed, the Court has held that certain "political" considerations, taken into account during the redistricting process, do not render a plan unconstitutional. While states cannot discriminate on the basis of race through redistricting, one recent case has held that race may, under certain circumstances, be a legitimate affirmative consideration in the process of drawing district lines.

A. Introduction

Gerrymandering[214] refers to the manipulation of electoral districts for the political benefit of particular groups of people. It is, as one commentator succinctly describes, "discriminatory districting. It equally covers squiggles, multi-member districting, or simple non-action, when the result is racial or political malrepresentation."[215] Another commentator writes more graphically:

> [t]he essence of the practice is the creation of an electoral advantage for a favored group by diluting the voting effectiveness of a politically competitive group. The goal of the gerrymanderer is to create a scheme that will cause the targeted group to waste a substantial proportion of its votes by dispersing them in support of losing candidates and/or by concentrating them so that they provide excessive support for winning candidates.[216]

The Supreme Court has recognized that such manipulation may be a ground for invalidating apportionment plans. For example, *Gaffney v. Cummings*[217] acknowledged that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the

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[213] This phrase was used in *Dixon*, *supra* note 12, at 31.

[214] According to Wilfred Funk, the term "gerrymander" was coined around 1812:

> The Massachusetts legislature ingeniously contrived to rearrange the shape of Essex County so as the better to control elections. When they got through with their redistribution it was noticed that this county resembled a salamander. The governor of the state at that time was Elbridge Gerry and a smart newspaper editor used his surname and the last half of salamander to create *gerry-mander*. Such a redistribution of boundaries today for the purposes of political advantages is still called *gerrymandering*.

W. FUNK, WORD ORIGINS AND THEIR ROMANTIC STORIES 208 (1978) (emphasis in original).

[215] R. DIXON, *supra* note 6, at 460 (emphasis deleted).

[216] Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 280.

[217] 412 U.S. 735 (1973).

Fourteenth Amendment;"[218] this is so where otherwise acceptable plans are "invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.' "[219] The *Gaffney* Court concluded that "[w]hat is done in . . . arranging for elections, or to achieve political ends or to allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."[220] However, as the following sub-sections of this article will illustrate, the Court has been less than eager to either scrutinize allegedly gerrymandered reapportionment plans or to reject plans on that basis.

In contrast to cases involving population bases and deviations between districts, the Supreme Court has made no distinction between congressional plans and state plans where gerrymandering has been an issue.

B. Partisan Gerrymandering[221]

Supreme Court cases addressing the issue of partisan gerrymandering demonstrate both a general unwillingness to invalidate plans on such grounds[222] as well as an acceptance of some "political" considerations which accompany the reapportionment process.

The Court's reluctance to address the issue of partisan gerrymandering is exemplified in *Wells v. Rockefeller*,[223] where congressional districts in New York were allegedly gerrymandered to favor one political party.[224] The Court declined to address this issue directly, rejecting New York's

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[218] *Id.* at 751.

[219] *Id.* (citation omitted).

[220] *Id.* at 754. *See* Guido, *supra* note 3, at 72-73 for a discussion regarding the justiciability of gerrymandering issues.

[221] Gerrymandering can be accomplished by manipulating either district boundaries or the number of representatives that will represent each district. This latter method has received considerable attention by the Supreme Court. *See* Section V. of this article.

[222] Lower federal courts have shared this reluctance. *See* Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 Sw. L.J. 607, 653 n. 370 (1980). *See also* Russo v. Vacin, 528 F.2d 27 (7th Cir. 1976); Caserta v. Village of Dickinson, 491 F. Supp. 500 (S.D. Tex. 1980) *modified*, 672 F.2d 431 (5th Cir. 1982); and Jimenez v. Hidalgo County Water Improvement Dist., 68 F.R.D. 668 (S.D. Tex. 1975). In refusing to overturn a plan that allegedly suffered from partisan gerrymandering, the *Jiminez* court stated:

> Were we to accept in full plaintiff's view of defendant's actions—that they represent a politicized drawing of boundaries having as its aim precisely and nothing but the perpetuation in power of the dominant body in a state political subdivision—plaintiffs would confront nothing that minority political bodies have not faced in the South and elsewhere, from time immemorial. That the practice is odious and unfair is too patent to require discussion; we take it as granted. But much in the political process is, or may be made, unfair, and we hold no general warrant to correct inequity.

68 F.R.D. at 674 (footnote omitted).

[223] 394 U.S. 542 (1964).

[224] *Id.* at 544.

reapportionment plan on the alternative ground that the maximum deviation between districts (13.1%) exceeded constitutional standards.[225]

In the subsequent case of *Gaffney v. Cummings*,[226] not only did the Court refuse to invalidate a reapportionment plan because of alleged improper "political" considerations, but it went on to hold that a "political fairness principle"[227] is not an unconstitutional consideration in the drawing of district lines. The controversy involved in *Gaffney* is aptly described by the Court:

> Appellant insists that the spirit of "political fairness" underlying this plan is not only permissible, but a desirable consideration in laying out districts that otherwise satisfy the population standard. . . . Appellees, on the other hand, label the plan as nothing less than a gigantic political gerrymander, invidiously discriminatory under the Fourteenth Amendment.[228]

In adopting the position of the appellant, the Court stated:

> We are quite unconvinced that the reapportionment plan . . . violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.[229]

Thus, *Gaffney* clearly acknowledged that "[p]olitics and political considerations are inseparable from districting and apportionment."[230] According to the Court, reapportionment plans, drafted on the sole basis of population equality without regard for political impact, might easily produce "the most grossly gerrymandered results."[231] The Court thus concluded:

> [N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.[232]

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[225] *See* Section III.B. of this article.

[226] 412 U.S. 735 (1973).

[227] *Id.* at 752.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 753.

[231] *Id.*

[232] *Id.* at 754. The difficult question which remains unanswered involves "the limits of permissible political considerations with regard to reapportionment plans." One commentator has characterized this uncertainty as follows:

> Unfortunately, . . . when dealing with the gerrymander, the political dilemma remains. How much politics can be allowed in a process which touches the fundamental political heartbeat—survival of the representative system—as well as the survival of

Another "political" consideration which has been upheld by the Court is the protection of incumbents. In both *Burns v. Richardson*[233] and *White v. Weiser*,[234] the Court noted that attempts to minimize contests between incumbents and to protect the seniority of incumbents are not constitutionally invalid; such grounds are therefore insufficient by themselves to invalidate reapportionment plans.

To summarize, the Court has yet to strike down a reapportionment plan on the sole basis of improper partisan gerrymandering. Nor has it set forth guidelines regarding the extent to which political considerations may affect the reapportionment process.[235] Indeed, the Court has merely recognized certain political considerations as constitutional.

C. *Racial Gerrymandering*

The Supreme Court first addressed the issue of racial gerrymandering in the case of *Gomillion v. Lightfoot*.[236] There the Court indicated that legislatures could not manipulate district lines in order to discriminate racially. *Gomillion* did not involve reapportionment; instead, it involved a state statute that changed city boundaries to exclude almost all black voters. This practice was held to violate the fifteenth amendment since blacks were effectively deprived of their right to vote on the basis of race.[237] *Gomillion* thus set the stage for challenges to reapportionment plans on the basis of racial gerrymandering.

Allegations of racial gerrymandering were directly addressed for the first time in *Wright v. Rockefeller*.[238] The Court found no evidence that the state had contrived to segregate New York's population on the basis of race or place of origin and therefore upheld the plan. The *Wright* holding implied that racial gerrymandering will not be countenanced if there

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> the political actor who is also the designer of the representation pattern? Who commits political suicide? Given the natural inclinations of politicians to ensure their own survival—with proper genuflections to representative government—when should the courts interfere?

Hardy, *Considering the Gerrymander*, 4 PEPPERDINE L. REV. 243, 279 (1977).

[233] 384 U.S. 73 (1966).

[234] 412 U.S. 783 (1973).

[235] Attempts are being made by political scientists to devise such guidelines. Indeed, political scientists have been credited with helping to pave the way to judicial acceptance of reapportionment as a justiciable issue by developing empirical measurements of malapportionment which illustrated the possibility of minority control of the electoral process. Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121 (1978). The above article attempts to do the same for the issue of gerrymandering. *See also* Hardy, *supra*, note 232.

[236] 364 U.S. 339 (1960).

[237] For an in-depth discussion of this case, see Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?* in REAPPORTIONMENT IN THE 1970's, *supra* note 12, at 130.

[238] 376 U.S. 52 (1964).

is sufficient proof of "state contrivance"[239] to discriminate racially. Unfortunately, this decision may be read by lower courts as indicating that the Supreme Court will not face the gerrymandering issue directly. One interpreter noted that "the Supreme Court *refused* . . . to act against congressional districting which *quite clearly* sought to ghettoize some New York districts into white and non-white constituencies."[240]

Since *Wright*, the Court has said little about this type of racial gerrymandering. Lower courts have done little as well, and as one observer has noted, "courts have grappled with *Wright v. Rockefeller* and timidly let go."[241]

The Court introduced a new twist into this area in *United Jewish Organizations v. Carey*,[242] which held that certain racial considerations may legitimately affect the drafting of a reapportionment plan. The plaintiffs in *Carey* had alleged that the 1974 New York plan violated the fourteenth amendment because it would "dilute the value of each plaintiff's franchise by halving its effectiveness, solely for the purpose of achieving a racial quota. . . ."[243] In addition, the plaintiffs claimed that their assignment to electoral districts was made solely on the basis of race. The district court dismissed the complaint,[244] and a divided court of appeals affirmed.[245] The Supreme Court affirmed, although the seven-justice majority could not agree on the reasoning. Some of the justices approved the use of racial criteria as part of the state's attempt to comply with the Voting Rights Act;[246] other justices were willing to go further, arguing that "whether or not the plan was authorized by or was in compliance with §5 of the Voting Rights Act, New York was free to do what it did as long as it did not violate the Constitution. . . ."[247] These latter justices

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[239] *Id.* at 58.

[240] Kirby, *The Right to Vote*, in THE RIGHTS OF AMERICANS, WHAT THEY ARE—WHAT THEY SHOULD BE 175, 187 (N. Dorsen ed. 1970) (emphasis added).

[241] Hardy, *supra* note 20, at 243-44. A number of lower federal courts have held that fragmentation of a compact minority community among two or more districts is unconstitutional and that concentration of a minority community in one district is also invalid. For a list of these cases, see Bickerstaff, *supra* note 222, at 652-53 nn. 364-67.

[242] 430 U.S. 144 (1977).

[243] *Id.* at 152-53.

[244] United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 377 F. Supp. 1164 (E.D.N.Y. 1974). The district court reasoned that petitioners enjoyed no constitutional right in reapportionment to separate community recognition as Hasidic Jews, that the plan did not disenfranchise them and that racial considerations were permissible to correct past discrimination. *Id.* at 1165-66.

[245] United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512 (2d Cir. 1975). The court of appeals agreed with the district court that petitioners had no constitutional right to separate community recognition. It further held that petitioners, as members of the white community at large, were not victims of discrimination. Finally, the court declined to decide the larger question of whether a state could, when "starting afresh," use racial considerations to bolster non-white voting strength. *Id.* at 524.

[246] Voting Rights Act of 1969, 42 U.S.C. §§ 1971, 1973 (1976).

[247] 430 U.S. at 165.

went on:

> [t]here is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.[248]

The four justices who voted to uphold the New York plan on the basis of the Voting Rights Act stated that "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment."[249] Two justices also argued that New York's plan was valid because the plan evidenced neither the purpose nor the effect of racial discrimination.[250] The upshot of *Carey* was that a majority of justices agreed that a state may take race into account in drawing district lines.[251]

Case law in this area is sparse, and therefore, it is difficult to draw general conclusions. However, while states may not draw district lines in such a way as to discriminate against racial minorities, they are not precluded from taking racial considerations into account during the reapportionment process.

D. Proof of Gerrymandering

With regard to the proof necessary to sustain an allegation of gerrymandering—either partisan or racial—one eminent scholar in the area has written:

> It can be predicted that in all gerrymandering cases proof will be difficult and alleged instances of discrimination will be susceptible to alternative explanations, some supporting a conclusion of gerrymandering, others suggesting a chance outcome in a complex process. For this reason, although the Court *must* treat the issue as justiciable to hold true to the spirit of *Baker v. Carr*, actual invalidations can be expected to be rare.[252]

Although the above-quoted passage appeared in 1970, the observation still holds true. Clearly, any challenge based on gerrymandering faces

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[248] *Id.* The substance of this argument appears in Part IV of Justice White's opinion, in which Justices Stevens and Rehnquist joined.

[249] 430 U.S. at 161. Justices Brennan, Blackmun and Stevens joined in Part II of Justice White's opinion.

[250] 430 U.S. at 179-80 (Stewart and Powell, J.J., concurring).

[251] The case is seen by some as validating an "affirmative action" gerrymander. *See, e.g.*, Bickerstaff, *supra* note 222, at 655-56.

[252] Dixon, *supra* note 12, at 35 (emphasis in original).

many obstacles:

> [Proof that there has been an unconstitutional gerrymander] would seem to require a demonstration that the votes of an identifiable, cohesive group have been diluted by the cartographers' product egregiously beyond that which could be expected to result from existing residential patterns. What could be "expected," however, is not easily determined, and what should be considered "egregious" is of course subject to debate.[353]

Indeed, gerrymandering is an elusive issue. One congressman has likened it to pornography, "You know it when you see it, but it's awfully hard to define."[354]

The burden of proving unconstitutional gerrymandering falls upon the challenger. This has prompted commentators to suggest that those alleging gerrymandering "not be required to prove their allegations, but only demonstrate through a prima facie showing that a presumption of gerrymandering is reasonable."[355] If the Court were to accept this approach, the burden would shift to the redistricting authorities once the requisite showing was made.[356] However, in view of the fact that the Supreme Court has never held a reapportionment plan invalid on the grounds of improper gerrymandering, it seems highly unlikely that it would agree to such a shift.

While much has been written about gerrymandering, it is no simple task to produce a clear-cut picture of what might constitute an unconstitutional gerrymander. What does appear clearer from commentaries on gerrymandering is that the experts seem to agree on what *not* to look for.

One cannot simply look at the shape of districts and, finding them "odd," conclude that gerrymandering has taken place.[357] The most widely quoted author in this area notes that it is a common but unwarranted conclusion that any "significant deviations from . . . symmetry are . . . unclean and unjustifiable."[358] Such a notion has been propagated by cartoonists who liken allegedly gerrymandered districts to snakes, turkey feet, frying pans and, of course, the famous salamander.[359] Colorful de-

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[353] Engstrom, *supra* note 216, at 282 (emphasis added) (footnote omitted). Another group of authors seems to suggest that a challenger would have a sound case if it could be proven that the representational advantage given to one political party is "unjustified in relation to its statewide support and that [the advantage] could be reduced by opting for some other districting scheme that is possible given the . . . criteria of population equality, compactness, and adherence to subdivision lines." Backstrom, Robins & Eller, *supra* note 235, at 1130-31.

[354] This statement is quoted in Engstrom, *supra* note 216, at 282.

[355] *Id.*

[356] *Id.*

[357] *See, e.g.*, R. DIXON, *supra* note 6, at 459-61; Backstrom, Robins & Eller, *supra* note 235, at 1125-27; and Hardy, *supra* note 232, at 264-65.

[358] R. DIXON, *supra* note 6, at 459.

[359] *Id.*

scriptions such as "The Camel Biting the Tail of the Buffalo Which is Stepping on the Tail of the Dachshund,"[260] "jigs and jags like a salamander scurrying over hot rocks,"[261] and "an x-ray of a badly-shattered elbow"[262] abound as well.

Experts suggest that preoccupation with the sizes and shapes of districts ignores "political realities."[263] This is not to say that shape is irrelevant, for it may indicate gerrymandering. However, shape should not be the primary focus of attention. Experts in the field also point out that the mere fact that districts are compact, contiguous and/or equal in terms of population is no guarantee that gerrymandering has not taken place.[264]

V. MULTIMEMBER DISTRICTING

Summary: The Supreme Court has expressed strong reservations about multimember electoral districts, although such districts have not been held to be unconstitutional per se. With regard to legislatively drawn reapportionment plans, multimember districts have been struck down only where they are found to discriminate against minorities. On the other hand, where reapportionment plans are drawn by courts, they must utilize single-member districts unless exceptional reasons exist for using multimember districts.

A. *Introduction*

As noted in the preceding section of this article,[265] multimember districting may constitute a form of gerrymandering. However, it warrants separate attention here because it differs conceptually from a simple line-drawing method of gerrymandering. In its most invidious application, multimember districting involves the dilution of votes of political or racial minorities by including those groups within districts where they are vastly outnumbered. Thus, majority interests are amply represented—the majority elects all of the at-large legislators—and minority interests are left with little or no actual representation.[266]

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[260] Engstrom, *supra* note 216, at 280 (footnote omitted).

[261] *Id.* (footnote omitted).

[262] Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970's, 249, 275, *supra* note 12.

[263] R. DIXON, *supra* note 6, at 459.

[264] Baker, *supra* note 237, at 122; and Backstrom, Robins & Eller, *supra* note 235, at 1126-27. The latter article also contends that it is not helpful to look at the outcome of an election following a reapportionment. *Id.*

[265] *See supra* notes 214-216 and accompanying text.

[266] Note that multimember districts will satisfy the "one-person, one-vote" principle if they provide for equal numbers of people per legislator. In addition, the use of such districts does not necessarily result in deviations between districts which exceed the permissible

B. *Multimember Districting in Plans Drafted by Legislatures*

In *Reynolds v. Sims*,[367] the Supreme Court suggested that states with bicameral legislatures could use a combination of single-member and multi-member districts. Specifically, the Court said that while each house must be apportioned according to population, one of the houses "could be composed of single-member districts while the other could have at least some multi-member districts."[368] In the Court's view, such a scheme would allow members of each house to represent different constituencies. However, in a companion case to *Reynolds*, *Lucas v. Forty-Fourth General Assembly of Colorado*,[369] the Court expressed concern over multimember districting.

Lucas held a Colorado reapportionment plan unconstitutional on the ground that the plan failed to use population as the prime factor in apportioning seats in the Colorado Senate. Instead, the plan took into account "a variety of geographical, historical, topographic and economic considerations"[370] in such a way as to create "substantial disparities from population-based representation."[371] On the issue of multimember districting, the Court noted that since some districts were to be represented by at-large representatives, "[n]o identifiable constituencies *within* the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multimember county represented the county as a whole."[372] The Court expanded upon this statement in a footnote:

> We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties.[373]

Thus, while *Lucas* did not reject the principle of multimember districting, it intimated that the use of single-member districts is generally more desirable from the standpoint of voters. The Court elaborated on this notion in two subsequent decisions.

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range. We focus here, however, on the use of multimember districts which discriminate against minority groups.

[367] 377 U.S. 533 (1964).

[368] *Id.* at 577.

[369] 377 U.S. 713 (1964).

[370] *Id.* at 738.

[371] *Id.*

[372] *Id.* at 731 (emphasis in original).

[373] *Id.*, n. 21.

In the first of those decisions, *Fortson v. Dorsey*,[274] the Court ruled that the Equal Protection Clause does not require the use of single-member districts exclusively in reapportionment plans. The *Fortson* Court emphasized, however, that its decision should not be understood as upholding the use of multimember districting in all cases. In the Court's words, "it might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[275]

The second decision was *Burns v. Richardson*,[276] which held that the "Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single-member legislative districts."[277] As in *Fortson*, the Court conceded that multimember districts might be struck down if they were found to minimize or cancel out the voting strength of racial or political groups.[278]

Thus, it appears that multimember districting on the part of state and local legislative bodies is not unconstitutional per se. The Supreme Court has recognized, however, that the use of multimember districts in reapportionment plans may result in the dilution of voting strength of racial or political minorities. Where this occurs, such plans will be rejected.[279]

C. Multimember Districting in Court-Ordered Plans

Since 1971, the Supreme Court has consistently held that single-member districts are preferred over multimember districts in court-ordered reapportionment plans. Consequently, multimember districting in court-ordered plans generally has been upheld only where "insurmountable difficulties"[280] or a "combination of unique factors"[281] necessitate its use.

Connor v. Johnson[282] and *Connor v. Williams*[283] were the first multimember districting decisions in which the Court applied different stan-

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[274] 379 U.S. 433 (1965).

[275] *Id.* at 439.

[276] 384 U.S. 73 (1966).

[277] *Id.* at 88. The case of Kilgarlin v. Hill, 386 U.S. 120 (1967) should be noted as well. There the Court upheld a district court decision allowing a combination of single-member and multimember districts. According to the Court, such a combination did not create an "unconstitutional 'crazy quilt'." 386 U.S. 120 at 121.

[278] *Id.*

[279] Further shortcomings of multimember districts were enumerated by the Court in cases decided after the cases cited above. *See infra* Section V.C. of this article.

[280] Connor v. Johnson, 402 U.S. 690, 692 (1971).

[281] Mahan v. Howell, 410 U.S. 315, 333 (1973). Note that in 1966, the Court summarily affirmed a court-ordered plan where multimember districts were found necessary to minimize the splitting of certain Wyoming counties between election districts. Harrison v. Shaefer, 383 U.S. 269 (1966).

[282] 402 U.S. 690 (1971).

[283] 404 U.S. 549 (1972).

dards to court-ordered and legislative reapportionment plans. This distinction was reaffirmed in *Chapman v. Meier*[284] and *Connor v. Finch*.[285] In *East Carroll Parish School Board v. Marshall*,[286] the Court struck down a court-ordered plan that provided for multimember districts, stating, "We have frequently reaffirmed the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid State legislation, single-member districts are to be preferred absent unusual circumstances."[287]

In view of the fact that multimember districts have not been held to be unconstitutional per se, one may ask why the Court is less likely to allow these districts in court-fashioned plans than in legislatively drawn plans. Arguably, the Supreme Court is cognizant of inherent weaknesses of multimember districts but does not wish to countenance perpetuation of those shortcomings by the courts.

Chapman v. Meier[288] identified three "practical weaknesses inherent"[289] in plans involving multimember districts:

> First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases . . . [and ballots] tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are elected at large, residents of particular areas within the district may feel that they have no representative specially responsible to them. . . . Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts.[290]

Connor v. Finch[291] echoed these observations albeit in slightly different terms; the *Connor* Court found that multimember districts may confuse voters, make legislative representatives more remote from the constituents, tend to submerge electoral minorities and tend to overrepresent electoral majorities.

In all of the above mentioned cases, the Supreme Court struck down court-fashioned plans which included multimember districts; the one exception to this line of cases was *Mahan v. Howell*.[292] *Mahan* upheld a court-ordered plan which provided for *one* multimember district in the state of Virginia. The Court found a "singular combination of unique fac-

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[284] 420 U.S. 1 (1975).
[285] 431 U.S. 407 (1977).
[286] 424 U.S. 636 (1976).
[287] *Id.* at 639.
[288] 420 U.S. 1 (1975).
[289] *Id.* at 15.
[290] *Id.* at 15-16.
[291] 431 U.S. 407 (1977).
[292] 410 U.S. 315 (1973).

tors"[293] supporting the validity of the multimember district. First, the plan was merely an interim measure. Second, the district court did not have access to reliable survey data which would have aided the court in drawing only single-member districts. Finally, because the district court wished to avoid delaying an upcoming election, it had formulated the plan under severe time pressures.[294]

While *Mahan* suggests factors which might justify the use of one multimember district in court-ordered reapportionment plans, several questions remain. It is unclear whether a unique combination of factors might justify the use of more than one multimember district in court-ordered plans. It may be argued that, had the Court intended to rule out this possibility, it would have done so. A second question raised by *Mahan* is whether factors absent in that case could be used to justify the use of multimember districts. It appears reasonable to surmise that additional factors could be so used.[295] Finally, *Mahan* did not define the level of severity of time pressures which would constitute "unique factors" justifying the use of multimember districts. In *Mahan*, the district court ordered the implementation of its plan *two weeks* before the filing deadline for primary candidates. In *Connor v. Johnson*,[296] however, the Court found that a district court could have fashioned a plan within *seventeen days* prior to the filing deadline for primary candidates. Of course, severe time pressures entailed only one of the factors considered in *Mahan*. Thus, when considered in concert with other "unique factors," a seventeen-day period might also constitute a "severe time pressure" justifying multimember districting.

D. How to Show Unconstitutional Multimember Districting

Multimember districts in court-ordered plans will be upheld only upon a showing of "unique factors" that necessitate the use of such districts. The burden of showing the presence of such factors is therefore upon those who would have such plans upheld. Conversely, the burden of proof with respect to legislative plans falls upon challengers; there must be a showing of invidious discrimination against a political, economic, or racial minority. This subsection addresses the manner in which challengers of legislative plans may meet this burden of proof.

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[293] *Id.* at 333.

[294] *Id.* at 332.

[295] In the case of Chapman v. Meier, 420 U.S. 1 (1975), the Court implied that an "established state policy" might also serve to justify the inclusion of multimember districts in a court-ordered plan. *Id.* at 15. However, the Court held that one prior instance of multimember districting by a state with respect to its senate did not constitute an "established state policy."

[296] 402 U.S. 690 (1971).

Under *Burns v. Richardson*,[297] a multimember districting scheme in a legislative plan will be rejected upon a showing that the plan has an "invidious effect."[298] Therefore, a plan must be shown to result in invidious discrimination by minimizing, diluting or cancelling out minority voting strength:

> [It] may be that this invidious effect can more easily be shown if . . . districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one.[299]

This language thus implies that a showing of "invidious effect" depends on more than mere appearances; "[s]peculations do not supply evidence."[300]

Subsequent to *Burns*, in *Whitcomb v. Chavis*,[301] the Court emphasized that challengers of a reapportionment plan must carry the burden of showing unconstitutional multimember districting. The Court determined in that case that the challengers' burden had not been met. According to the Court, the challengers' arguments were only theoretical, and they fell short of demonstrating invidious discrimination.[302]

In *White v. Regester*,[303] the Court affirmed a Texas district court's rejection of multimember districts in two counties. The lower court had found invidious discrimination against the Black community in one county and the Hispanic community in the other. The Court outlined the proper judicial inquiry with respect to invidious discrimination through multimember districting. First, it must be determined whether "the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."[304] Second, the court should determine whether "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[305]

As one commentator notes, the importance of *White v. Regester* lies in its emphasis on

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[297] 384 U.S. 73 (1966).

[298] *Id.* at 88.

[299] *Id.*

[300] *Id.*

[301] 403 U.S. 124 (1971).

[302] *Id.* at 145-46.

[303] 412 U.S. 755 (1973).

[304] *Id.* at 765-66. According to the Court, this finding is not sufficient by itself to sustain claims of invidious discrimination. *Id.*

[305] *Id.* at 766.

> the *effect* of the multimember districting scheme, not the *intent* of the planners. The Court plainly stated, "The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question."[306]

The Supreme Court found the evidence weighed by the district court adequate to meet the challengers' burden. That evidence included: (1) a demonstrated history of official discrimination (resulting in low registration rates and voter turnout); (2) existence of a state rule requiring a majority vote as a prerequisite to nomination in a primary election; (3) a "place" rule, limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, which reduced the election of representatives from the multimember district to "a head-to-head contest for each position;"[307] (4) a showing of significant underrepresentation of the minority group in the legislature; and (5) a showing of the unresponsive conduct of the legislature to the interests of the minority community (in particular, the Hispanic community).[308]

In 1980, when *City of Mobile v. Bolden*[309] was decided, the Supreme Court appeared to be adopting a position slightly different from that taken in *White*. In *Bolden*, a 6-3 plurality reversed the lower courts' holding that Mobile's at-large system for electing city commissioners unfairly diluted the voting strength of Blacks. Four members of the Court's majority argued that the evidence weighed by the lower courts was insufficient to meet the required standard of "purposeful discrimination."[310]

In a dissenting opinion, Justice White characterized the Court's decision as inconsistent with *White v. Regester*. In his view, the Court was moving away from an analysis of the invidiously discriminatory *effect* of multimember districting to a more stringent inquiry, focusing on whether an apportioning body has manifested an invidiously discriminatory *intent*.[311] Not long after *Mobile*, the Court articulated an approach consistent with pre-*Mobile* cases and added some new and important dimensions.

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[306] J. Dantzler, *Election Law: Multimember Districts*, 1978 ANN. SURV. OF AM. L. 91, 101 (emphasis added)(footnote omitted). The "test" developed by the Court in cases up to and including White v. Regester has been described variously: "aggregate of factors" test, *see* Note, *Challenges to At-Large Elections Plans*, 47 CIN. L. REV. 64 (1978); "denial of access" test, *see* Note, *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 HARV. L. REV. 1847 (1978); and "political access" test, *see* Note, *The Reapportionment Dilemma: Lessons from the Virginia Experience*, 68 VA. L. REV. 541 (1982). The Court, however, has never acknowledged such a label.

[307] 412 U.S. at 766.

[308] For the listing and discussion of these five items of evidence, *see id.* at 766-69.

[309] 446 U.S. 55 (1980).

[310] The justices were Burger, C.J., and Stewart, Powell, and Rehnquist, JJ.

[311] 446 U.S. at 94 (White, J., dissenting).

In *Rogers v. Lodge*,[312] challengers alleged that the at-large system for electing commissioners of Burke County, Georgia, was maintained for invidious purposes in violation of the fourteenth amendment. The district court had found the system to be unconstitutional and therefore ordered that the county be divided into five single-member districts. Both the Fifth Circuit Court of Appeals and the Supreme Court affirmed.

In clear, strong language, the Court reviewed the weaknesses of multimember and at-large election schemes. Such schemes, it observed, "tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district."[313] More significantly, the Court noted that distinct minorities, whether "racial, ethnic, economic, or political . . ., may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts."[314] Nevertheless, multimember districts are unconstitutional only if they are " 'conceived or operated as purposeful devices to further racial . . . discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population."[315]

The Court divided the evidentiary factors present in *Rogers* into three major categories. In the first category, the Court placed those demonstrated facts which were insufficient in themselves to prove invidious discrimination but which showed that elected representatives could ignore Black interests without fear of political consequences: (1) although Blacks had always constituted a substantial majority of the county population, they were a distinct minority of registered voters; (2) bloc voting along racial lines existed; and (3) no Black candidates had ever been elected. The second category of evidentiary factors included supporting evidence which indicated that past discrimination against Blacks had impaired their ability to participate effectively in the political process: (1) low voter registration among Blacks was shown to result from the use of the literacy tests, poll taxes, and White primaries in the past; (2) past and present discrimination in education had a similar impact on the voter registration among Blacks; (3) past discrimination had kept Blacks from effectively participating in Democratic Party affairs and in primary elections; (4) elected county officials displayed a lack of responsiveness and sensitivity to the needs of the Black community; and (5) a depressed socio-economic status of the minority members of the community was apparent. The final category included facts which illustrated the potential of multimember districts to minimize minority voting strength and to impair access to the political process: (1) the large size of the county which made it difficult for Blacks to campaign or get to polling places; (2) majority vote

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[312] 50 U.S.L.W. 5041 (U.S. July 1, 1982) (No. 80-2100).

[313] *Id.* at 5042 (emphasis in original).

[314] *Id.*

[315] *Id.*

requirement existed; (3) certain candidates were required to run for specific seats; and (4) residency requirements were not imposed for particular areas of the county.[316]

In summary, multimember districting in legislatively drawn reapportionment plans will be struck down if such plans operate to discriminate invidiously against political, economic or racial minorities.[317] The burden of proving this discrimination falls upon those who challenge the plans. The inquiry with respect to discrimination focuses on the *effect* of multimember districting and not merely upon whether plans were drafted with an *intent* to discriminate. A final point is that, while multimember districts are not unconstitutional per se, the Court has yet to approve a plan containing only multimember districts.

VI. Conclusion

The process of challenging and defending reapportionment plans is vitally important to ensuring the right to vote as well as the right to equal representation. Apportionment decisions affect the most basic of relationships in our elective democracy—the relationship between legislators and their constituents; indeed, the integrity of our government often depends on judicial efforts to keep this relationship within constitutional bounds.

In addition to highlighting the foregoing discussion, this section touches upon the impact of the Voting Rights Act[318] on the reapportionment process and the mechanism for attorney fee awards in reapportionment challenges.

A. Permissible Population Bases

The use of federal census population data represents the safest approach in drafting a reapportionment plan. This base is not susceptible to challenge. Although the Supreme Court has not taken a definitive stance on the issue, exclusion of *any* element of the population poses increased constitutional risks in the context of congressional plans. In formulating state and local plans, the following groups may be excluded on the authority of *Burns v. Richardson*:[319] aliens, transients, short-term or temporary residents, and persons denied the right to vote for conviction of

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[316] For the Court's outline of these categories, *see id.* at 5044-45.

[317] The cases in this area have thus far dealt only with racial minorities; it is therefore unclear to what extent a challenge on political or economic grounds would be considered sufficient by the courts. At the very least, however, existing precedent indicates the Supreme Court's willingness to consider the relevant issues in other than a racial context.

[318] 42 U.S.C. § 1971 (1976), *as amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 1982 U.S. Code Cong. & Ad. News (96 Stat.) 131.

[319] 384 U.S. 73 (1966).

crime.[320] However, any exclusion must be accomplished in a rational, systematic, and fair manner. For example, blanket exclusion of certain groups, such as military personnel or college students, will not be allowed. Only those individuals meeting reasonable criteria of transiency or nonresidency may be subtracted from the population base. Where the apportionment base is comprised solely of registered voters, the apportioning body must demonstrate equivalency—preferably, on a district-by-district basis—between that base and an otherwise permissible base, such as total census population.

B. Population Deviations Between Electoral Districts

For state and local plans, an acceptable approach is one in which all deviations are kept below 10%. If deviations exceed 10%, but are less than 16.4%, they must be supported by a rational state policy; maintenance of local county boundaries constitutes thus far, the only justification accepted by the Supreme Court. Deviations above 16.4% are highly suspect and are presumptively unconstitutional. A great burden is therefore placed upon the reapportioning body to justify such extraordinary deviations.

Congressional plans should avoid deviations in excess of one percent. If deviations fall between one and four percent, it may be possible to justify them where the plans are approved in good faith, and the deviations are unavoidable (i.e., no other plans with lower maximum deviations were before the reapportioning body).

C. Gerrymandering

It is difficult to mount a successful challenge against a reapportionment plan on the ground that the plan reflects improper manipulation of district boundaries. A gerrymandered plan will be invalidated only if it clearly discriminates against an ethnic minority, or if it is so blatant as to offend the sensibility of the court. There are few cases and little guidance in this area.

D. Multimember Districting

Although the Supreme Court does not favor the use of multimember districts, particularly in court-ordered plans, reapportioning bodies can feel generally secure in using a mix of single and multimember districts. Problems may arise, however, if the use of such districts results in submerging the interests of a minority ethnic group. Those cases holding the

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[320] *Id.* at 92.

use of multimember districts to be unconstitutional have arisen in the South and have concerned the submergence of the black vote.

E. The Voting Rights Act

The Voting Rights Act of 1965[321] was "primarily designed to provide swift administrative relief where there was compelling evidence that, despite a history of litigation, racial discrimination continued to plague the electoral process, thereby denying minorities the right to exercise effectively their franchise."[322] For purposes of reapportionment, the key provision is Section 5 of the Act, which requires *pre-clearance* by the administration of legislatively prepared reapportionment plans prior to implementation.

The Congressional report on the 1982 extension of the Act notes that "Congress and the courts have long recognized that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the election process as to render votes meaningless."[323] If a plan is subject to Section 5, it is imperative that the drafting body allow sufficient time for submission and pre-clearance by the Justice Department, since the courts may not pass upon any plan that has not been so pre-cleared.[324] Plans prepared by the courts themselves are not subject to the provisions of Section 5.[325]

F. Attorney's Fees

One of the pleasant rewards for a successful challenger of a reapportionment plan, is the likely award of costs and attorney's fees. Under the Civil Rights Attorneys' Fees Awards Act of 1976,[326] a court may allow attorney's fees to the prevailing party in actions, *inter alia*, to enforce the terms of the Civil Rights Act of 1866.[327] This fee provision recognizes that attorneys are more likely to take such cases on a pro bono basis if the possibility exists for the award of attorney's fees.[328]

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[321] *See supra* note 318.

[322] H.R. REP. No. 227, 97th Cong., 1st Sess. 3 (1981).

[323] *Id.* at 17.

[324] *McDaniel v. Sanchez*, 452 U.S. 130, 148 (1981).

[325] *Id.* at 148-49.

[326] 42 U.S.C. § 1988 (1976).

[327] Ch. 31, 14 Stat. 27 (now codified at 42 U.S.C. §§ 1971-1974d, 1981-2000h (1976 & Supp. III 1979)). Most reapportionment plans are challenged under this Act.

[328] For a full discussion of the issues related to the Attorneys' Fees Act, *see* Witt, *The Civil Rights Attorneys' Fees Award Act of 1976*, 13 URB. LAWYER 589, 595 (1981).

ADDENDUM

Two recent cases decided by the United States Supreme Court, relating to both congressional and state legislative reapportionment, modify and clarify the guidelines described in this article.

In *Brown v. Thompson*,[1] the Court upheld Wyoming's legislative reapportionment, which had an 89% maximum deviation. This extreme deviation resulted from the requirement of the Wyoming State Constitution that each county constitute at least one representative district. Niobrara County, with a population of 2,924 persons (according to the 1980 census), was allotted one state representative.[2] The ideal apportionment would have been 7,337 persons per representative.[3] The Wyoming League of Women Voters challenged the specific aspect of the plan granting one representative to Niobrara County, arguing that it "improperly and illegally diluted" the voting privileges of citizens in other counties in violation of the fourteenth amendment.[4]

A three-judge district court upheld the plan, as did the Supreme Court. The Court noted that "Wyoming's constitutional policy — followed since statehood — of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns."[5]

The Court also noted, however, that it was not considering the proposed plan as a whole — with its 16% average deviation and 89% maximum deviation — but "whether Wyoming's policy of preserving county boundaries justifies the *additional deviations* from population equality resulting from the provision of representation to Niobrara County."[6] Here the Court noted that if Niobrara's one representative district was eliminated and combined with that of a contiguous county, the average deviation would decline to only 13%, and the maximum deviation would decline only to 66%.[7] The Court concluded that "[t]hese statistics make clear that the grant of a representative to Niobrara County is not a significant cause of the population deviations that exist in Wyoming."[8]

The limitations of this decision are made clear by the concurring opinion of Justice O'Connor, joined by Justice Stevens.[9] Justice O'Connor

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[1] Brown v. Thompson, 103 S.Ct. 2690 (1983).

[2] *Id.* at 2694-95. The issues in this case focus only on Niobrara County, which, except for the state constitutional provision, would have been "deprived . . . of its own representative for the first time since it became a county in 1913." *Id.* at 2694.

[3] *Id.* at 2694.

[4] *Id.* at 2695. Plaintiffs were residents of seven counties in which population per representative was greater than the state average. *Id.*

[5] *Id.* at 2696.

[6] *Id.* at 2698 (emphasis added).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 2699 (O'Connor, J., concurring).

noted that the Court's decision focused not on the 89% maximum deviation, but only on "the additional deviation from equality produced by the allocation of one representative to Niobrara County."[10] Justice O'Connor also noted that in *Mahan v. Howell* the Court had "suggested that a 16.4% maximum deviation 'may well approach tolerable limits.' "[11] The concurring opinion maintained

> the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries. I join the Court's opinion on the understanding that nothing in it suggests that this Court would uphold such a scheme.[12]

The four dissenting Justices, led by Justice Brennan,[13] also discussed the limitations of the majority opinion:

> Although I disagree with today's holding it is worth stressing how extraordinarily narrow it is, and *how empty of likely precedential value*. . . . [T]he Court weighs only the *marginal* unequalizing effect of that one feature [i.e., allotting Niobrara County its own representative], and not the overall constitutionality of the entire scheme. . . . Hence, although in my view the Court reaches the wrong result in the case at hand, it is unlikely that any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature.[14]

The other recent Supreme Court case, *Karcher v. Daggett*,[15] concerned New Jersey's congressional reapportionment plan. The Court, again in a 5-4 decision,[16] found the plan unconstitutional, although the maximum deviation was less than 1%.

The Court in *Karcher* upheld a three-judge district court decision, which, based upon *Kirkpatrick v. Preisler*[17] and *White v. Weiser*,[18] had found that the population deviations among districts, although small, were not the result of a good-faith effort to achieve population equality.[19]

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[10] *Id.*

[11] *Id.* at 2700 (citing Mahan v. Howell, 410 U.S. 315, 329 (1973)).

[12] 103 S.Ct. at 2700 (O'Connor, J., concurring).

[13] *Id.* at 2700 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., dissenting).

[14] *Id.* (first emphasis added; second emphasis in original).

[15] 103 S.Ct. 2653 (1983).

[16] *Id.* Brennan, J., delivered the opinion of the Court, joined by Marshall, Blackmun, Stevens and O'Connor, JJ.. Stevens, J., concurred in a separate opinion. White, J., filed a dissenting opinion, joined by Burger, C.J., and by Powell and Rehnquist, JJ.. Powell, J., also filed a separate dissenting opinion.

[17] 394 U.S. 526 (1969).

[18] 412 U.S. 783 (1973).

[19] *See* Daggett v. Kimmelman, 535 F. Supp. 978 (D.N.J. 1982).

The challenged plan had a maximum deviation of 0.6984%.[20] The Court noted, however, that the state legislature had before it "other plans with appreciably smaller population deviations between the largest and smallest districts."[21] One of the plans had a maximum deviation of 0.4514%. The Court further noted that the district court had found that the legislature failed to show that the larger population variance was "justified by the Legislature's purported goals of preserving minority voting strength and anticipating shifts in population."[22]

The Court held that a two-step process must be followed in assessing the constitutionality of a congressional reapportionment plan. It must first be determined whether the plan is the product of a good-faith effort to achieve population equality. If not, the burden is shifted to the state to prove that the population deviations in its plan are necessary to achieve some legitimate state objective.[23] Such justification might include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."[24] These rationales may justify "minor population deviations" which, the Court implied, amount to less than 1% deviation.[25] It is not absolutely clear whether the Court would uphold a plan which had a maximum deviation in excess of 1% even if expressly justified under one or more of the above rationales.

The four dissenting Justices, in an opinion by Justice White,[26] argued that the majority had unreasonably insisted on "unattainable perfection in the equalizing of congressional districts."[27] The dissent suggested that the majority opinion in effect "overrules [the] ill-considered holdings of *Kirkpatrick*" by allowing several "consistently applied legislative policies" to justify deviation districts.[28] According to the dissent, the congressional line of cases, decided under article I, section 2 of the United States Constitution, and the state legislative cases, decided under the Equal Protection Clause, should not be decided under different population deviation standards.[29] The dissent "would not entertain judicial challenges, absent extraordinary circumstances, where the maximum deviation is less than 5%."[30] This rationale is similar to the legislative reapportionment plan guideline which suggests that any deviations of less than 9.9% are *de minimis*.

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[20] 103 S.Ct. at 2657.
[21] *Id.*
[22] *Id.* at 2658.
[23] *Id.*
[24] *Id.* at 2663.
[25] *Id.*
[26] *See supra* note 16.
[27] 103 S.Ct. 2653, 2678 (1983)(White, J., dissenting).
[28] *Id.* at 2685.
[29] *Id.* at 2686.
[30] *Id.*

Interestingly, Justice Stevens in his concurring opinion,[31] and Justice Powell in his separate dissenting opinion,[32] each discuss the issue of gerrymandering.[33] Both Justices would entertain constitutional challenges to partisan gerrymandering when it reaches a certain level of discrimination; both would examine the shapes of the districts as well as whether they deviated from established political boundaries to see whether the plan had a significant adverse effect upon a defined group; and both Justices emphasize that a plan could have equal population districts, but still be found unconstitutional because of a gerrymandering of districts which diluted the voting strength of a particular group. However, there still does not exist any clear majority on the Court to uphold challenges of reapportionment plans based upon charges of gerrymandering, except on racial grounds.

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[31] *Id.* at 2667 (Stevens, J., concurring).

[32] *Id.* at 2687 (Powell, J., dissenting).

[33] For numerous instances of parallel discussion by the two Justices, see the texts of their respective opinions, *supra* notes 31 & 32.

LEGITIMACY AND SCOPE OF TRUST TERRITORY HIGH COURT POWER TO REVIEW DECISIONS OF FEDERATED STATES OF MICRONESIA SUPREME COURT: THE *OTOKICHY* CASES

Addison M. Bowman*

On August 13, 1982, in a case styled *Federated States of Micronesia v. Otokichy*,[1] the Supreme Court of the Federated States of Micronesia, Appellate Division,[2] rendered its historic first decision and issued its first appellate opinion. Writing for a unanimous Court,[3] Chief Justice Edward C. King[4] held that the Trial Division of the Supreme Court has jurisdic-

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[1] 1 FSM Intrm. 183 (1982).

[2] The F.S.M. Const. art. XI, § 2 establishes trial and appellate divisions of the Supreme Court; *see* note 3 *infra*. The August 13, 1982, decision in *Otokichy* was an appeal from a trial division ruling. *See* companion case, Truk v. Otokichy, 1 FSM Intrm. 127 (1982).

[3] The *Otokichy* Court consisted of Chief Justice King and designated justices Soukichi Fritz, Presiding Judge of the Truk District Court, and Janet H. Weeks, Judge of the Superior Court of Guam. The F.S.M. Const. art. XI, § 2 provides that the Supreme Court shall consist of the Chief Justice "and not more than 5 associate justices," that the trial division can be held by one justice, that the trial division justice may not sit on the appeal from his own decision, and that "at least 3 justices shall hear and decide appeals." Since the Supreme Court presently consists of Chief Justice King and Associate Justice Richard H. Benson, the appellate division, in any appeal from the trial division, will necessarily consist of King or Benson and at least two designated justices. The F.S.M. Const. art. XI, § 9(b) empowers the Chief Justice to "assign judges among the divisions of a court and give special assignments to retired Supreme Court justices and judges of state and other courts." The power to appoint and assign designated justices is further elaborated in Section 4 of the Judiciary Act of 1979, F.S.M. Code tit. 4, § 104 (1982).

The Supreme Court's second appellate decision, Alaphonso v. Federated States, 1 FSM Intrm. 209 (1982), was rendered by a panel consisting of Chief Justice King and designated justices Alfred Laureta, Judge of the U.S. District Court for the Northern Mariana Islands, and Herbert Soll, Judge of the Commonwealth Court of the Northern Mariana Islands.

[4] Chief Justice King became the first Chief Justice of the Federated States of Micronesia on March 24, 1981. King's background appears in Turcott, *Beginnings of the Federated States of Micronesia Supreme Court* (unpublished manuscript to be published at 5 U. HAWAII L. REV. _____ (1983)).

tion over criminal cases even where the offenses are alleged to have been committed before the effective date of the Federated States of Micronesia National Criminal Code[5] and are thus reachable only under the otherwise repealed criminal law of the Pacific Islands Trust Territory.[6] King's holding was based entirely upon interpretations of the Federated States of Micronesia Constitution[7] and the new National Criminal Code.

On March 11, 1983, the *Otokichy* decision was reversed[8] by the Pacific Islands Trust Territory High Court in the exercise of *certiorari* jurisdiction bestowed upon the High Court by order[9] of the United States Secretary of the Interior. The High Court's opinion, authored by Associate Justice Richard I. Miyamoto,[10] flatly disagreed with the Federated States of Micronesia Supreme Court's construction of the National Criminal Code, and held that jurisdiction in *Otokichy* and like cases is vested in the Trial Division[11] of the Trust Territory High Court. This article will examine the *Otokichy* opinions and will assess the nature and legitimacy of the High Court's assertion of power to review Supreme Court decisions treating strictly internal law matters.

The article commences with a description of the development of constitutional government in the Federated States of Micronesia that culminated in the exercise of constitutional jurisdiction by the Federated States Supreme Court. Governance by the United States in its role as administering authority of the Pacific Islands Trust Territory is, by way of contrast, depicted as an expiring function. In particular, the mission of the Trust Territory High Court in dispute resolution is virtually completed. The High Court retains *certiorari* jurisdiction to review final decisions of the Supreme Court, but the nature and scope of that review power have not been delimited. Surprisingly, the High Court, in its first exercise of that jurisdiction in *Otokichy*, failed to raise or to consider the issue. This article concludes that the High Court's legitimate power in its twilight years in Micronesia does not extend to cases like *Otokichy*, and

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[5] F.S.M. Code tit. 11 (1982); *see infra* text accompanying note 99.

[6] *See* 1 TTC tit. 11 (1980); *infra* note 90.

[7] The F.S.M. Constitution is reprinted in 1 F.S.M. Code at C-3-C-18 (1982) and 2 TTC 309 (1980 Ed.).

[8] Otokichy v. Appellate Division, Cert. No. C-2-82, slip op., (T.T.C. App. Div. Mar. 11, 1983).

[9] U.S. Department of Interior Secretarial Order No. 3039 (1979), *reprinted in* 1 TTC 47 (1980 Ed.); *see infra* text accompanying notes 112 & 113.

[10] The High Court panel consisted of Chief Justice Alex R. Munson, Associate Justice Miyamoto, and designated justice Alfred Laureta, Judge of the U.S. District Court for the Northern Mariana Islands.

[11] The High Court has trial and appellate division. *See* 1 TTC § 52 (1980 Ed.). Pending the establishment of functioning court systems in the states of Kosrae, Ponape and Truk, the trial and appellate divisions of the High Court function in the interim as surrogate state courts, *see infra* text accompanying notes 77-84. Jurisdiction in cases like *Otokichy*, held the High Court's appellate division, lies in the High Court's trial division in its state court surrogate role.

that *Otokichy*-like arrogations of appellate authority by the High Court should be disapproved and rescinded by the Interior Secretary because they place the United States in violation of the very Trusteeship Agreement that defines its legitimate Pacific Islands presence.

The Federated States of Micronesia. The Federated States of Micronesia, one of several emergent Pacific political entities,[12] is a nation of 607 islands covering a huge expanse of ocean north of the equator and west of the international dateline.[13] The Federated States includes most of the Caroline Islands.[14] What were formerly the island districts of Ponape, Truk and Yap are now the four Federated States of Kosrae,[15] Ponape,[16] Truk[17] and Yap.[18] The Federated States' 607 islands comprise a land area of 270 square miles and support a population of 77,000.[19]

For the past hundred years the people of the Caroline Islands have been dependent upon four successive foreign powers: Spain (1885-98),

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[12] The Compact of Free Association, *see infra* note 28, has been signed by the governments of the United States, the Marshall Islands, the Republic of Belau and the Federated States. The constitutions of the latter three governments are reprinted in 2 TTC (1980 Ed.). The free-association status and the proposed arrangement with the Commonwealth of the Northern Mariana Islands are discussed in Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980).

[13] For current statistical information about the Federated States, see F.S.M. NATIONAL GOVERNMENT, [1981] NATIONAL YEARBOOK OF STATISTICS [hereinafter cited as 1981 STATISTICS]. The Federated States lies between 1° and 12° north latitude, and between 137° and 163° east longitude.

[14] Micronesia consists of four archipelagoes: the Mariana, Caroline, Marshall and Gilbert Islands. The Carolines comprise the islands of Ponape, Truk, Yap and Palau, in east-to-west order. The Palau Islands have become the Republic of Belau, *see supra* note 12; the balance of the Carolines is now the Federated States of Micronesia.

[15] Kosrae, consisting of five islands with a total land area of 42.3 square miles and a population of 5,522, was formerly part of the Ponape District. *See* 1981 STATISTICS, *supra* note 13, at 4.

[16] Ponape consists of 163 islands with a land area of 133.4 square miles and a population of 23,485. *Id.* The principal island, also called Ponape, is one of the largest islands in Micronesia with an area of 129 square miles. The seat of the Government of the Federated States is in Kolonia, Ponape. For a wealth of statistical data about Ponape, see PONAPE STATE STATISTICS OFFICE, PONAPE STATISTICAL YEARBOOK FOR 1981.

[17] Truk has 290 islands, a land area of 49.2 square miles, and a population of 38,648. Truk thus claims over half the population of the Federated States. *See* 1981 STATISTICS, *supra* note 13, at 4.

[18] Yap boasts 149 islands, a land area of 45.9 square miles, and a population of 9,319. *See* 1981 STATISTICS, *supra* note 13, at 5. Yap has adopted a state constitution. *See infra* text accompanying notes 56 & 82.

[19] *See* 1981 STATISTICS, *supra* note 13, at 5. Of these, about 12,000 are employed as wage and salary earners, and over half of these are employed by the government. *See* 1981 STATISTICS, *supra* note 13, at 10-11. Subsistence agriculture and fishing are common. For a sociocultural description of the people of the Federated States, see W. ALKIRE, AN INTRODUCTION TO THE PEOPLES AND CULTURES OF MICRONESIA 1-18, 33-67 (1977).

Germany (1899-1914), Japan (1914-45) and America (since 1945).[20] Spain obtained the Carolines through papal arbitration, Germany purchased them from Spain, Japan colonized and governed them under a League of Nations mandate, and the United States seized them in World War II.[21] Throughout that century the Carolinians have preserved their languages,[22] maintained their distinctive customs and traditions,[23] and sustained a hope for freedom and autonomy.[24] At the present time the Federated States is part of the Trust Territory of the Pacific Islands, and the people are wards of the United States under a Trusteeship Agreement approved by the United Nations Security Council and the United States in 1947.[25]

The Trusteeship Agreement designates the United States as "administering authority" of the Trust Territory with "full powers of administration, legislation, and jurisdiction over the territory."[26] This mandate is subject to one important condition:

> In discharging its obligations [as a trustee] the administering authority shall . . . foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop

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[20] For a description of this history, see C. HEINE, MICRONESIA AT THE CROSSROADS (1974); N. MELLER, THE CONGRESS OF MICRONESIA (1969).

[21] The United States' acquisition of Micronesia included the Carolines, the Marshalls, and the Marianas. Meller writes:

> Over 6,000 Americans were killed wresting Micronesia from Japanese control, and the temper of the American people hardly countenanced surrendering the islands to any other nation; conversely, the United States had early declared it sought no territorial gains from World War II. The placing of the area under United Nations trusteeship resolved the dilemma, and in 1947, with the Trusteeship Agreement, the islands technically came under civil administration.

N. MELLER, *supra* note 20, at 14. Governance of the Trust Territory was entrusted to the Commander-in-Chief, U.S. Pacific Fleet, from 1947 until 1951, when the responsibility was shifted to the Department of the Interior. *Id.* at 14-17.

[22] Each of the four Federated States has a separate language, and there are many dialects. Most people speak their own language plus English or Japanese. It is probable that English will become the common language of the Federated States. *See* C. HEINE, *supra* note 20, at 92. English is the language of the Government of the Federated States. *See* 1981 STATISTICS, *supra* note 13.

[23] W. ALKIRE, *supra* note 19.

[24] C. HEINE, *supra* note 20.

[25] Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947), *reprinted in* 2 F.S.M. Code 895 (1982), *and in* C. HEINE, *supra* note 20, at 188.

[26] *Id.* art. 3. The agreement refers to the U.N. CHARTER, arts. 75-77 (establishing and defining an "International Trusteeship System"), *reprinted in* 2 F.S.M. Code 890 (1982).

> their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends. . . .[27]

In pursuance of this obligation the United States has countenanced a developmental process, more fully described in the next section of this article, resulting in the emergence of the Federated States of Micronesia.

On October 1, 1982, at Honolulu, Hawaii, the governments of the United States and the Federated States signed the Compact of Free Association.[28] Subject to termination by either party,[29] the Compact envisions the Federated States as dependent upon the United States for its security and defense[30] and for continuing economic assistance.[31] With those qualifications, the Federated States looks forward to independence. In particular, the free-association status contemplates unqualified autonomy for the Federated States in self-government and internal law.[32] The Compact of Free Association was approved by plebiscite in the Federated States on June 21, 1983, and now awaits approval by the United States Congress and by the United Nations.[33]

Development of Self-Government in the Federated States. The United States in 1964 sponsored a Congress of Micronesia to inaugurate the de-

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[27] Trusteeship Agreement for the Former Japanese Mandated Islands, *supra* note 25, art. 6. Article 6 also requires that the United States promote "economic advancement and self-sufficiency" and social and educational advancement. The language quoted in text conforms with the requirement of article 76 of the U.N. CHARTER.

[28] The Compact of Free Association, as officially approved in 1982, closely resembles the draft initialed in 1980 which was reprinted in 7 BROOKLYN J. INT'L L. 283 (1981), and discussed in Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law, id.* at 235. Macdonald states that the concept of free association implies: "(1) self-government—the associated territory should have a right to determine its internal constitution; (2) free expression—the decision should be one freely made without compulsion; and (3) mutability—the territory should retain the power and right to become independent should it later desire to do so." *Id.* at 241; *see also* Clark, *supra* note 12. Clark concludes that the envisioned free-association status comports with applicable self-determination requirements. *Id.* at 74.

[29] Compact of Free Association §§ 441-43, 451-53 (1982).

[30] *Id.* tit. 3. In other respects the Federated States is free to conduct its own foreign affairs except that it "shall consult, in the conduct of [its] foreign affairs, with the Government of the United States." *Id.* §§ 121, 123.

[31] *Id.* tit. 2.

[32] *Id.* § 111: "The peoples of Palau, the Marshall Islands and the Federated States of Micronesia, acting through the Governments established under their respective Constitutions, are self-governing."

[33] The plebiscite result was reported in The National Union (official F.S.M. publication), Aug. 19, 1983, at 1, col. 1. Thereafter the Compact becomes effective upon approval "by the Government of the United States in accordance with its constitutional processes." Compact of Free Association § 411(e). Final approval of the Compact by the United Nations is contemplated in U.N. CHARTER arts. 83, 85.

velopment of self-government.[34] The Congress of Micronesia in turn authorized a constitutional convention which convened on Saipan in 1975 and wrote a constitution establishing a tripartite form of democratic government closely resembling its apparent American prototype.[35] By plebiscite held on July 12, 1978, the people of Kosrae, Ponape, Truk and Yap adopted and ratified that constitution by majority vote,[36] and then and there created the Federated States of Micronesia. Since then the development of constitutional government has proceeded without interruption.

The first Congress of the Federated States was elected on March 27, 1979, and it convened on May 10, 1979.[37] The Legislative Article of the Constitution establishes a unicameral Congress with expressly delegated legislative power, treaty ratification power, taxation power, impeachment and removal power, and power to override a presidential veto.[38] The national legislative power includes defining and establishing penalties for "major crimes."[39] All bills must pass two readings to become law. On first reading a two-thirds majority is required. "On final reading each state delegation shall cast one vote and a ⅔ vote of all the delegations is required."[40] Professor Meller notes that this scheme incorporates, in a unicameral legislature apportioned according to population, most of the power balancing that is typically achieved in a bicameral body wherein

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[34] *See* N. MELLER, *supra* note 20.

[35] *See* F.S.M. Const. art. IX (Legislative), X (Executive), and XI (Judicial). According to article II, the Constitution "is the supreme law of the Federated States of Micronesia." Article IV contains a "Declaration of Rights" that closely resembles the Bill of Rights. Article VII preserves national, state, and local levels of government, and article VIII ("Powers of Government") grants to the national government those powers "expressly delegated" or "indisputably national [in] character" but reserves to the states all other power. *See generally* Meller, *We the People*, THE NEW PACIFIC, Nov.-Dec. 1981, at 30.

In Alaphonso v. Federated States, 1 FSM Intrm. 209, 214, 216 (App. Div. 1982), the Court noted "that the Constitution and Journal of the [F.S.M.] Constitutional Convention reveal the United States Constitution as the historical precedent for most provisions in the Declaration of Rights," and looked to corresponding U.S. Supreme Court precedent "rendered prior to and at the times of the Constitutional Convention, and ratification of the Constitution . . . ." *See also* Lonno v. Trust Territory, 1 FSM Intrm. 53 (Trial Div. 1982) (judicial power granted to Supreme Court by F.S.M. Const. art. XI similar to that granted federal courts by U.S. Const. art. III).

[36] *See* Alaphonso v. Federated States, 1 FSM Intrm. at 216 n.5. Pursuant to article XVI ("Effective Date"), the Constitution took effect one year after ratification. According to 1 F.S.M. Code intro. (1982), the "establishment of constitutional government [took place] on May 10, 1979."

[37] Lonno v. Trust Territory, 1 FSM Intrm. 53, 56 n.5 (Trial Div. 1982). The seat of the national government is Kolonia in Ponape.

[38] F.S.M. Const. art. IX, § 2.

[39] F.S.M. Const. art. IX, § 2(p) ("to define major crimes and prescribe penalties, having due regard for local custom and tradition"). Congress exercised this power when it enacted the National Criminal Code, F.S.M. Code tit. 11 (1982), in 1981. Section 902 of the Code defines "major crimes" as those punishable by three years or more imprisonment and those "resulting in loss or theft of property or services in the value of $1,000 or more . . . ."

[40] F.S.M. Const. art. IX, § 20.

one house is constituted to provide equal representation to each state regardless of population.[41]

Congress consists "of one member elected at large from each state on the basis of state equality, and additional members elected from congressional districts in each state apportioned by population."[42] The former serve four-year terms, the latter two-year terms. Pursuant to the Executive Article of the Constitution, the President and Vice-President are elected "by Congress for a term of four years by a majority vote of all members."[43] Only those members of Congress holding four-year terms are eligible to become President and Vice-President. This scheme, notes Meller, was designed in recognition of the absence of "territory-wide political parties to support the campaigns of candidates," and to counterbalance the voting strength of Truk State.[44] It seems ideally suited to a nation as far-flung and locally isolated as the Federated States. In 1979, after the convening of the first Congress, President Tosiwo Nakayama and Vice-President Petrus Tun were elected by and from its membership.[45]

The Judicial Article of the Federated States of Micronesia Constitution vests "the judicial power of the national government" in the Supreme Court,[46] which has a trial division and an appellate division.[47] The Supreme Court is thus the Micronesian functional equivalent of the entire federal judiciary in the United States. As in the United States, the justices are appointed by the President, confirmed by the Congress, and serve "during good behavior."[48] On March 24, 1981, President Nakayama

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[41] Meller, *supra* note 35, at 31.

[42] F.S.M. Const. art. IX, § 8.

[43] F.S.M. Const. art. X, § 1. The President "may not serve for more than 2 consecutive terms." *Id.*

[44] Meller, *supra* note 35, at 30. Meller adds: "The solution [the Constitutional Convention] arrived at was to have each state elect one congressman for a four year term, and the FSM Congress then to co-opt the president and vice-president among them. This encouraged the popular choice of only persons of presidential timber to fill the longer-term congressional seats." *Id.* Following election, the president and vice-president "vacate their places in the legislative branch and thereafter function much as any other American-type executive." *Id.* For Truk State population statistics, see *supra* note 17.

[45] The Federated States of Micronesia Information Service reports, as this article goes to press, that the Third Federated States of Micronesia Congress has just reelected Tosiwo Nakayama President of the Federated States of Micronesia. President Nakayama, a native of Ulul Island, Truk State, previously served as senate president of the Congress of Micronesia and as president of the 1975 Constitutional Convention. The new vice-president of the Federated States is Bailey Olter, who hails from Mokil Island in Ponape State. Honolulu Star-Bulletin, May 11, 1983, at A-11, col. 4.

[46] Like U.S. Const. art. III, § 1, F.S.M. Const. art. XI, § 1 contemplates "a Supreme Court and inferior courts established by statute." But since the Federated States Supreme Court has a trial division and an appellate division, *id.* § 2, *see supra* note 3, there is no existing need for more national courts.

[47] *See supra* note 46.

[48] F.S.M. Const. art. XI, § 3.

administered oaths of office to Chief Justice Edward C. King and Associate Justice Richard H. Benson.[49] Chief Justice King sits as trial division justice in Ponape and Kosrae, and Justice Benson similarly functions at the trial level in Truk and Yap. On any appeal the trial justice is disqualified, and two additional justices are temporarily appointed to form an appellate panel of three to decide that case.[50] The Supreme Court's jurisdiction resembles that conferred upon federal courts in the United States, including "original jurisdiction in cases arising under this [Federated States of Micronesia] Constitution; national law or treaties . . . ."[51] The Supreme Court has the ultimate authority to interpret the Constitution,[52] and the Constitution is the "supreme law" of the nation.[53]

Like the United States, the Federated States is a federation with national and state levels of government. The Federated States Constitution requires that each state "shall have a democratic constitution."[54] The National Government is a government of power "expressly delegated [or] . . . indisputably national [in] character."[55] And, as in the United States, the states hold the residual power.[56] As of this writing only Yap has developed and adopted a state constitution, but constitutional conventions are underway or completed in Kosrae, Ponape and Truk.

The Constitution contains a Transition Article that "continues in effect" all Trust Territory statutes "except to the extent [they are] inconsistent with this Constitution [or are] amended or repealed."[57] In a recent trial-level decision in a seaman's suit against the Trust Territory Government styled *Lonno v. Trust Territory*,[58] Chief Justice King foreshadowed

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[49] Turcott, *supra* note 4. For a survey of the early history of the Federated States Supreme Court, see *id.*

[50] *See supra* note 3.

[51] F.S.M. Const. art. XI, § 6:

(a) The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue.

(b) The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national law or treaties; and in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject.

(c) When jurisdiction is concurrent, the proper court may be prescribed by statute.

[52] *Id.* §§ 6-8; Alaphonso v. Federated States, 1 FSM Intrm. 209 (App. Div. 1982).

[53] F.S.M. Const. art. II states: "This Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the Government in conflict with this Constitution is invalid to the extent of conflict."

[54] *Id.* art. VII, § 2.

[55] *Id.* art. VIII, § 1.

[56] *Id.* § 2: "A power not expressly delegated to the national government or prohibited to the states is a state power."

[57] *Id.* art. XV, § 1.

[58] 1 FSM Intrm. 53 (Trial Div. 1982).

the decision in *Otokichy* by holding that the Seaman's Protection Act,[59] although enacted as a part of the Trust Territory Code by the Congress of Micronesia,[60] "relates to matters that now fall within the legislative powers of the [Federated States] national goverment . . . and has therefore become a national law of the Federated States of Micronesia"[61] by operation of the Transition Article. Thus, held King, Lonno's suit fell within Supreme Court jurisdiction because it "arose under" national law.[62] The result is that national law assimilates those parts of the Trust Territory Code that treat subject matter within the constitutional reach of the Congress of the Federated States.[63]

The Federated States, after a century of alien dominion and governance, has quickly seized the opportunity for self-government extended by America pursuant to its obligation as international trustee. The Constitution, which was ratified in 1978, became effective by its own terms in 1979,[64] and by 1981 all three branches of the national government were fully functional. The Compact of Free Association has been signed and awaits final approval. America's trusteeship responsibilities are approaching expiration.[65]

Transitional Trust Territory Administration. Pursuant to Executive Order No. 11021,[66] dated May 9, 1962, the Secretary of the Interior is charged with responsibility "to carry out the obligations assumed by the United States as the administering authority of the trust territory under the terms of the trusteeship agreement . . . ."[67] The charge includes the power to administer civil government, to exercise executive, legislative and judicial functions, and to designate and appoint personnel for these purposes.[68] The Trust Territory High Court is the creature of this executive authority.[69] Established by order of the Interior Secretary to carry out a centralized judicial function in Micronesia, the High Court has trial

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[59] 1 TTC §§ 201-32 (1980 Ed.).

[60] Lonno v. Trust Territory, 1 FSM Intrm. at 72.

[61] *Id.; see infra* note 104.

[62] *See supra* text accompanying note 51. Alternatively, held King in *Lonno*, the case fell within the Supreme Court's original and exclusive admiralty jurisdiction conferred by F.S.M. Const. art. XI, § 6(a). *See supra* note 51.

[63] The F.S.M. Code (1982) is a good example of the proposition in text. It contains, in 57 titles, those statutes enacted by the F.S.M. Congress plus those portions of the Trust Territory Code not "exclusively within the jurisdiction of the States of the Federated States of Micronesia." F.S.M. Code intro. at i (1982). By the same reasoning, state law would assimilate the non-inconsistent balance of the Trust Territory Code.

[64] *See supra* note 36.

[65] *See supra* note 33. Termination of the trust is discussed in Clark, *supra* note 12.

[66] *Reprinted in* 48 U.S.C. § 1681 (1976).

[67] Exec. Order No. 11,021. *Id.* § 1.

[68] *Id.* §§ 1-2.

[69] 1 TTC §§ 51-55 (1980 Ed.); Secretarial Order No. 2918 (as amended March 24, 1976), part IV (judicial authority), *reprinted in* 1 TTC 23, 29 (1980 Ed.).

and appellate divisions and territory-wide jurisdiction over "all causes, civil and criminal."[70] High Court justices are appointed by and serve at the pleasure of the Interior Secretary.[71] The Appellate Division of the High Court is located at Saipan in the Northern Mariana Islands.

With commendable foresight, the Secretary of the Interior anticipated the need to provide for delegation and transfer of governmental functions during the period of transition to self-government and cessation of official American presence in Micronesia.[72] The Secretary in 1979 promulgated Secretarial Order No. 3039 "to provide the maximum permissible amount of self-government, consistent with the responsibilities of the Secretary under Executive Order 11021, for the Federated States of Micronesia, the Marshall Islands, and Palau, pursuant to their respective constitutions as and when framed, adopted, and ratified, pending termination of the 1947 Trusteeship Agreement . . . ."[73] Section 2 of Secretarial Order No. 3039 expressly delegates "executive, legislative, and judicial functions of the Government of the Trust Territory of the Pacific Islands . . . to the three political subdivisions of the Trust Territory known as the Federated States of Micronesia, the Marshall Islands and Palau."[74] This delegation, which became effective upon the commencement of "constitutional government,"[75] enables the courts of the Federated States to assume jurisdiction "as the Constitution of the Federated States of Micronesia authorizes such jurisdiction."[76]

Section 5 of Secretarial Order No. 3039 provides that the Trust Territory judiciary, which includes Community and District Courts and the trial and appellate divisions of the Trust Territory High Court, will continue to function "until the Federated States of Micronesia, the Marshall Islands, and Palau have established functioning Courts pursuant to the

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[70] 1 TTC § 53 (1980 Ed.).

[71] *Id.* § 1(2). The Interior Secretary may also "make temporary appointments when a vacancy exists, and in addition may appoint temporary judges to serve on the high court." *Id.* In *In re* Iriarte, 1 FSM Intrm. 255, 267 (Trial Div. 1983), the court notes that High Court personnel are selected and appointed without prior consultation with the Federated States.

[72] In 1978 the Secretary promulgated Secretarial Order No. 3027, *reprinted in* 1 TTC 44 (1980 Ed.), in recognition of the emerging Federated States, Marshall Islands and Palau governments. Order 3027 canceled the Congress of Micronesia and reorganized the Trust Territory Government "to give appropiate effect to governments based on locally developed constitutions in the Marshall Islands, the Palau District, and the Districts which will comprise the Federated States of Micronesia."

[73] Secretarial Order No. 3039 § 1, *reprinted in* 2 F.S.M. Code 950 (1982).

[74] *Id.* § 2. This express delegation is recognized by the High Court in Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. (T.T.C. App. Div. Mar. 11, 1983), and discussed by the Supreme Court in Lonno v. Trust Territory, 1 FSM Intrm. at 57-59.

[75] Secretarial Order No. 3039, *supra* note 73, § 7. Constitutional government commenced in 1979, *see supra* note 36, and the executive and legislative delegations occurred in that year, *see supra* text accompanying notes 37 and 44. Transfer of the judicial function to the Supreme Court took place in 1981, *see infra* text accompanying notes 79 & 80.

[76] Lonno v. Trust Territory, 1 FSM Intrm. at 58.

terms of their respective constitutions."[77] The determination that "functioning courts" exist is to be made by the Chief Justice of the High Court,[78] and the Federated States Supreme Court was so certified on May 5, 1981.[79] The Supreme Court has held that Section 2 delegation of jurisdiction and judicial functions to the Supreme Court became fully effective on that date.[80] Like its United States counterpart, however, the Supreme Court is a court of limited juisdiction;[81] it received on May 5, 1981, only that portion of the judicial function which it is constitutionally entitled and bound to exercise. The balance belongs to the state courts in the four Federated States. At this writing, however, only Yap State has established a functioning state court system.[82]

In the absence of functioning court systems in the states of Kosrae, Ponape and Truk,[83] the trial and appellate court structure of the Trust Territory Government, including trial and appellate divisions of the High Court, continues in those states to exercise whatever jurisdiction "does not fall within the constitutional jurisdiction of the Supreme Court of the Federated States of Micronesia."[84] In other words, the High Court serves in Kosrae, Ponape and Truk as interim surrogate for the as-yet-unestablished state court systems. The Court pointed out in *Lonno v. Trust Territory* that the allocation of jurisdiction between the Supreme Court and the High Court during this transitional period "will be determined on the

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[77] Secretarial Order No. 3039, *supra* note 73, § 5a.

[78] *Id.* "The determination that such functioning courts exist shall be made in writing by the Chief Justice of the High Court of the Trust Territory of the Pacific Islands upon written request of the chief judicial officer of the respective jurisdictions. A denial of the request may be appealed to the Secretary."

The F.S.M. Judiciary Act of 1979, F.S.M. Code tit. 4 (1982), provides in § 206 ("initial organization of Supreme Court") that the "Supreme Court is deemed organized when . . . the Chief Justice of the Trust Territory High Court, upon written request by the Chief Justice of the Supreme Court of the Federated States of Micronesia certifies . . . that the Supreme Court is prepared to hear matters."

[79] *See* Federated States v. Otokichy, 1 FSM Intrm. 183, 193 n.8 (App. Div. 1982); Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. at 2 n.3 (T.T.C. App. Div. Mar. 11, 1983).

[80] Lonno v. Trust Territory, 1 FSM Intrm. at 58. This result is implicit in the transfer and delegation provisions of Secretarial Order No. 3039, *supra* note 73, § 7: "This Order becomes effective, as to each of them, upon the date when each of the respective jurisdictions, namely, the Federated States of Micronesia, the Marshall Islands, and Palau, have commenced a constitutional government . . . ." Constitutional government in the Federated States commenced in 1979, see *supra* notes 75 and 36, and thus delegation of the judicial function merely awaited the certification of the Supreme Court.

[81] *See supra* note 51.

[82] The Yap State court system was certified pursuant to Secretarial Order No. 3039 by the Trust Territory Chief Justice on March 9, 1982. *See* Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. at 9, (T.T.C. App. Div. Mar. 3, 1983).

[83] Truk State has held a constitutional convention, and conventions are underway or completed in Kosrae and Ponape. *See* Turcott, *supra* note 4. State court systems will likely be established in the near future in all three states.

[84] Lonno v. Trust Territory, 1 FSM Intrm. at 68.

basis of jurisdictional provisions within the Constitution and laws of the Federated States of Micronesia and its respective states."[85] Thus, the Trust Territory courts "continue to function"[86] in the Federated States to fill a void, as the High Court recognized in its opinion in *Otokichy*.[87] The High Court noted that the absence of state courts in Truk, Ponape and Kosrae creates a "void [which] is filled by the continuing existence of the Trust Territory courts . . . within the FSM states where state courts have not been established."[88] This brings us directly to *Otokichy*, which raised a question of *trial-level* jurisdiction in a case filed in Truk. The precise question was whether the High Court's Trial Division, sitting as state court surrogate, or the Supreme Court's Trial Division, exercising its constitutionally mandated jurisdiction, should hear the case in the first instance.

The Merits of Otokichy. Otokichy arose out of serious criminal charges involving group torture and allegations of attempted murder, aggravated assault and conspiracy. The events occurred on Onei Island, Truk, on May 4, 1981. The State of Truk brought charges in the Trust Territory High Court[89] alleging violations of applicable provisions of the Trust Territory Code.[90] Prior to trial, the Federated States of Micronesia Government intervened by way of motion under Special Joint Rule No. 1, seeking transfer to the Federated States Supreme Court.

Special Joint Rule No. 1, signed on July 13, 1981, by the respective Chief Justices of the Trust Territory High Court and the Federated States Supreme Court, expresses as its purpose "that the Supreme Court

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[85] *Id.*

[86] The language is that of Secretarial Order No. 3039, *supra* note 73, § 5a.

[87] Cert. No. C-2-82, slip op. at 9 (T.T.C. App. Div. Mar. 11, 1983).

[88] *Id.* at 9-13. The High Court also asserted, in dicta, that it will "continue to exercise exclusive jurisdiction over suits against the Trust Territory of the Pacific Islands Government or the High Commissioner filed within FSM, Palau, and the Marshall Islands . . . ." *Id.* at 13. This assertion appears designed to express disapproval of the Supreme Court's holding in Lonno v. Trust Territory, 1 FSM Intrm. 53, which was to the contrary. The question of jurisdiction over suits brought against the Trust Territory Government turns on construction of the following language in Secretarial Order No. 3039, *supra* note 73, § 5a: "Once such a determination [that local functioning courts exist] has been made for a jurisdiction, all cases, except for suits against the Trust Territory of the Pacific Islands Government or the High Commissioner, currently pending but not in active trial before the Community Courts, the District Courts, and the Trial Division of the High Court, shall be transferred to the functioning courts of such jurisdiction." *Lonno* held that this language, plus the general delegation of functions provision of § 2, transferred the High Court's former exclusive jurisdiction over suits against the Trust Territory Government to the courts of the Federated States.

[89] There are two criminal cases, Nos. 13-81 and 16-81, and twelve defendants were charged with the same crimes.

[90] 1 TTC tit. 11, §§ 4(2) (attempted murder), 202 (aggravated assault), and 401 (conspiracy to commit murder and aggravated assault). The possible penalties were 30 months to 30 years imprisonment, 10 years imprisonment, and 5 years imprisonment, respectively.

of the Federated States of Micronesia immediately shall exercise the full scope of its jurisdiction under the Constitution and laws of the Federated States of Micronesia, and that the Supreme Court shall determine the scope of its own jurisdiction."[91] Recognizing that the "High Court shall remain active in the Federated States of Micronesia to hear only those cases which do not fall within the jurisdiction of the Supreme Court," the rule provides that in any case originally filed in the High Court either party may assert by motion that the case properly falls within the jurisdiction of the Supreme Court, and mandates that upon such a motion the High Court "shall promptly certify the question of jurisdiction to the Supreme Court . . . ."[92] Special Joint Rule No. 1 is thus an explicit recognition of the Supreme Court's primacy on questions of its own constitutional jurisdiction. The Trial Division of the High Court granted the Federated States' motion and transferred *Otokichy* to the Trial Division of the Supreme Court, which held that, because the crimes charged occurred before the effective date of the new National Criminal Code,[93] and since the charges were brought under the Trust Territory Code,[94] the Supreme Court did not have subject matter jurisdiction.[95] The Federated States appealed, and the stage was set. The outcome would hinge on determination of the question of national law.[96]

Chief Justice King's opinion for the Court in *Otokichy*, joined by designated justices Soukichi Fritz[97] and Janet H. Weeks,[98] squarely held that the case arose under national law and, accordingly, fell within Supreme Court trial jurisdiction. The analysis was straightforward and trenchant. The National Criminal Code was signed into law on January 7, 1981, but by its own terms did not become effective until July 12, 1981.[99] The criminal law governing the *Otokichy* crimes, which were perpetrated on May 4, 1981, was Trust Territory Code Title 11, whereunder the charges were brought. When the Federated States of Micronesia commenced constitutional government in 1979,[100] Title 11 became the criminal law of the Federated States by operation of the Constitution's transition provision

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[91] Special Joint Rule No. 1, High Court, Trust Territory of the Pacific Islands; Supreme Court, Federated States of Micronesia: *Joint Order for Transfer of Cases and Resolution of Jurisdictional Issues*, July 13, 1981 (unpublished admin. order). Special Joint Rule No. 1 is signed by Chief Justice King and by former High Court Chief Justice Harold M. Burnett.

[92] *Id.*

[93] The F.S.M. National Criminal Code, F.S.M. Code tit. 11 (1982), did not become effective until July 12, 1981.

[94] *See supra* note 90.

[95] The holding was spelled out in a companion case, Truk v. Otokichy, 1 FSM Intrm. 127 (Trial Div. 1982) (Benson, J.).

[96] F.S.M. Const. art. XI, § 6(b); *see supra* note 51.

[97] *See supra* note 3.

[98] *Id.*

[99] F.S.M. Code tit. 11, § 3 (1982).

[100] *See supra* notes 36 and 75.

"continu[ing] in effect" all applicable Trust Territory statutes.[101] The question was whether the Title 11 attempted murder and assault provisions were assimilated into *national* law or, more precisely, whether cases charging violations of those provisions now "arise under" national law and therefore fall within Supreme Court jurisdiction. A negative answer to the question would mean that the *Otokichy* offenses would be within the residual jurisdiction of state courts and therefore proper in the first instance in the trial division of the High Court. Since Congress has the power to define and prescribe punishments for "major crimes,"[102] and since the National Criminal Code embodied that power and defined "major crimes" as those punishable by three years or more imprisonment,[103] the offenses alleged in *Otokichy* would qualify as "major crimes" were they so assimilated. Assimilation so conceived, however, presents a sort of chicken-and-egg problem. The offenses become "major crimes" if assimilated, but can't be assimilated unless they are "major crimes."[104] Perhaps in recognition of this difficulty, the Supreme Court turned to the repealer provisions of the National Criminal Code.

Section two of the National Criminal Code repeals "to the full extent of National Government jurisdiction"[105] Title 11 of the Trust Territory Code. However, in order to avoid a hiatus of inadvertently immunized criminality, on one hand, and an *ex post facto* problem, on the other, Section 102 of the Code provides that it "does not apply to offenses committed before its effective date" and that prosecutions for such offenses

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[101] F.S.M. Const. art. XV, § 1; *see supra* text accompanying notes 57-63.

[102] F.S.M. Const. art. IX, § 2(p); *see supra* text accompanying note 39. Congress's power to define and thus "nationalize" major crimes presents a sharp contrast with the United States Congress's crime legislating power which, with a few specified exceptions such as counterfeiting, piracy and other offenses on the high seas (see U.S. Const. art. 1, § 8) is entirely derivative from other powers like commerce regulation and taxation. *See generally* W. La Fave & A. Scott, Handbook on Criminal Law 106, 112 (1972).

What are "major crimes"? The constitutional history is limited:

> Your Committee feels that a rational clear-cut distinction between the authority of the national government and that of the state governments ought to be made in the area of criminal law and that the distinction ought to be based on the severity of the crime. Your Committee also feels that the national government ought to take local custom into consideration in legislating regarding crimes. Your Committee has therefore provided that the national government should have authority over major crimes, should be empowered to distinguish between "major" and "minor" crimes and that in enacting such legislation should take local custom into account.

2 *J. Micro Con Con of 1975*, S.C. Rep. No. 33 ¶ 18, at 813, 819, Oct. 10, 1975.

[103] National Criminal Code, F.S.M. Code tit. 11, § 902(a) (1982). Section 902(b) added to the "major crimes" category "all crimes resulting in loss or theft of property or services in the value of $1,000 or more, as well as any attempt to commit such crimes."

[104] The subject matter of Lonno v. Trust Territory, 1 FSM Intrm. 53 (Trial Div. 1982), was admiralty and therefore came within Congress's power "to regulate navigation and shipping." *See* F.S.M. Const. art. IX, § 2(h); text *supra* accompanying notes 57-62. Assimilation of the Seaman's Protection Act into national law was therefore direct and uncomplicated, in contrast with a classification of "major crimes" awaiting definition by Congress.

[105] National Criminal Code, F.S.M. Code tit. 11, § 2 (1982).

"are governed by the prior law, which is continued in effect for that purpose, as if the Code were not in force."[106] *Otokichy,* involving crimes allegedly committed on May 4, 1981, was such a prosecution. But for Section 102, reasoned King, the repealer clause of the Code would have barred the *Otokichy* prosecution.[107] Since Title 11 prosecutions are thus "preserved" by Section 102, they arise under national law. In support of this result King noted that, since Congress would have no power to authorize or affect prosecutions in courts outside the Federated States of Micronesia system, the "normal implication"[108] of Section 102's preservation of prosecutions for "major crime" category offenses is that Supreme Court jurisdiction attaches. In effect, Congress " 'froze' the [application of substantive criminal law to] defendants so that guilt or innocence would be determined under the law in effect at the time the alleged crime was committed."[109] Title 11 is thus "continued in effect" for cases like *Otokichy* only because of Section 102, and the Trust Territory criminal statutes owe whatever waning vitality they possess to the new National Criminal Code. Congress, King added, "recognized that this Court would have jurisdiction over all such cases by virtue of . . . the Constitution."[110] The *Otokichy* mandate instructed the Supreme Court Trial Division to retain jurisdiction of the prosecution.[111]

Otokichy in the High Court. The High Court's Appellate Division had final say in *Otokichy* because of its *certiorari* jurisdiction. Secretarial Order No. 3039,[112] in addition to providing a state court surrogate role for both divisions of the High Court, allows a continuing review function in the appellate division: "[T]he Appellate Division of the High Court shall retain jurisdiction by writ of certiorari to entertain appeals from the courts of last resort of the respective jurisdictions of the Federated States of Micronesia, the Marshall Islands and Palau."[113] In its first exercise of

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[106] *Id.* § 102. Retroactive extension of substantive provisions of the criminal code would in all likelihood have violated F.S.M. Const. art. IV, § 11 ("a bill of attainder or *ex post facto* law may not be passed"); *cf.* Weaver v. Graham, 450 U.S. 24 (1981); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[107] "The result would have been dictated by the Section 2 repeal clause," noted King, "but also could have occurred if the universal common law rule of abatement of prosecution under repealed statutes had been applied by the courts." Federated States v. Otokichy, 1 FSM Intrm. at 189-90. The rule of abatement is discussed in Bradley v. United States, 410 U.S. 605 (1973), which was cited by King for that proposition.

[108] 1 FSM Intrm. at 191.

[109] *Id.*

[110] *Id.* at 193.

[111] This instruction was in the form of a writ of prohibition addressed to the trial division and prohibiting transfer of the cases back to the High Court. "The Trial Division is instructed to retain jurisdiction and to proceed in the cases in whatever manner the Trial Division deems appropriate." *Id.* at 194.

[112] *Supra* note 73.

[113] *Id.* § 5b. The implication is that the *certiorari* jurisdiction will last until the trustee-

that function, the High Court reversed the Supreme Court and claimed subject matter jurisdiction for its own trial division in *Otokichy* "and cases of like import." The opinion by Justice Miyamoto is remarkable in two respects: it fails entirely to confront or dispute the analysis supporting the Supreme Court's holding that *Otokichy* "arises under" national law; and it neglects to raise or discuss the appropriate scope of the High Court's *certiorari* jurisdiction.

On the merits, Justice Miyamoto recognized that the judicial function in the Federated States is "shared between the national, state and local governments,"[114] and that the High Court serves as a surrogate "court within the FSM states where state courts have not been established."[115] He noted that the Trust Territory law was the applicable law, and characterized the Federated States' argument in support of the Supreme Court's exercise of jurisdiction as a contention "that the National Crimes Act in fact made the Trust Territory Title 11 crimes national crimes by the retroactive effect of the National Criminal Code."[116] So characterized, the contention was brushed aside as "convoluted" and "totally without merit."[117] Miyamoto simply quoted National Criminal Code Section 102,[118] the linchpin in the Supreme Court holding, and concluded: "Anything as clear as this section does not require interpretation by this court of matters advanced to support retroactivity."[119] In a curious afterthought, Miyamoto asserted that nothing in the new National Criminal Code "lessens the vitality of Title 11 of the Trust Territory Code, under the circumstances of this case."[120] That was the full extent of the High Court's treatment of the merits, except for the concluding generalization that the Supreme Court "cannot exercise jurisdiction over matters which are within the exclusive province of the state courts."[121]

What about Special Joint Rule No. 1 and the Supreme Court's right to determine its own jurisdiction? In response to the Federated States' argument that the Supreme Court's decision should be dispositive because of the rule, the High Court, with hyperbole characteristic of the entire opinion, dismissed the point as the product of a "gross misunderstanding as to what the Special Joint Rule is."[122] The rule, opined the High Court, "was simply a memorandum adopted to express general agreements to create

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ship is terminated.

[114] Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. at 8 (T.T.C. App. Div. Mar. 11, 1983).

[115] *Id.* at 13.

[116] *Id.* at 11.

[117] *Id.*

[118] *See supra* text accompanying note 106.

[119] Cert. No. C-2-82, slip op. at 11 (T.T.C. App. Div. Mar. 11, 1983).

[120] *Id.*

[121] *Id.* at 12.

[122] *Id.* at 13.

an atmosphere for smooth transition and cooperation."[123] The "atmosphere" and language of *Otokichy* in the High Court are sarcastic and petulant, and the special rule is simply disregarded. The disregard of the rule is especially remarkable in view of the High Court's express recognition that its holding was based upon a rejection of the Supreme Court's definitive construction of Federated States national law, and that the jurisdictional bounty of *Otokichy* will accrue to the High Court strictly as state court surrogate.[124]

The thrust of the High Court decision, it seems fair to conclude, is that proper resolution of the subject matter jurisdiction issue thought to have been presented is so clear that the rejection of the Supreme Court's reasoning did not require discussion or analysis, and the joint rule could have no operative effect. Keeping in mind that the *Otokichy* litigants were Truk State and people from Truk, and that decision in both courts turned on construction of the Constitution and statutes of the Federated States, *Otokichy* appears to represent an arrogation of plenary appellate jurisdiction over national courts of last resort by the High Court in its holdover years in Micronesia.

Perhaps most suprising is the High Court's failure to address the legitimate scope of its own power under Secretarial Order No. 3039.[125] In addition to arguing Supreme Court primacy under the Federated States Constitution and Special Joint Rule No. 1, the Federated States asked the High Court to abstain from decision. Justice Miyamoto responded: "Surely, we cannot abdicate responsibility because the problem presented in this case is one of the prime reasons why the High Court was given certiorari jurisdiction."[126] But the "problem" and the "reason" thus implied were not specified or discussed. The implication is that the High Court harbors some unarticulated grievance against the Supreme Court, almost as if the opinion were designed to chastise by innuendo. The Supreme Court was reversed, "and the Trust Territory High Court . . . vested with the jurisdiction to try and dispose of this case and cases of like import."[127]

The Otokichy Analysis. One startling aspect of the High Court result in *Otokichy* is its apparent gratuitousness. It is difficult to imagine a subject matter of less concern or interest to the United States, the Trust Territory Government, or the High Court than the jurisdictional allocation of such a diminishing class of local litigants as that represented by *Otokichy*. Not only is the class of litigants diminishing; so is the function of the High Court's trial division. Soon Truk, Ponape and Kosrae will

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[123] *Id.*

[124] *See supra* text accompanying notes 83-88.

[125] *See supra* text accompanying notes 112-13.

[126] Cert. No. C-2-82, slip op. at 12 (T.T.C. App. Div. Mar. 11, 1983).

[127] *Id.* at 14.

have state court systems, and *Otokichy*'s progeny will be theirs. Why did the High Court care about internal jurisdictional allocation in the Federated States?[128] Why did the High Court choose to address the balance of national and state power? The High Court's opinion sheds no light on these problems.

The remainder of this analysis will focus on four issues: What about the merits of the jurisdiction issue in *Otokichy*? Did the High Court abuse its *certiorari* jurisdiction? Does the High Court result in *Otokichy* violate the Trusteeship Agreement? Should the Supreme Court follow *Otokichy* in subsequent cases?

What about the merits of *Otokichy*? Was the Supreme Court right? Did Congress intend the result King reached? On two points the intent of Congress was express: to define, and thus assert national jurisdiction over, "major crimes" as allowed in the Constitution;[129] and to repeal "to the full extent of National Government jurisdiction" the Trust Territory criminal code. Section 102's governance of interregnum prosecutions "as if the Code were not in force" suggests, literally and superficially, that the High Court should prevail in the jurisdictional tug-of-war. Had the National Criminal Code not been written, for example, it would have been impossible confidently to assert Supreme Court jurisdiction because, even though the Constitution's transition provision incorporated Title 11 into the law of the Federated States,[130] there would have been no definition of "major crimes" and hence no means of sorting out national cases and state cases.

The problem of sorting out national and state cases needs to be kept in mind to avoid the High Court's apparent mistake of viewing *Otokichy* as a clash between the Federated States criminal law and the Trust Territory Code. The Supreme Court employed the former, not to sap the vitality of the latter, but to demonstrate that the Trust Territory Code was assimilated into national, rather than state, law. There is no impediment to this result. It can be reached in several ways. To begin with, King's analysis is entirely adequate as a matter of statutory construction. Congress intended to define major crimes, and it intended to augment transfer of the judicial function to the Supreme Court.[131] Is it not plausible to infer from Congress's obvious intent a further desire to preempt major crime jurisdiction and deliver the maximum possible amount of it to the Supreme Court? Congress's predominant purpose, as King pointed out,

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[128] The opinion gives no indication of the High Court's interest.

[129] National Criminal Code, F.S.M. Code tit. 11, §§ 901-902 (1982). The Code was the embodiment of the Constitutional power. *See* F.S.M. Const. art. IX, § 2(p).

[130] Lonno v. Trust Territory, 1 FSM Intrm. 53 (Trial Div. 1982); *see supra* text accompanying notes 57-62.

[131] F.S.M. Code tit. 11, § 901 (1982), announces that "[t]he National Government of the Federated States of Micronesia has exclusive jurisdiction over all major crimes," and § 902 defines "major crimes." *See supra* note 39. The intent to facilitate transfer of the judicial function to the Supreme Court appears in S.C. REP. No. 1-299, 1st Cong., 4th Sess. (1981).

was substantive: it wanted to write a law defining serious crimes; it wanted to repeal the old law; and it wanted to avoid an interregnum of potential immunity. If Congress had thought about the issue at all, it would likely have wanted to deliver maximum jurisdiction to the Supreme Court, and that was the Supreme Court's holding. The High Court never suggested in *Otokichy* that Congress could not place jurisdiction over Trust Territory Code offenses in the Supreme Court. Indeed, the transition provision of the Constitution would have done precisely that except for the absence of a definition of "major crimes."[132] Thus the power existed and the question, as both courts recognized, was one of construction of national law.

The Supreme Court held that *Otokichy* arises under national law because the National Criminal Code preserves and classifies interim prosecutions for certain Trust Territory offenses already assimilated into the law of the Federated States. This is fully consistent with the meaning of "arising under . . . national law" intended by the Constitutional Convention. The relevant committee report[133] reads:

> In general, the national courts have trial court jurisdiction under this proposal in cases involving national law or the national constitution, and in certain other specific categories of cases, either interstate or international in character, and therefore beyond the competence of the state courts . . . . The term "arising under" . . . mean[s] cases involving the enforcement of a right protected or created by the national constitution, national law or a treaty and cases involving the construction or interpretation of the national constitution, national law or a treaty.[134]

The effect of the National Criminal Code in preserving interim prosecutions does not conflict with these stated purposes.

Another way of approaching the *Otokichy* issue is to ask what would have happened in a murder or attempted murder case had the National Criminal Code not been written. Because of the constitutional transition provision the relevant Trust Territory statute would have become a law of the Federated States, and because of Secretarial Order No. 3039 jurisdiction would lie in the Supreme Court or in a state court. High Court jurisdiction could thus be posited only in the High Court's role as Truk state court surrogate. Under the Constitution, and in the absence of any jurisdictional allocation by Congress, the Supreme Court would have jurisdiction over the case if it involved a "major crime" and thus became assimilated into national law.[135] Would not the Supreme Court, in such a case, have the power (if not the duty) to supply a common-law definition

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[132] *See supra* note 130.

[133] Committee on Governmental Functions, S.C. REP. No. 49, ¶ 7, 2 *J. Micro Con Con of 1975*, at 876, 879 (1976).

[134] *Id.*

[135] *See supra* text accompanying notes 129-30.

of "major crimes" in order to decide the jurisdictional issue?[136] And, in deciding upon the propriety of exercising such a power, would it not be relevant to know that Congress had decided, albeit in an enactment not yet effective, to draw the line between major and minor crimes at three years? In short, is it all that clear what would have happened "if the Code were not in force?" The High Court appears to have begged that question.

More important than deciding now which court had a firmer grip on *Otokichy*, however, is the question of the High Court's power. The Judicial Article of the Constitution vests the "judicial power of the national government . . . [in the] Supreme Court,"[137] and confers upon the Supreme Court the ultimate power to interpret the Constitution and all national law.[138] The High Court challenges that power, and disputes the Supreme Court's interpretation of the Constitution and a national statute. But under the Constitution the Supreme Court simply cannot be wrong in its interpretation of national law. The High Court's power cannot derive from the Constitution; its source must be elsewhere, and the only possibility is Secretarial Order No. 3039.[139]

Why was the High Court given the power of review on *certiorari*? Did the High Court abuse that power? The most troublesome aspect of *Otokichy* is that the High Court never addressed the issue of limitations on its own power. In 1982 the High Court adopted a set of rules to govern writs of *certiorari*,[140] but said only that the writ "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."[141] This rule was not mentioned by the High Court in *Otokichy*. Special Joint Rule No. 1, conceding the Supreme Court's primacy on *Otokichy*-like questions, was disregarded. After the High Court's decision, the Federated States asked for reconsideration and argued explicitly[142] the question of abuse of *certiorari* power, but the High Court denied the motion without opinion.[143] Virtually ines-

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[136] Such a duty could be derived from the Constitution's command that some crimes were too serious to entrust to state court adjudication. *See supra* note 102 and text accompanying notes 133-34.

[137] F.S.M. Const. art. XI, § 1.

[138] *Id.* §§ 6-8.

[139] *Reprinted in* 1 TTC 47 (1980 Ed.).

[140] High Court of the Trust Territory of the Pacific Islands, *Rules for Writ of Certiorari*, adopted and filed June 25, 1982.

[141] *Id.* Rule 5.

[142] Respondent's Motion for Reconsideration, Otokichy v. Appellate Division, Cert. No. C-2-82, (T.T.C. App. Div. Mar. 18, 1983). The Federated States argued: "It simply makes no sense at all to reason that the High Court has certiorari power largely in order to review matters of purely internal FSM law and the allocation of jurisdiction between the FSM's state and national courts. What possible need is there for a Trust Territory forum to resolve such issues? Why is the FSM forum not completely adequate and, in fact, more appropriate to the resolution of such internal issues?" *Id.* at 5.

[143] Otokichy v. Appellate Division, Cert. No. C-2-82 (T.T.C. App. Div. Mar. 23, 1983)

capable, in these circumstances, is the conclusion that the High Court, aware of the legitimate and pressing issue of its own power, prefers to stonewall its spectators.

The *certiorari* power should be limited to review of decisions that arguably threaten fulfillment of United States trusteeship responsibilities or endanger human rights. Secretarial Order No. 3039 can be construed as qualifying the grant of *certiorari* in this way. The purpose of the order, it will be recalled with some irony, is to provide the "maximum permissible amount of self-government" to the Federated States by releasing and transferring government functions. The transfer of executive functions is, however, expressly qualified to allow the High Commissioner the retained authority to carry out trusteeship obligations.[144] In the same way, the transfer of legislative functions is qualified to retain in the High Commissioner power to disapprove legislation "inconsistent with the provisions of this Order, the Trusteeship Agreement, with existing treaties, laws, and regulations of the United States . . . ."[145] The transfer of judicial functions is qualified only by the retention of the High Court's *certiorari* review, and the scope of that power is not delineated. Given the purpose and general thrust of Order No. 3039, however, plenary appellate review in the High Court seems the *least* likely answer to the question the High Court did not raise.

The most reasonable interpretation of the proper scope of *certiorari* review, in light of the maximum self-government motive, is that it is limited in the same way the order limits retained executive and legislative powers. The limitation allows the vestigial remnants of the Trust Territory Government no more power than that required to fulfill trusteeship responsibilities and to safeguard human rights. Indeed, proper discharge of the function of trustee demands the restraint implicit in the limitation. The High Court avoided the question and reversed *Otokichy* because it preferred its construction of Federated States law, and it expressly rested the decision on the *certiorari* jurisdiction conferred in the order. So defined, that jurisdiction violates the Trusteeship Agreement.

The Trusteeship Agreement not only requires the promotion of self-government but also dictates that self-government be a "progressively increasing" reality. In the Federated States, the High Court's presence is vestigial and its function is expiring. Its power must progressively diminish as the judicial power of the emergent Pacific nations matures. *Otokichy* is simply a step in the wrong direction. Special Joint Rule No. 1 should be reinstated. Its abrogation violates trusteeship obligations. And for the same reason, the High Court holding in *Otokichy* should be rescinded by the Interior Secretary. The High Court should not be permitted to stamp its preferences on the developing law of this young nation.

(order denying petition for reconsideration).

[144] Secretarial Order No. 3039, *supra* note 139, § 3a.

[145] *Id.* § 4a.

For the United States to pay lip service to self-government and free association, on one hand, and to countenance the bullying and demeaning of a constitutional government as the time for free association appears to draw near, on the other, is to perpetrate a double bind and to demonstrate its lingering ambivalence toward freedom and free association for Micronesia.[146] The diminishing class of litigants represented by *Otokichy* symbolizes the diminishing American presence in the Federated States of Micronesia. The High Court should be summarily instructed to respect an emerging Government and to curtail its *certiorari* function.

The final issue, whether the Supreme Court should respect and follow the High Court *Otokichy* precedent, was answered in the affirmative in an opinion delivered in August 1983. The Federated States Supreme Court, consisting of Associate Justice Benson and designated justices Dorothy W. Nelson[147] and Samuel P. King,[148] held in *Jonas v. Supreme Court*[149] that the High Court's authority to issue the *Otokichy* writ was legitimate, and that, "[T]his court cannot disregard an opinion resulting from such review."[150] So concludes the saga of *Otokichy*, but not the fundamental issue that it represents.

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[146] *See* Clark, *supra* note 12, at 6-7. "The United States has not shown great enthusiasm for the independence of Micronesia. The fear has been that United States security interests could not be adequately protected in an independent Micronesia."

[147] Judge, U.S. Court of Appeals for the Ninth Circuit.

[148] Judge, U.S. District Court for the District of Hawaii.

[149] 2 FSM Intrm. ___ (App. Div. Aug. 15, 1983) (per curiam).

[150] *Id.*, slip op. at 6.

METROMEDIA, INC. V. CITY OF SAN DIEGO: THE CONFLICT BETWEEN AESTHETIC ZONING AND COMMERCIAL SPEECH PROTECTION; HAWAII'S BILLBOARD LAW UNDER FIRE

In 1981, the United States Supreme Court addressed the constitutionality of a billboard regulation in *Metromedia, Inc. v. City of San Diego,*[1] finding the municipal regulation to be an unconstitutional abridgment of free speech guaranteed by the first amendment.[2] The case served both as a vehicle for the Court's first direct treatment of this issue[3] and as a subsequent source of interminable confusion for governmental bodies enacting such regulation.

Two major issues were addressed in *Metromedia.* The first involved the legality of a municipal regulation of billboards for aesthetic purposes. The second involved the concomitant prohibition of speech, flowing from the billboard regulation. *Metromedia* aptly illustrated the fragile nature of this interface.

Aesthetic regulation of billboards entails a delicate balancing of conflicting values. It protects the recognized governmental interest of beautification. However, such regulatory efforts to promote beautification may infringe upon the exercise of free speech. Therefore, any regulation of billboards must be tempered by the constitutional protections of the first amendment. For states such as Hawaii, where natural beauty is indispensable to a tourism-dependent economy, there is an urgent need for guidance in this area. Hawaii's billboard statute[4] will stand or fall according to the law derived from *Metromedia.* Unfortunately, the tangle of opinions produced in *Metromedia* offers little in the way of clear guidelines, but hints ominously at possibly fatal defects in our billboard statute.

This note reviews the often conflicting concerns of billboard regulation for aesthetic purposes and the exercise of free speech. It determines that Hawaii's billboard statute is unconstitutional under the holding in *Me-*

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[1] 453 U.S. 490 (1981).

[2] U.S. CONST. amend. I states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[3] *Metromedia* remains the Court's only plenary consideration of a first amendment challenge to a billboard regulation. *Metromedia,* 453 U.S. at 498.

[4] *See infra* note 125 and accompanying text.

tromedia. More importantly, this note finds that the Hawaii Supreme Court's broad interpretation of the *Metromedia* holding poses even greater constitutional problems for Hawaii's billboard statute. In conclusion this note offers recommendations for correcting the constitutional defects in Hawaii's billboard law.

I. FACTS

In 1972, the City of San Diego enacted an ordinance regulating outdoor advertising display signs.[5] The ordinance prohibited all outdoor advertising[6] with two exceptions: (1) on-site advertising display signs[7] and (2) signs falling within twelve categories.[8] The primary stated purposes of the

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[5] San Diego, Cal., Ordinance 10,795 (Mar. 14, 1972), *reprinted in* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493 (1981). The general prohibition against billboard advertising is contained in subsection (b):

> Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:
>
> 1. Any sign identifying a use, facility or service which is not located on the premises.
>
> 2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
>
> 3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

[6] The San Diego City Council did not define the phrase *outdoor advertising display sign*. In *Metromedia*, the California Supreme Court resolved this problem by adopting the definition provided in CAL. REV. & TAX CODE § 18090.2 (West Cum. Supp. 1981). Section 18090.2 defines an outdoor advertising display sign as "a rigidly assembled sign, display or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 856 n.2, 610 P.2d 407, 410 n.2, 164 Cal. Rptr. 510, 513 n.2 (1980).

[7] On-site signs identify the name of the premises on which the sign is located or the name of the owner or occupant, or advertise goods manufactured on, or services rendered on, the premises. San Diego, Cal., Ordinance 10,795, at § 101.0700(B).

[8] These twelve categories are: government signs; bench signs at public bus stops; historical plaques; religious symbols; signs not visible from off the property; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; signs within shopping malls; signs manufactured, transported, or stored within the city, if not used for advertising purposes; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs. *Id.* at § 101.0700 (F).

The last exception was added to the ordinance following the decision in Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). In *Baldwin*, the Ninth Circuit held that an ordinance which regulated temporary political signs by requiring application fees and imposing size and distribution limitations violated the first amendment

ordinance were to promote traffic safety; to protect public health, safety and general welfare; and to prevent "the destruction of the natural beauty and environment of the City."[9]

Shortly after enactment of the ordinance, Metromedia, Inc. and Pacific Outdoor Advertising Company, owners of numerous outdoor advertising displays, brought suit against the City to enjoin enforcement of the ordinance.[10] The trial court granted the plaintiffs' motion for summary judgment, holding that the ordinance constituted an unreasonable exercise of the police power and a violation of the First Amendment to the United States Constitution.[11]

The California Court of Appeals affirmed solely on the ground that the ordinance was an invalid exercise of state police power,[12] leaving the first amendment argument unaddressed. On appeal, the California Supreme Court reversed, stating unequivocally that the ordinance served to further legitimate police power objectives of traffic safety and aesthetics.[13] Further, the court found no first amendment violation because the ordinance was a reasonable regulation of time, place and manner, consistent with the free speech provisions of the United States and California Constitutions.[14]

In a 6-3 plurality decision which generated five separate opinions,[15] the United States Supreme Court reversed, holding that the ordinance violated the First Amendment to the United States Constitution because its exemption of on-site commercial billboards accorded greater protection to commercial than to noncommercial speech.[16] The plurality found, however, that the prohibition of off-site commercial billboards was a reasona-

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of the United States Constitution.

San Diego, Cal., Ordinance 12,189, allows removal of temporary 90-day political signs within 10 days after elections.

[9] San Diego, Cal., Ordinance 10,795, at § 101.0700 (C) and (D).

[10] Together, these two companies owned approximately 500 to 800 outdoor advertising displays. *Metromedia*, 453 U.S. at 496. At the time the ordinance was enacted, all of these billboards were located in commercially or industrially zoned areas. *Id.*

[11] *Metromedia*, 453 U.S. at 497.

[12] Metromedia, Inc. v. City of San Diego, 67 Cal. App. 3d 84, 136 Cal. Rptr. 453 (1977).

[13] *Metromedia*, 26 Cal. 3d at 859-61, 610 P.2d at 412-13, 164 Cal. Rptr. at 516-17.

The Court also relied in part on United States Supreme Court cases in which state court decisions sustaining billboard regulations were summarily affirmed. 26 Cal. 3d at 866-67, 610 P.2d at 417, 164 Cal. Rptr. at 520 [*citing* Lotze v. Washington, 444 U.S. 92 (1979); Newman Signs, Inc. v. Hjelle, 440 U.S. 921 (1979); Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978)].

[14] *Id.* at 871, 610 P.2d at 420, 164 Cal. Rptr. at 523.

The California Supreme Court found that the ordinance did not suppress the advertisers' messages on the basis of content because it banned billboards without reference to the message advertised.

[15] *See Metromedia*, 453 U.S. at 493-521 (White, Stewart, Marshall, Powell, JJ.); *id.* at 521-40 (Brennan, Blackmun, JJ., concurring); *id.* at 540-55 (Stevens, J., concurring and dissenting); *id.* at 555-69 (Burger, C.J., dissenting); *id.* at 569-70 (Rehnquist, J., dissenting).

[16] *Id.* at 521.

ble means of achieving the legitimate police power goals of traffic safety and aesthetics.[17] Although the *Metromedia* plurality did not indicate whether a total ban on billboards would pass constitutional muster under the first amendment,[18] every member of the Court acknowledged that a well-drafted billboard prohibition would be valid under certain circumstances.[19]

II. Aesthetic Zoning and the Commercial Speech Doctrine: A Historical Perspective

Metromedia and its ramifications for billboard regulation in Hawaii are best understood against the backdrop of aesthetic zoning and commercial speech protection. The use of the police power to zone for aesthetic purposes and the accordance of first amendment protection to commercial speech proceeded upon separate paths to judicial acceptance. Thus, the evolution of each legal doctrine is properly viewed within its own sphere. It is critical to an understanding of *Metromedia*, however, that the reader appreciate the resultant clash of concerns embodied in these doctrines when courts are called upon to review the constitutionality of billboard regulations.

A. Zoning for Aesthetic Purposes

The authority of local governments to exercise control over billboards and other forms of outdoor advertising is derived from the police power.[20]

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[17] *Id.* at 508.

[18] *Id.* at 515 n.20. The three dissenting justices, however, would support a total ban on billboards. *Id.* at 553 (Stevens, J., dissenting); *id.* at 568 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

Although Justice Stevens agreed with the plurality's view that commercial billboards may be prohibited, he disagreed with the holding invalidating the prohibition of noncommercial billboards. *Id.* at 540-42.

Chief Justice Burger argued that noncommercial as well as commercial billboards may be prohibited as long as the state or local regulatory plan was content-neutral and left open other adequate means of conveying such messages. *Id.* at 560-61.

In the viewpoint of Justice Rehnquist, the aesthetic justification alone is sufficient to sustain a local government's decision to ban billboards altogether, even in commercial and industrial districts. *Id.* at 570.

[19] *See Metromedia*, 453 U.S. at 515 n.20 (White, Stewart, Marshall, Powell, JJ., plurality); *id.* at 528 (Brennan, Blackmun, JJ., concurring); *id.* at 542 (Stevens, J., dissenting in part); *id.* at 568-69 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

[20] The police power is the power of the state or local government to promote the public health, safety, and welfare by regulating the personal and property rights of its citizens. Berman v. Parker, 348 U.S. 26, 32 (1954). Governmental entities may exercise the police power solely for public purposes, which include peace and order; public health, safety, and morals; public convenience; and general prosperity. *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926).

In the majority of cases, aesthetic concerns have in fact been the moving force behind enactment of billboard regulations.[21] While a few cases have upheld zoning ordinances based on aesthetics alone,[22] many courts have been reluctant to recognize aesthetic improvement as a legitimate, sole governmental purpose.[23] This judicial reluctance may stem, in part, from the subjective nature of aesthetic values and the inherent difficulty of articulating appropriate legal guidelines. As a result, some courts have gone to extreme lengths to justify billboard regulations on bases other than aesthetics.[24] Numerous courts have simply permitted local governments to remove unsightly billboards under a variety of asserted purposes, including protecting property values,[25] promoting tourism,[26] attracting busi-

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When questions arise as to the validity of an ordinance enacted pursuant to the police power, legislative motive or intent is not determinative. *Id.* at 395-96. Rather, the test is whether the regulation bears a rational relationship to a permissible police power purpose and provides an impartially administered, reasonable means for accomplishing its public objective. *Id.* Challengers must prove that the ordinance is unreasonable, arbitrary or discriminatory and therefore violative of the Fifth and Fourteenth Amendments of the United States Constitution. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-96 (1962).

[21] Courts have sought to avoid characterizing billboard legislation as purely aesthetic regulation, however, because aesthetic values can vary tremendously from person to person. This variance makes it extremely difficult to articulate and apply guidelines in a consistent manner. *See* City of Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905) (striking down a sign law on the ground that a person should not be deprived of his property merely because "his tastes are not those of his neighbors"). Given this problem, courts have allowed cities to achieve the primarily aesthetic objective of removing unsightly billboards for economic reasons as well as other valid police power goals. *See infra* notes 24-30 and accompanying text.

[22] As early as 1935, a Massachusetts court held that consideration of taste and fitness could be a proper basis for granting or denying permits for the location of outdoor advertising displays. General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935). *See also* State v. Diamond Motors, 50 Hawaii 33, 429 P.2d 825 (1967); Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980).

[23] It is significant that this position was clearly articulated in California, in the landmark case of Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909), where the California Supreme Court held that "[a]esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power." *Id.* at 320, 100 P. at 818. The same court overruled this decision seventy-one years later in *Metromedia*, holding that local governments may regulate private property for purely aesthetic purposes in order to resolve the pervasive problem of billboard blight. *Metromedia*, 26 Cal. 3d at 860-61, 610 P.2d at 412-13, 164 Cal. Rptr. at 516.

[24] In jurisdictions where purely aesthetic zoning was not recognized, such regulations were justified upon arguments that billboards could be used as privies, hiding places for criminals, and shields for immoral practices. St. Louis Gunning Advertisement Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911).

[25] John Donnelly & Sons v. Mallar, 453 F. Supp. 1272, 1279 (D. Maine 1978); Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W. 2d 206, 212-13 (1968); United Advertising Corp. v. Metucham, 42 N.J. 1, 198 A.2d 447, 449 (1964); State *ex rel* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W. 2d 217, 220-22 (1955).

[26] John Donnelly & Sons v. Campbell, 639 F.2d 6, 12 (1st Cir. 1980); John Donnelly & Sons v. Mallar, 453 F. Supp. 1272, 1279 (D. Maine 1978); E. B. Elliott Advertising Co. v.

nesses,[27] preventing urban decay,[28] maintaining historic landmarks,[29] and improving traffic safety.[30] Justification of billboard regulations on the bases of aesthetics in combination with one or more accepted police power objectives has emerged as a traditional approach of courts and local governments.

While the use of aesthetics as a sole or partial justification for zoning proliferated, this issue remained unaddressed by the United States Supreme Court. Increasing public recognition of the importance of aesthetic zoning in community planning prompted the need for some statement clarifying the Court's position in this area, however. In 1954, *Berman v. Parker*[31] became the first Supreme Court decision to address, albeit in dictum, the propriety of aesthetics as a sole objective in zoning.

In *Berman*, the Court upheld the constitutionality of a congressional act authorizing the exercise of eminent domain for a Washington, D.C. slum clearance project. The redevelopment of the District of Columbia was held to be a public purpose for which the District could properly exercise its police power as well as its power of eminent domain.[32] *Berman* employed the traditional approach, recognizing the use of police power for aesthetic purposes in combination with the more accepted purposes of economic and social welfare. In dictum, however, the Court stated that "[i]t is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . ."[33]

Metropolitan Dade County, 425 F.2d 1141, 1152 (5th Cir. 1970); Desert Outdoor Advertising Co. v. County of San Bernadino, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543, 546 (1967); Opinion of the Justices, 103 N.H. 268, 169 A.2d 762, 764 (1961).

[27] John Donnelly & Sons v. Mallar, 453 F. Supp. 1272, 1279 (D. Maine 1978); Desert Outdoor Advertising Co. v. County of San Bernadino, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543, 546 (1967); Donnelly Advertising Corp. v. City of Baltimore, 279 Md. 660, 370 A.2d 1127, 1131 (1977).

[28] Donnelly Advertising Corp. v. City of Baltimore, 279 Md. 660, 370 A.2d 1127, 1131 (1977).

[29] A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E. 2d 444, 450 (1979); Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333, 336-37 (1973); City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798, 802-03 (1953).

[30] John Donnelly & Sons v. Campbell, 639 F.2d 6, 12 (1st Cir. 1980); E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141, 1152 (5th Cir. 1970).

[31] 348 U.S. 26 (1954).

[32] In *Berman*, plaintiffs sought to enjoin condemnation of their property pursuant to the District of Columbia Redevelopment Act of 1945.

[33] *Berman*, 348 U.S. at 33. Writing for the majority, Justice Douglas stated in a now familiar passage that the concept of the public welfare is broad enough to include aesthetics:

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . . If those who govern the District of Columbia decide that the Nation's Capitol shall be beautiful as well as sanitary, there is nothing in the fifth amendment that stands in the way.

While the traditional practice of combining aesthetics with other police power objectives is still followed in certain jurisdictions,[34] an increasing number of courts since *Berman* have accepted aesthetics as a legitimate, separate purpose under the police power, and accordingly, have upheld billboard regulations on this basis alone.[35]

1. Metromedia

Justice Douglas' oft-quoted language in *Berman* was eagerly embraced by courts and governing bodies wishing to rely solely on aesthetics for the exercise of police power. At the same time, there remained an unnerving uncertainty as to the legitimacy of purely aesthetic zoning. *Berman*'s glorification of aesthetic purposes, after all, was found in dictum only. This existing state of confusion led observers to hope for a definitive answer from *Metromedia;* the question of whether purely aesthetic regulation of billboards would receive judicial approval was ripe for resolution.

Metromedia's answer consisted of applying the traditional approach.[36] A plurality of the Court found the San Diego ordinance to be a valid use of the police power, but in reaching this conclusion, it relied on a more traditional combination of aesthetic and traffic safety rationales.[37]

The plurality's reluctance to follow the dictum in *Berman* may be explained in part by the percevied difficulties of developing an objective test to measure aesthetic justifications for the use of the police power.[38]

Significantly, the plurality accepted, without comment, the justification offered by the San Diego City Council for its differential treatment of off-

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Id.

[34] *E.g.*, Donnelly Advertising Corp. v. Mayor of Baltimore, 279 Md. 660, 370 A.2d 1127, 1133-34 (1977) (aesthetic regulations promote economic growth).

[35] State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825, 827 (1967); Oregon City v. Hatke, 240 Or. 351, 400 P.2d 255, 261-63 (1965); City of Phoenix v. Fehlner, 90 Ariz. 13, 363 P.2d 607, 610 (1961); John Donnelly & Sons v. Outdoor Advertising Bd., 369 Mass. 206, 339 N.E. 2d 709, 717-19 (1975); Opinion of the Justices, 103 N.H. 269, 169 A.2d 762, 764 (1961); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248, 259 (1968), *appeal dismissed,* 393 U.S. 316 (1969); Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W. 2d 217, 227 (1955).

[36] The Court addressed the question of whether the ordinance directly advanced the governmental interests of traffic safety and aesthetics. *Metromedia,* 453 U.S. at 508.

[37] The plurality was hesitant "to disagree with the accumulated common sense judgments of local lawmakers and the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509. The plurality also found that the ordinance advanced the city's aesthetic interests. *Id.* at 510.

[38] In general, the use of the police power is judged with reference to the particular needs and situations of the community involved. *Euclid,* 272 U.S. at 388. As such, aesthetic zoning must be considered in the light of changing times and shifting conditions of local communities. Any attempt to develop an objective test to evaluate the constitutionality of aesthetic regulations is thus made all the more difficult as a result of a community's shifting aesthetic tastes.

site and on-site signs.[39] This extreme deference is surprising in view of the fact that a prohibited off-site sign was arguably no more distracting to motorists than an on-site sign which was exempted by the ordinance.[40] In upholding the Council's questionable conclusions that billboards were related to traffic accidents, and that billboard regulation would directly advance traffic safety,[41] the plurality afforded itself the convenient means with which to employ a traditional approach in justifying the ordinance.[42] Given the relative weakness of the traffic safety rationale, one could argue that *Metromedia*'s outcome lends substantial support to the use of police power for purely aesthetic purposes.[43]

Justice Brennan, concurring, was troubled by the city's failure to explain how the exemption of on-site billboards did not detract from the goal of promoting aesthetics.[44] He concluded that before an urban area such as San Diego could ban billboards entirely, it would be required to demonstrate a genuine, comprehensive commitment to improving aesthetics in its industrial and commercial zones.[45]

Two dissenters in *Metromedia* voiced support for the more contemporary approach of upholding the use of the police power for purely aesthetic purposes. Chief Justice Burger stated in dissent that it is within

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[39] The San Diego City Council claimed that prohibited off-site signs were more distracting to motorists and were aesthetically more offensive than exempted on-site signs. *Metromedia*, 453 U.S. at 511.

[40] The City of San Diego presented no evidence on this issue.

[41] *Metromedia*, 453 U.S. at 508.

[42] In so doing, the plurality was able to avoid the difficult task of developing objective standards by which to determine whether an aesthetic regulation exceeds constitutional limitations. Instead, the San Diego ordinance could be judged on the more definable traffic safety standard of whether traffic safety was promoted by the ordinance.

[43] For example, there is little reason to believe that a prohibited off-site noncommercial sign would be any more distracting to motorists than exempted on-site commercial signs. In fact, given the strong incentive to advertise commercial messages, there is a real possibility that on-site commercial billboards would continue to proliferate throughout the City of San Diego and therefore remain a traffic hazard to motorists. If the real effect of billboard regulation was not the improvement of traffic safety, it would appear that the true underlying purpose of the ordinance was to improve the sightliness of the City by reducing the number of billboards.

[44] The billboard owners had argued that the ordinance's prohibiton of off-site, but not on-site, commercial billboards opened to question the extent of the City's commitment to traffic safety and aesthetics. *Metromedia*, 453 U.S. at 511.

[45] *Id.* at 532-34. Justice Brennan specifically observed that a billboard is no more aesthetically inconsistent with its surroundings than are oil storage tanks, blighted areas, or strip development, all of which are prevalent in most industrial or commercial zones. Therefore, a court must be convinced that a city is seriously and comprehensively addressing aesthetic concerns with respect to its environment when it bans an entire medium of expression such as billboard advertisement. *Id.* at 531. Brennan did observe, however, that in historic and scenic areas, such as Williamsburg, Virginia or Yellowstone National Park, governmental bodies should easily be able to prove that their interests in historical authenticity and aesthetics are sufficiently important to overcome any first amendment challenges to billboard regulations. *Id.* at 534.

the purview of a legislative body to conclude that large billboards adversely affect the environment; therefore, local authorities may enact broad prohibitions of billboards as part of a reasonable approach to a perceived problem.[46] In a separate dissenting opinion, Justice Rehnquist went even further, finding the aesthetic justification, standing alone, sufficient to sustain a community's prohibition of billboards.[47] Contrary to Justice Brennan's concurring opinion, Justice Rehnquist deemed it irrelevant whether the prohibition applied to industrial zones or residential districts.[48]

B. Development of the Commercial Speech Doctrine

First amendment challenges to billboard regulation are of recent vintage. For the most part, challengers had argued, in the past, that it was an invalid use of police power to regulate billboards for aesthetic purposes. With the development of the commercial speech doctrine, however, courts are now charged with ensuring the protection of commercial speech under the free speech provisions of the first amendment.[49]

Because billboards serve as a common medium of commercial expression, attempts to regulate them must accommodate first amendment concerns. Difficulties arise in this area due to the lack of an explicit definition of commercial speech.[50] It is clear that noncommercial speech is that which conveys political, philosophical, social and cultural ideas, the protection of which lay at the very heart of the first amendment.[51] Commer-

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[46] *Id.* at 560-61 (Burger, C.J., dissenting).

[47] *Id.* at 570 (Rehnquist, J., dissenting).

[48] *Id.*

[49] *See supra* note 2.

[50] For example, it is unclear at what point purely economic expression is transformed into commercial speech; similarly, confusion often attends the progression from commercial to noncommercial speech.

The lack of an explicit definition of commercial speech tends to blur dividing lines between the appropriate levels of protection to be accorded purely economic matter, commercial speech and noncommercial speech. For example, in passing upon the constitutionality of purely economic regulations—those dealing with nonspeech matter—courts will apply a minimum level of scrutiny. Under this rational basis test, also referred to as a legislative deference test, courts will defer to legislative judgment behind the enactment of the regulation if some rational justification can be found therefore. Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938). Commercial speech, on the other hand, is accorded a greater level of protection than purely economic activity since it falls within the ambit of the first amendment. *See infra* note 52 and accompanying text. Noncommercial speech, or *core* speech, receives the highest level of constitutional protection. *See infra* note 51 and accompanying text.

[51] *See* Cohen v. California, 403 U.S. 15 (1970) (reversing defendant's conviction for disturbing the peace by wearing a jacket with the words *Fuck the Draft* inside a courthouse); Roth v. United States, 354 U.S. 476, 484 (1957) (discussing the difference between first amendment protection of the *interchange of ideas for the bringing about of political and social changes* and expressions that are *utterly without redeeming social importance*, such

cial speech, on the other hand, is commonly characterized as speech which concerns the advertising and soliciting of products or services—speech which proposes a business transaction;[52] as such, it is an essential component of our free enterprise system.

1. *Unprotected Commercial Speech*

State and local governments in search of constitutionally secure billboard regulations must now grapple with the hazards of suppressing commercial speech, guided largely by cryptic messages in *Metromedia.* Moreover, the task of deciphering the Court's latest embellishment to the commercial speech doctrine is made all the more difficult by the relative newness of the doctrine.

The notion that commercial speech is deserving of first amendment protection was, until recently, a novel one. The imputed roguishness of such speech deprived it of any constitutional protection; so accepted was this treatment of commercial speech that it was not until 1942 that the question of according it any protection at all was addressed by the Supreme Court. In that year, the Court in *Valentine v. Chrestensen*[53] confronted the issue of whether commercial speech was protected under the first amendment and concluded that it was not to be accorded any level of constitutional protection.[54]

2. *Protected Commercial Speech*

Commercial speech retained its unprotected status until 1975, when

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as obscenity and libel).

[52] Pittsburg Press Co. v. Human Relations Commission, 413 U.S. 376, 385 (1973); Bigelow v. Virginia, 421 U.S. 809, 822 (1975); Friedman v. Rogers, 444 U.S. 1 n.10 (1979).

Commercial speech has been distinguished from noncommercial speech on the bases of information function, subject matter, economic motivation and contractual nature. *See* Farber, *Commercial Speech and First Amendment Theory,* 74 N.W. U. L. REV. 372 (1979).

Commercial speech receives less protection than noncommercial speech under the first amendment because, it is reasoned, the economic motive to advertise will provide a consistent, powerful incentive for commercial speech. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 771 n.24 (1976). The profit motive is thus thought to counterbalance any *chilling* effect resulting from government regulation. *Id.* at 762.

[53] 316 U.S. 52 (1942).

[54] In *Valentine,* the Court considered a first amendment challenge to a municipal ordinance prohibiting the distribution of commercial handbills. One side of Chrestensen's handbill featured an advertisement for a submarine exhibit; the other side contained a written protest against the municipality's refusal to provide a pier for the exhibit. The Court found that Chrestensen's purpose in combining the commercial and noncommercial messages was to evade the ordinance and held that dissemination of the handbill was not protected by the first amendment. *Id.* at 54.

the Supreme Court in *Bigelow v. Commonwealth of Virginia*,[55] recognized that such speech was deserving of some level of protection under the first amendment. In *Bigelow*, the Court explained that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[56] Although speech may relate solely to products or services, *Bigelow* cautioned that courts may not escape the task of assessing the first amendment interest involved and balancing such interest against the public interest served by the government regulation.[57] The Court thus concluded that commercial speech was entitled to some level, though undefined, of first amendment protection.[58] While *Bigelow* did not expressly overrule *Valentine*,[59] it did reject the proposition that commercial speech could never warrant first amendment protection.

Indeed, *Bigelow* was characterized one year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[60] as a case in which "the notion of 'unprotected commercial speech' all but passed from the scene."[61] The *Virginia Pharmacy* Court recognized that the informational interests of consumers and the general public warranted protection of commercial speech under the first amendment.[62] The free flow of commercial information was thus held to mandate first amendment protection because it "enlighten[s] public decisionmaking in a democracy."[63]

Under *Valentine*,[64] the distinction between commercial and noncommercial speech had been controlling with respect to first amendment pro-

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[55] 421 U.S. 809 (1975). Bigelow, a newspaper editor, was convicted of a misdemeanor for encouraging the procurement of abortions after his newspaper printed an advertisement for a New York abortion service. The Virginia statute prohibited the circulation of information encouraging abortion. *Id.* at 821-32.

[56] *Id.* at 826.

[57] *Id.* The Court found that the advertisement, while proposing a commercial transaction, also involved the exercise of free speech regarding the controversial issue of abortion. *Id.* at 821-29.

[58] *Id.*

[59] The *Bigelow* Court explained the apparently inconsistent holdings by noting that the ordinance in *Valentine* "was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed . . . . The case obviously does not support any sweeping proposition that advertising is unprotected per se." *Id.* at 819-20.

[60] 425 U.S. 748 (1976). At issue in *Virginia Pharmacy* was a Virginia statute prohibiting licensed pharmacists from advertising the prices of prescription drugs.

[61] *Id.* at 759.

[62] *Id.* at 761-70. The Court held that the marketplace of ideas protected by the first amendment includes commercial as well as political and cultural information. *Id.* at 763-65.

Three reasons were provided for extending first amendment protection to commercial speech: (1) consumers have a strong interest in receiving information about products; (2) the free flow of commercial price and product information promotes intelligent consumer decisions and thus contributes to the proper allocation of resources; and (3) such information allows the formation of intelligent opinions concerning regulation of commerce. *Id.* at 763-65.

[63] *Id.* at 765.

[64] 316 U.S. 52 (1942).

tection; noncommercial speech was secure under the safeguards of the first amendment, while commercial speech was left without any modicum of constitutional protection. This all or nothing approach met with criticism in *Virginia Pharmacy*. While the Court characterized *Valentine*'s approach as simplistic,[65] however, it did concede that inherent differences between commercial and noncommercial speech might justify a court in according them different levels of constitutional protection.[66] Commercial speech, observed the Court, possesses certain characteristics which render it amenable to limited regulation; commercial expression is more easily verifiable,[67] and the profit motive underlying such speech largely prevents it from being chilled by government regulation.[68]

In 1977, first amendment protection of commercial speech was further expanded in *Linmark Associates, Inc. v. Willingboro*,[69] where the Court struck down a New Jersey ordinance prohibiting the posting of *For Sale* and *Sold* signs on real property.[70] *Linmark* broke new ground by subjecting a commercial speech regulation to the following time, place and manner analysis:[71] first, the restriction on speech must not relate to the content of the regulated expression;[72] second, the ordinance must serve a

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[65] *Id.* at 759.

[66] *Id.* at 771 n.24. Consequently, *Valentine*'s clear, albeit simplistic, distinction between commercial and noncommercial speech was replaced by an undefined boundary separating fully protected core speech from partially protected commercial speech. The resultant lack of clarity in determining appropriate levels of protection for commercial and noncommercial speech is arguably to blame for courts' confused and inconsistent approaches to the commercial speech doctrine.

[67] The truth of commercial speech is more easily verifiable than other forms of speech since accurate information is readily available in most instances. *Virginia Pharmacy*, 425 U.S. at 772 n.24. For example, a commercial advertiser seeks to disseminate information about a specific product or service that he or his company provides and presumably knows more about it than anyone else. *Id.* Thus if a company advertises a medical product, claiming that it cures a particular illness, it is possible to conduct tests and compile data with which to prove the truth or falsity of the advertisement. This is vastly more difficult, if not impossible, to do in the context of political or philosophical expression. How does one prove the truth or falsity of Karl Marx's political philosophy in its ideal form?

[68] The profit motive supporting commercial speech makes it more resistant to the chilling effect that is normally inflicted by regulation of other forms of speech. *Id.* For example, if a speaker may be held liable for his political or philosophical views he may be less willing to express them. On the other hand, the commercial speaker has strong economic incentive to advertise even if it is subject to government regulation.

[69] 413 U.S. 85 (1977).

[70] The Willingboro ordinance had been enacted in an attempt to curb the perceived problem of *white flight* from a suburban community into which black families were moving.

[71] *Id.* The Court found that the Willingboro ordinance satisfied the second element of the time, place and manner analysis. *Id.* However, the ordinance failed to meet the first requirement because it banned only those signs which carried a specific message rather than all signs of a certain size, shape or location. Additionally, the ordinance was defective under the third requirement because it did not leave open a practical substitute for the prohibited form of expression. *Id.* at 93-95.

[72] 431 U.S. at 94.

compelling state interest independent of the speech to be regulated;[73] and third, the legislation must leave open ample alternative channels of communication.[74] Prior to *Linmark*, this tripartite analysis had been reserved for alleged content-based regulation of noncommercial speech.[75]

First amendment protection of commercial speech reached its zenith in the 1981 decision of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[76] where the Court held that a ban on utility company advertisements promoting the use of electricity violated the first amendment. The Court established a four-part test which imposed the most stringent analysis to date of commercial speech regulations.[77] Under the *Central Hudson* test, a regulation of commercial speech must meet each of the following conditions: (1) the speech must concern lawful activity and must not be misleading;[78] (2) the regulation must serve a substantial governmental interest;[79] (3) the regulation must directly advance the asserted governmental interest;[80] and (4) the regulation must not be more extensive than necessary to serve the governmental interest.[81] This four-

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[73] *Id.* at 95. In dicta, the Supreme Court implied that aesthetics may be a sufficiently compelling state interest on which to base a valid time, place and manner restriction. *Id.*

[74] *Id.* at 93.

[75] *Linmark* marked the first application of a time, place and manner analysis to commercial speech. *See also* Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-56 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 535 (1980).

Regulations of speech fall into two broad categories: content-based restrictions; and time, place and manner restrictions. Regulations may not be based on the content or subject matter of the speech. However, a state may reasonably regulate the time, place and manner of speech that occurs in a public place. *See* Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (the United States Supreme Court upheld a regulation that restricted the location of solicitors at the Minnesota State Fair).

[76] 447 U.S. 557 (1980). In *Central Hudson*, the challenged regulation prohibited advertisements by utilities promoting the use of electricity. The Central Hudson Gas & Electric Corporation had encouraged its customers to increase electricity consumption in order to lower rates through improved economies of scale. Customers were informed of this advantage through a message which accompanied their utility bills.

The Court stated that, in other contexts, the first amendment prohibits regulation of speech based on the content of the message. Commercial speech, however, has two attributes which permit regulation of content. First, a commercial speaker's knowledge of his product ensures accuracy of the message. Second, the profit incentive behind commercial speech mitigates the otherwise chilling effect of a content-based regulation. *Id.* at 569-72.

[77] *Id.* at 563-66.

[78] *Id.* at 563-64.

[79] The Court concluded that energy conservation was a substantial state interest. *Id.* at 568-69.

[80] The Court found that the prohibition of the commercial advertisement in this case, which encouraged increased consumption of electricity, served the substantial government interest of conserving energy. *Id.* at 568-69.

[81] Although the challenged regulation met the first three conditions, the Court found it unconstitutional under the fourth; a narrower regulation, one which would not have proved inadequate to further the interest in energy conservation, might have been promulgated. *Id.* at 570-71.

part test dramatically increased the protection accorded commercial speech. Unlike the time, place and manner analysis of *Linmark*,[82] which applied to the limited class of content-neutral regulations, the *Central Hudson* test would be applicable to all regulations of commercial speech.

Notwithstanding its stronger requirements, the new test of *Central Hudson* fell short of according full first amendment protection to commercial speech.[83] The Court declined to evaluate the regulation on the level of strict scrutiny, customarily applied in reviewing regulations which affect constitutionally protected rights.[84] Instead, it employed an intermediate level of scrutiny;[85] under this analysis, the Court applied a balancing test in which it weighed the first amendment interest requiring protection against the public interests served by the regulation.[86]

Currently, all forms of commercial speech may be regulated as long as the regulations comply with the standards enunciated in *Linmark* or *Central Hudson*. With few exceptions, however, noncommercial speech may not be regulated.[87]

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[82] 413 U.S. 85 (1977).

[83] Commercial speech was not found to be a fundamental interest, deserving of the same protection accorded noncommercial speech. Thus, the Court applied an intermediate level of scrutiny appropriate to commercial speech's position between fully protected core speech and unprotected forms of speech.

[84] *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The *Central Hudson* Court, however, did not disturb the well-established rule of applying strict scrutiny to content-based restrictions on noncommercial speech. This has led to confusion in cases where speech regulation is not content-neutral and the regulated speech is both commercial and noncommercial. One commentator notes that in reviewing a content-based regulation of commercial and noncommercial speech, courts must now divide the regulation into separate components and review each according to the appropriate level of scrutiny. Note, *Standard of Review for Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego*, 66 MINN. L. REV. 903, 909 (1982).

[85] Justice Blackmun, concurring in *Central Hudson*, criticized the majority for creating an intermediate level of scrutiny for regulations of commercial speech. 447 U.S. at 573 (Blackmun, J., concurring). He explained that the four-part test might well be appropriate in analyzing a regulation of deceptive commercial speech or a time, place or manner restriction. However, Blackmun argued against applying an intermediate level of scrutiny "when a state seeks to suppress information about a product in order to manipulate a private economic decision that the state cannot or has not regulated or outlawed directly." *Id.* Commonsense differences between commercial and noncommercial speech do not "justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, commercial speech." *Id.* at 578.

[86] 447 U.S. at 562-65.

[87] For example, noncommercial speech is not protected when it consists of *fighting words* [Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)]; or when it is obscene [Roth v. United States, 354 U.S. 476, 485 (1957); libelous [Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974)]; part of a commission of an illegal act [Scheuck v. United States, 249 U.S. 47, 52 (1919)]; false and misleading [*Gertz*, 418 U.S. at 348-49]; or used to incite unlawful activity [Brandenburg v. Ohio, 395 U.S. 444, 447 n.2 (1969)].

3. *Metromedia*

Since its inception nearly forty years earlier, the commercial speech doctrine produced little in the way of clear judicial guidelines; distinctions between commercial and noncommercial speech remained hazy, and the level of first amendment protection to be accorded commercial speech was far from indelibly fixed. Thus, in 1981, the Court was presented with a golden opportunity to clarify the uncertain boundaries of the commercial speech doctrine in the context of billboard regulations. Any hopes of seeing an end to this confusion were dashed, however, upon the issuance of the *Metromedia* decision.[88] The fragmentation of the Court produced a plurality opinion in which several basic categories of speech were accorded differing levels of constitutional protection under differing analyses; the sheer length and variance of the Justices' opinions[89] made for difficult reading as well as minimal predictive value.

a. Central Hudson Analysis

The *Metromedia* plurality identified four basic categories of speech affected by the San Diego ordinance: on-site noncommercial, off-site noncommercial, on-site commercial and off-site commercial.[90] Subjecting the ordinance's commercial speech component to the four-part test of *Central Hudson*,[91] the plurality found that the speech did not concern unlawful activity and was not misleading.[92] The regulation was found to serve the substantial governmental interests of traffic safety and aesthetics[93] and was no broader than necessary to protect these interests.[94] Thus, the ordi-

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[88] 453 U.S. 490 (1981).

[89] The plurality's decision was extremely critical of Chief Justice Burger's dissent, which it referred to as *rhetorical hyperbole*, parts of which make *little sense even abstractly*. *Metromedia*, 453 U.S. at 517, 521. The Chief Justice, on the other hand, found the plurality's decison a *bizarre twist of logic*. *Id.* at 555 (Burger, C.J., dissenting). Justice Rehnquist lamented that it "is a genuine misfortune to have the Court's treatment of the subject to be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (Rehnquist, J., dissenting).

[90] It is interesting to note that the San Diego ordinance did not purport to distinguish between commercial and noncommercial speech. Nevertheless, the plurality *presumed* that the statute made such a distinction by analyzing the impact of the general scheme under which on-site commercial advertising was permitted and all other commercial and non-commercial advertising prohibited.

[91] 453 U.S. at 508.

[92] *Id.* at 507.

[93] *Id.* at 507-08, *citing* Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1 (1973); Berman v. Parker, 348 U.S. 26 (1954); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[94] 453 U.S. at 508. It is interesting to note, however, that by limiting the size and placement of billboards, a modified regulation arguably could have achieved the same ends albeit with fewer restrictions. Nevertheless, the plurality concluded that if "the city has a suffi-

nance met the first, second and fourth elements of the *Central Hudson* test.

In employing a *Central Hudson* analysis, the plurality in *Metromedia* faithfully subjected the ordinance to three of the four established requirements. However, in applying *Central Hudson*'s third element, the plurality displayed an unwarranted deference to the judgment of the San Diego City Council. The Council had determined that billboards were related to traffic accidents and that billboard regulation therefore directly advanced traffic safety.[95] The plurality found that these legislative determinations were "not manifestly unreasonable,"[96] explaining its "hesitat[ion] to disagree with accumulated, commonsense judgments of local lawmakers."[97] As commentators have noted, this deferential language suggests a standard of review similar to the rational basis test used in evaluating purely economic regulations.[98] Thus, while *Central Hudson* clearly called for analysis under an intermediate level of scrutiny, the *Metromedia* plurality departed sharply from this mandate and subjected the commercial component of the ordinance to a more lenient rational basis test.

The plurality's deferential analysis undercut the trend affording greater first amendment protection to commercial speech. In this manner, *Metromedia* reverts to a *Valentine*-like holding, according such speech little or no protection so long as a rational basis for the regulation exists.[99]

b. Noncommercial Speech Protection

San Diego's billboard scheme was found to be a valid regulation of

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cient basis for believing that billboards are traffic hazards and are unattractive, then obviously the only effective approach to solving the problems they create is to prohibit them." *Id.*

[95] *Id.* at 507-09.

[96] *Id.* at 508.

[97] *Id.* at 509.

[98] Note, *Standard of Review for Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego*, 66 MINN. L. REV. at 910; Note, *Metromedia, Inc. v. City of San Diego: A Bifurcated Approach to Billboard Regulation and the First Amendment*, 3 CARDOZO L. REV. at 339.

[99] Justices Brennan and Blackmun found fault with the plurality's use of this deferential standard. Justice Brennan stated that a mere rational relationship between the ordinance and the governmental interest involved was not sufficient to regulate such an important constitutional right as free speech. *Metromedia*, 453 U.S. at 528-34 (Brennan, J., concurring). He concluded, however, that a city may ban billboards if the governmental interests are *sufficiently substantial*. *Id.*

Both concurring justices found that the practical effect of the ordinance was to ban all billboards. Indeed, all parties at trial had stipulated that the ordinance, if upheld, would mean an end to the billboard business in San Diego. *Id.* at 497. Justices Brennan and Blackmun thus concluded that the San Diego City Council had failed to demonstrate a substantial government interest sufficient to justify the banning of an entire medium of communication. *Id.* at 527.

commercial billboards. However, the ordinance as applied to noncommercial billboards was held to violate the first amendment.[100] Although the ordinance met the constitutional requirements of *Central Hudson* in regulating commercial speech, the plurality noted that "the city does not have the same range of choice in the area of noncommercial speech."[101] By effectively prohibiting almost all noncommercial billboards[102] while, at the same time, permitting all on-site commercial billboards, the San Diego City Council had afforded commercial speech greater protection than noncommercial speech. Such legislative action ran contrary to the weight of precedent since *Valentine* and inverted the settled rule which "consistently accorded noncommercial speech a greater degree of protection than commercial speech."[103] Thus, absent a severability provision, the plurality concluded that San Diego's billboard ordinance must be held facially invalid.[104]

The *Metromedia* plurality subjected the noncommercial speech component of the ordinance to a strict scrutiny analysis.[105] The regulation could be upheld under this most rigorous form of constitutional analysis[106] only if it was related to a compelling state interest and was narrowly tailored to achieve its purposes with minimal restriction.[107] The plurality found that the city had failed to explain how or why noncommercial billboards, banned in locations otherwise permitting commercial billboards, would pose a greater threat to safe driving or would detract from the city's beauty any more than would commercial billboards.[108] As a result, the

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[100] *Id.* at 512-15.

[101] *Id.* at 514.

[102] This was done despite the fact that billboards in San Diego had been used to carry important noncommercial messages. These included: protests against U.S. involvement in the war in Vietnam; support for American prisoners of war missing in action in Vietnam; denouncement of American participation in the United Nations; protests against rising taxes; condemnation of the assassination of Israeli athletes at the Munich Olympic Games; and promotion of the United Crusade. *Id.* at 502. The twelve narrow exceptions for noncommercial speech contained in the San Diego ordinance did not allow for such messages to be expressed on billboards. *See supra* note 8 and accompanying text.

[103] *Metromedia*, 453 U.S. at 513.

[104] *Id.* at 521. The San Diego ordinance was struck down because of the invalidity of its noncommercial speech component. However, the plurality stated that the commercial speech component would be constitutional if it were found to be severable by the California Supreme Court. *Id.* at 521-22 n.26.

[105] The other levels of constitutional analysis in descending order are: the intermediate level of scrutiny exemplified in the *Central Hudson* four-part test and the rational basis or legislative deference standard of review employed by the *Metromedia* plurality in upholding San Diego's regulation of commercial speech.

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

[107] The reason for this is that very few regulations pertain to truly compelling state interests. Furthermore, the court uses the strict scrutiny standard to go behind the application of the language of the statute to the actual motivation of the regulation regardless of the legislature's stated purposes.

[108] *Metromedia*, 453 U.S. at 573. The ordinance, for example, also exempted political campaign signs. Yet the San Diego City Council furnished no evidence that such signs had

ordinance's regulation of noncommercial speech was held unconstitutional.

The ordinance also proved to be constitutionally defective in excepting twelve categories of noncommercial billboards. The plurality found that these exceptions were impermissibly based on content and did not meet the time, place and manner requirements for lawful regulation of speech.[109] Because most noncommercial billboards were banned under the ordinance, the twelve exceptions effectively conferred upon the city an improper power to "choose the appropriate subjects for public discourse."[110]

Moreover, the restrictions on noncommercial billboards deprived the public of a major medium of expression. Alternative means of communication for noncommercial messages were found to be largely insufficient, inappropriate and prohibitively expensive.[111] Thus, the ordinance had eliminated one of the few reasonable means with which citizens could express political, economic, religious or social philosophies.[112]

Metromedia's demonstrated tolerance of commercial speech regulations, coupled with its vigorous scrutiny of regulations which infringe upon noncommercial speech, effectively creates a bifurcated analysis of any regulatory scheme which affects both categories of speech. This bifurcation requirement constitutes a problematic approach to reviewing commercial speech regulations which impinge, albeit unintentionally and only incidentally, upon noncommercial speech.[113] A regulatory scheme which meets the deferential standards of *Metromedia* may well be valid as to commercial speech; where the scheme also affects noncommercial speech, however, it must withstand strict judicial scrutiny or be held invalid as applied to noncommercial speech.[114] In the absence of a sound severabil-

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less adverse effects on traffic safety or aesthetics than did prohibited noncommercial signs. *Id.* at 514.

[109] *Id.* at 515-16.

[110] *Id.* at 515.

[111] *Id.* at 516 n.21.

[112] Billboards furnish one of the most inexpensive means of advertisement. In 1976 the comparative average costs of reaching 1,000 people by various media were: outdoor advertising (signs and billboards), $0.41; a thirty-second commercial on network radio, $1.39; a thirty-second commercial on daytime local radio, $1.94; prime-time network television, $2.93; a one-page, four color ad in one of the top fifty magazines, $6.77; a thousand-line newspaper advertisement (less than half a page), $10.17. *See* Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978).

[113] The Court chose to champion the commercial speech doctrine by breaking with *Central Hudson* to demonstrate its tolerance for the regulation of commercial speech, while following precedent in applying a strict scrutiny standard of review to noncommercial speech regulations.

[114] For example, the *Metromedia* plurality accepted with little question the City's rationale for regulating commercial billboards. On the other hand, it refused to accept the reasons underlying the regulation of noncommercial billboards because the City failed to "explain how or why noncommercial billboards located in places where commercial billboards [were] permitted would be more threatening to safe driving or would detract more from the beauty

ity provision, otherwise well-intentioned governmental entities could find their commercial speech regulations completely lost due to fatal infirmities under the stricter standards which govern regulations of noncommercial speech.[115]

4. *Post-Metromedia*

While the implications of *Metromedia* are at best ambiguous, it is clear that billboards which contain commercial messages may be regulated within constitutional bounds. The plurality opinion in *Metromedia* provides commercial speech with a limited measure of protection commensurate with its subordinate position in the scale of first amendment values. A more exact prediction as to the level of protection to be accorded commercial speech is difficult in view of *Metromedia*'s inexplicable retreat from the intermediate standard of review established in *Central Hudson*.

Metromedia arguably indicates that the Court has not completely abandoned the *Valentine* concept of commercial speech under which such speech is deemed unworthy of first amendment protection. In effectively lowering the level of protection for commercial speech, *Metromedia*'s plurality exemplifies this judicial reluctance to disregard the concerns addressed in *Valentine*.

Metromedia's failure to clarify the extent to which commercial speech will merit first amendment protection[116] gives rise to potentially conflicting results in differing jurisdictions. If advertising is viewed merely as a means of promoting economic efficiency, courts may permit extensive time, place and manner regulation of commercial expression in order to ensure that the information conveyed is truthful and conducive to maximization of productivity.[117] On the other hand, if courts follow the declaration in *Virginia Pharmacy*[118]—that communication of all information, not just viewpoints relating to great political or social issues, serves the first amendment goal of enlightened public decision-making[119]—they may formulate stricter standards of review for laws which regulate commercial expression.

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of the City." *Metromedia*, 453 U.S. at 513.

[115] As explained in *Metromedia*, the plurality's "judgment [was] based essentially on the inclusion of noncommercial speech within the prohibitions of the ordinance, [but] the California courts [could] sustain the ordinance by limiting its reach to commercial speech" through the use of the severability clause contained in the ordinance. 453 U.S. at 521-22 n.26.

[116] It remains unclear whether commercial speech regulations are to be judged by an intermediate standard of scrutiny as in *Central Hudson*, a deferential standard as in *Metromedia*, or some as yet undefined standard.

[117] Time, place and manner regulations do not prohibit commercial speech altogether, but only help to determine the most appropriate means of conveying commercial messages.

[118] *Virginia Pharmacy*, 425 U.S. at 779-80.

[119] *Id.* at 765.

Finally, the question remains whether, under *Metromedia*, a total ban on billboards would be held invalid[120] as an unconstitutional prohibition of noncommercial speech. Under the concurring opinion of Justice Brennan, an ordinance which allowed only on-site noncommercial billboards could be viewed either as an outright ban on all billboard advertisement[121] or as the imposition of a prohibitively expensive fee on billboard advertisers who would have to purchase property in order to display their noncommercial messages.[122] It might appear constitutionally preferable, at first blush, to ban all billboards rather than to allow only landowners the right to communicate through this medium. However, this alternative is equally problematic. Because billboard prohibitions restrict political as well as commercial speech, a billboard ordinance that satisfies the four-part test of *Central Hudson* or the deferential standards of *Metromedia* may yet violate the more stringent constitutional standards which protect noncommercial speech. Thus, courts could find that asserted governmental interests in promoting traffic safety or beautification simply do not outweigh the substantial burden on noncommercial expression resulting from such a prohibition.[123]

III. The Fragility of Hawaii's Billboard Statute

Only three states[124] have ever attempted to effect a statewide ban on billboards.[125] Hawaii was the forerunner in eliminating all billboards[126]

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[120] The constitutionality of a total ban on outdoor advertising was not at issue in *Metromedia*. However, it is clear from Justice Brennan's concurrence that he desired resolution of this issue and believed that *Metromedia* was the proper case in which to do so because the practical effect of the ordinance would be to eliminate all billboards from San Diego. *Metromedia*, 453 U.S. at 522.

[121] *Id.* at 536 (Brennan, J., concurring).

[122] Chief Justice Burger agreed with Justice Brennan in this respect. *Metromedia*, 453 U.S. at 568 n.9 (Burger, C.J., dissenting).

[123] *See* John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), in which the United States Court of Appeals for the First Circuit held that a Maine statute prohibiting billboards throughout the State of Maine except for specified *billboard advertising centers* violated the first amendment because it prohibited noncommercial speech. It is significant to note that the United States Supreme Court, without hearing oral argument, affirmed the First Circuit in *John Donnelly* on the same day that the *Metromedia* decision was announced. The question may be posed whether this summary affirmance provides some indication of how the United States Supreme Court would decide a constitutional challenge to Hawaii's statewide billboard statute.

[124] Hawaii, Vermont, and Maine have enacted statewide bans on billboards.

[125] *See* Hawaii Rev. Stat. § 264-71 to 79, and § 445-11 to 121 (1976); Vt. Stat. Ann. tit. 10, ch. 21, §§ 481-505 (1973); Me. Rev. Stat. Ann. tit. 23, §§ 1901-1925 (1978).

The Maine statute was declared unconstitutional in John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980). *See supra* note 123 and accompanying text.

[126] By 1926, Hawaii had eliminated all billboards, largely through the efforts of the Outdoor Circle. The Outdoor Circle, organized in Hawaii in 1911, accomplished this goal by boycotting products advertised on billboards or buying out Hawaii's few remaining billboard

and, until recently, its billboard statute was constitutionally secure.[127] However, with the advent of *Metromedia* and, more importantly, a recent Hawaii Supreme Court decision interpreting its mandate,[128] Hawaii's statewide ban on billboards[129] is in jeopardy of being held unconstitutional.

Judicial acceptance of aesthetic zoning in Hawaii arguably places the state in a position stronger than most with respect to billboard regulation.[130] Nonetheless, the Hawaii Supreme Court's preference for a stringent application of the commercial speech doctrine[131] threatens to hinder state lawmakers from freely regulating billboards in the future.

A. Diamond Motors

Hawaii has distinguished itself as a pioneer in the area of aesthetic zoning, having gone further than almost any other state in promulgating the use of the police power for purely aesthetic purposes. The Hawaii Supreme Court has unequivocally sanctioned the use of police power by local governments to regulate billboards for aesthetic purposes alone.

The sole challenge to billboard regulation in Hawaii came in the landmark decision of *State v. Diamond Motors.*[132] This case involved an ordinance promulgated by the City and County of Honolulu which banned billboards from the Island of Oahu.[133] Appellant Diamond Mo-

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companies. A. BELIN, M. BILOTTO & T. CHRART, A LEGAL HANDBOOK FOR BILLBOARD CONTROL 26 (Stanford Environmental Law Society 1976) (hereinafter cited as LEGAL HANDBOOK FOR BILLBOARD CONTROL).

[127] *See infra* note 142 and accompanying text.

[128] State v. Bloss, 64 Hawaii 148, 637 P.2d 1117 (1981).

[129] HAWAII REV. STAT. § 445-112 to § 445-121 (1976).

[130] The Hawaii Supreme Court, in its landmark decision of State v. Diamond Motors, upheld the regulation of billboards on purely aesthetic grounds.

[131] *Bloss*, 64 Hawaii 148, 637 P.2d 1117, State v. Hawkins, 64 Hawaii 499, 643 P.2d 1058 (1982).

[132] 50 Hawaii 33, 429 P.2d 825 (1967).

[133] The ordinance prohibited, *inter alia*, erection and maintenance of billboards in industrial districts. *Diamond Motors*, 50 Hawaii at 33-34.

The Revised Ordinances of Honolulu (1961), Article 26, (Sign Regulations), was repealed in April 1970, after the state legislature implemented its own statewide billboard statute. HAWAII REV. STAT. § 445-112 envisions two levels of sign regulation in Hawaii: state statute and county ordinance. Hawaii's four counties have ordinances which, in conjunction with HAWAII REV. STAT. § 445-113 (2), regulate outdoor advertising devices as to size. *See* HONOLULU, HAWAII, COMPREHENSIVE ZONING CODE art. 2, § 21-2.13 (1978); KAUAI, HAWAII, REV. ORDINANCES art. 4, § 15-4.9 (1976); MAUI, HAWAII, PERMANENT ORDINANCES art. 1, §§ 15-1.3, 15-1.8 (1971); HAWAII, HAWAII, CODE ch. 10, art. 3, §§ 1, 3 (1975). These regulations are incorporated in the counties' comprehensive zoning codes. Although the ordinance challenged in *Diamond Motors* has been repealed, it is relevant to note that it contained many of the same exceptions and exemptions regarding the regulation of commercial speech now contained in Hawaii's statewide billboard law. For example, § 13-26.3 (Exempt Signs) and § 13-26.8 (Permissible Signs) of the *Diamond Motors* ordinance exempted signs on the basis

tors, Inc., whose billboard was located in an industrial area,[134] challenged the ordinance on two major grounds:[135] first, that it denied free speech in violation of the first amendment to the Constitution of the United States and article I, section 3, of the Constitution of the State of Hawaii;[136] and second, that the ordinance constituted an invalid use of the police power because it was based exclusively upon aesthetic considerations. In upholding the ordinance, the Hawaii Supreme Court summarily dismissed the free speech argument as being without merit,[137] focusing instead on the issue of aesthetic zoning. The court broke with the more traditional approach of upholding regulations on a combined basis of aesthetics and other recognized police power objectives. In unequivocal language, it held that beauty alone is a proper community objective, attainable through the use of the police power.[138] In so doing, the court relied heavily on both

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of their message and permitted on-site commercial signs in areas where noncommercial signs were prohibited. Similar exceptions and exemptions are contained in HAWAII REV. STAT. § 445-112.

[134] Appellants had erected a billboard along the main highway between the Honolulu International Airport and downtown Honolulu and Waikiki Beach.

[135] *Diamond Motors*, 50 Hawaii at 35. Appellants also contended that provisions of the ordinance regulating non-billboard outdoor advertising were ultra vires, and that the ordinance, as applied to the appellants, constituted a taking of private property without just compensation in violation of both the fifth amendment and article I, section 18 of the Constitution of the State of Hawaii. *Id.* For the purposes of this note these two issues are not addressed.

[136] HAWAII CONST. art. I, § 3 reads: "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."
This provision is now embodied in HAWAII CONST. art. I, § 4.

[137] *Diamond Motors*, 50 Hawaii at 35.

The court explained in a footnote that Honolulu's billboard ordinance did not deny free speech in violation of either the first amendment to the Constitution of the United States or its parallel provision in the state constitution; rather, it merely regulated the number and size of outdoor advertising signs, thus requiring billboard advertisers to compete on equal terms. *Id.* at 35 n.3.

It should be noted that *Diamond Motors* was decided in 1967, at a time when commercial speech was still unprotected by the first amendment. The commercial speech doctrine, as developed by *Bigelow, Virginia Pharmacy, Linmark Associates* and *Metromedia*, would no longer permit dismissal of first amendment considerations with such ease. This is particularly true in light of State v. Bloss, 64 Hawaii 148, 637 P.2d 1117 (1981). *See infra* notes 149-77 and accompanying text.

[138] The city did offer a more traditional combined justification for the ordinance, arguing that billboard regulation was inseparably tied to the protection of tourism and the promotion of Hawaii's economic well-being. However, the court found aesthetics to be a valid sole objective of the police power. *Diamond Motors*, 50 Hawaii at 35-36. The opinion specifically cites Dukeminer, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218, where the author comments, "[w]ithout frank judicial acceptance of beauty as a proper community objective attainable through use of the police power, the maximization of all community values is impossible and ordinances attempting to prevent eyesores generally become makeshift and piecemeal devices." *Diamond Motors*, 50 Hawaii at 36 n.4.

the legislative history of the ordinance and a specific provision within the state constitution.

Hawaii, unlike any other state, expressly validated the use of the police power for aesthetic purposes in its state constitution. Article VIII, section 5 of the Hawaii State Constitution provided that "[t]he State shall have the power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order, and for that purpose private property shall be subject to reasonable regulation."[139] The clear and unambiguous language of this provision made it unnecessary for the court to articulate any combined justification of the ordinance.[140] Moreover, findings and declarations of the City Council, which prompted enactment of the ordinance, clearly placed a premium on aesthetic zoning.[141] Thus it was with relative ease that the court issued its

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[139] *Cited in Diamond Motors*, 50 Hawaii at 36.

[140] In 1978, Article VIII, section 5 of the Hawaii State Constitution was amended and renumbered. HAWAII CONST. art. IX, § 7 reads:

> The state shall have the power to conserve and develop objects and places of historic or cultural interest and provide for public sightliness and physical good order. For these purposes private property shall be subject to reasonable regulation.

Other sections of the Hawaii State Constitution which pertain to aesthetic zoning include HAWAII CONST. art. XI, § 1, which reads in part:

> For the benefit of present and future generations, the state and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . . .

and HAWAII CONST. art. XI, § 9, which states in part:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources . . . .

[141] In enacting Article 26 (Signs Regulations) of Chapter 13 (Regulations Promoting General Welfare) of the Revised Ordinances of Honolulu, the City Council noted the following justification for billboard regulation:

> (a) That the people of the City have a primary interest in controlling the erection, location and maintenance of outdoor signs in a manner designed to protect the public health, safety and morals and to promote the public welfare; and
>
> (b) That the rapid economic development of the City has resulted in a great increase in the number of businesses with a marked increase in the number and size of signs advertising such business activities; and . . .
>
> (g) That the natural beauty of landscape, view and attractive surroundings of the Hawaiian Islands, including the City, constitutes an attraction for tourists and visitors; and
>
> (h) That a major source of income and revenue of the people of the City is derived from the tourist trade; and
>
> (i) That the indiscriminate erection and maintenance of large signs seriously detract from the enjoyment and pleasure of the natural scenic beauty of the City which in turn injuriously affect the tourist trade and thereby the economic well-being of the City; and
>
> (j) That it is necessary for the promotion and preservation of the public health, safety and welfare of the people of the City that the erection, construction, location, maintenance of signs be regulated and controlled.

§ 26.1 (Legislative Intent), Revised Ordinances of Honolulu (repealed 1970). *Cited in Dia-*

powerful opinion in *Diamond Motors*.

B. *Metromedia*

Prior to *Metromedia*, Hawaii's statewide scheme of billboard regulation was securely based on the *Diamond Motors* decision. The holding in *Metromedia*, however, immediately identifies certain constitutional deficiences in Hawaii's billboard statute.

Hawaii's billboard statute bears some striking similarities to the ordinance which was found unconstitutional in *Metromedia*.[142] First, Hawaii's statute, like the San Diego ordinance, exempts on-site commercial billboard advertising. Thus, under *Metromedia*, Hawaii's statute impermissibly favors commercial speech over noncommercial speech. Second, the Hawaii statute exempts specific noncommercial advertisements, such as scenic markers and temporary political signs, while prohibiting most other noncommercial speech. Because such exemptions are grounded in distinctions between specific messages, Hawaii's billboard statute impermissibly regulates noncommercial speech on the basis of content.[143] Hawaii's billboard statute thus suffers from the same defects which rendered the San Diego ordinance invalid and may be held unconstitutional on its face.

Hawaii's billboard scheme does not appear to fare much better under

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mond Motors, 50 Hawaii at 34 n.1.

[142] Hawaii's billboard statute is strikingly similar to the ordinance invalidated in *Metromedia* in that it exempts on-site commercial advertisements. *Compare* San Diego Ordinance No. 10,795 (New Series) which states:

> B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED
> Only those outdoor advertising display signs . . . which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted.

with HAWAII REV. STAT. § 445-112 (4) which reads in part:

> No person shall erect, maintain, or use a billboard or display any outdoor advertising device, except as herein provided:
>
> (4) Any outdoor advertising device which advertises property or services which may be bought, rented, sold or otherwise traded in on the premises or in the building on which the outdoor advertising is displayed.

Additionally, Hawaii's statute permits certain noncommercial advertisements, based on content, while banning most other noncommercial messages. HAWAII REV. STAT. § 445-112 exempts signs displaying official public notices, announcements of on-premises meetings, signs warning of dangerous conditions, signs indicating places of natural beauty or historical interest and political campaign ads. *See supra* note 8 and accompanying text for the noncommercial speech exceptions contained in the San Diego ordinance.

[143] The *Metromedia* plurality was troubled by the San Diego ordinance's noncommercial speech exceptions and concluded that such exceptions violated the requirement of content-neutrality. Thus, under the content-neutrality requirement, it would be difficult for the Hawaii Supreme Court to uphold Hawaii's statute in light of its content-based exceptions.

the aesthetic regulation analysis of concurring Justice Brennan in *Metromedia*. Before a governmental entity may effect a total ban on billboards, Justice Brennan would require that it demonstrate a genuine, comprehensive commitment to improving aesthetics in its industrial and commercial zones.[144] Hawaii's lawmakers would thus be required to furnish empirical evidence that the billboard statute is in fact designed to improve the aesthetics of a given area and that the state is committed to improving the aesthetics of all areas in which billboards are banned.[145]

It is reasonable to assume that areas such as Waikiki Beach and Diamond Head will attract greater numbers of tourists if they are kept free of unsightly billboards. However, this economic rationale arguably fails to justify the banning of billboards from Honolulu's commercial and industrial areas.[146] Indeed, these areas invite commercial advertising and are aesthetically less pleasing than many of Hawaii's popular tourist destinations. The Hawaii Supreme Court in fact recently struck down a Honolulu ordinance regulating the distribution of handbills in Waikiki because commercial speech in such form was found to be an accepted part of Waikiki's commercial scene.[147] Thus, under Brennan's view, the state's interest in aesthetic improvement of industrial and commercial sectors must outweigh the interests of businessmen owning advertising display signs in such areas as well as the public interest in having billboard advertisements located therein;[148] failure to overcome this balance would defeat statewide prohibition of billboards.

C. *Bloss*

While the outlook for Hawaii's billboard statute might appear bleak at first glance, total prohibition of billboards in Hawaii is not a constitu-

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[144] In other words, the legislative body must show that a *sufficiently substantial* government interest is furthered in enacting such legislation and that a more narrowly-drawn restriction will be less successful in promoting that goal. *Metromedia*, 453 U.S. at 528.

[145] For example, there may be no legitimate justification for banning billboards in the Kakaako business district if this area will remain aesthetically unattractive. On the other hand, if the state or the City of Honolulu demonstrates a sincere commitment to improving the aesthetics of this area, the reasoning behind such a total ban on billboards will be a valid one.

[146] In fact, Justice Brennan questioned whether large cities such as San Diego, with their bustling commercial districts and unsightly industrial zones, could ever meet the burden of proof under his analysis. *Id.* at 530-34.

Appellants in *Diamond Motors* had questioned the propriety of billboard regulation in commercial and industrial areas; they argued that Hawaii's constitutional provision, authorizing the use of the police power for aesthetic purposes, had no application where the offending sign was located in an industrial area of Honolulu. In response, the court stated that the natural beauty of the Hawaiian Islands was not confined to mountain areas and beaches. *Diamond Motors*, 50 Hawaii at 36.

[147] State v. Bloss, 64 Hawaii 148, 637 P.2d 1117 (1981).

[148] *Metromedia*, 453 U.S. at 532 n.10 (Brennan, J., concurring).

tional impossibility under *Metromedia*. Indeed, every member of the *Metromedia* court conceded that a well-drafted billboard prohibition could withstand constitutional attack.[149] Thus, while the case may foster a sense of legislative insecurity as to the future of billboard regulation in Hawaii, *Metromedia* does not itself constitute an insurmountable obstacle to local lawmakers. More ominous implications for billboard regulation arise instead from the Hawaii Supreme Court's interpretation of *Metromedia* and its application of the commercial speech doctrine. Under *State v. Bloss*[150] any regulatory scheme for billboards must now contend with an unprecedented level of protection for commercial speech.

1. The Facts

Hawaii's billboard statute was enacted at a time when commercial speech was still without protection under the first amendment.[151] The strong judicial approval of the statute's precursor, in *Diamond Motors*, was made without consideration of now established first amendment concerns.[152] *State v. Bloss* thus took on increased significance because it represented the first opportunity for application of the commercial speech doctrine by the Hawaii Supreme Court.

Bloss[153] presented a challenge to a Honolulu ordinance which prohibited on-street handbill solicitation for business purposes in Waikiki.[154]

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[149] *See supra* note 19.

[150] 64 Hawaii 148, 637 P.2d 1117 (1981).

[151] Hawaii's statewide billboard statute was enacted in 1970. It was not until 1975, however, in the case of Bigelow v. Commonwealth of Virginia, that commercial speech was accorded any form of protection under the first amendment to the United States Constitution.

[152] Thus, the Hawaii Supreme Court dismissed as being without merit appellants' claim that the ordinance denied free speech in violation of the Hawaii and United States Constitutions. *Diamond Motors*, 50 Hawaii at 35. In a footnote, the court responded to appellants' free speech argument by stating that Diamond Motors, Inc., "is not injured by having to compete with its neighbors on equal terms. To hold otherwise is to say that the free marketplace of ideas is reserved to that person who can shout the loudest or can afford the largest loudspeaker." *Id.* at 35 n.3.

[153] In *Bloss*, defendant-appellee was arrested for illegal distribution of handbills in violation of Chapter 13, § 26-6.2 (b) (7), Revised Ordinances of Honolulu. Defendant-appellee's van was legally parked on a major thoroughfare in Waikiki. Handbills advertising appellee's shooting gallery were affixed to the exterior of the van, making them available to any passerby willing to remove them. *Bloss*, 64 Hawaii at 150.

[154] The ordinance stated in part:

> (b) Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale, solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly, goods, wares, merchandise, food stuffs, refreshments or other kinds of property or services, or to distribute commercial handbills, or to carry on or conduct any commercial promotional scheme, advertising program or similar activity in the following areas:
>
> (7) Waikiki peninsula—upon the public streets, alleys, sidewalks, malls, parks, beaches or other public places in Waikiki commencing at the entrance to the Ala Wai Canal to

Appellants contended that the ordinance constituted a denial of free speech in violation of the first amendment to the United States Constitution and article I, section 4 of the Hawaii State Constitution. The Hawaii Supreme Court agreed and found the ordinance to be an invalid regulation of commercial speech under the free speech sections of both the Hawaii and United States Constitutions.[155]

2. *The Four-Part Central Hudson Test*

The *Bloss* court applied *Central Hudson*'s four-part test[156] to determine the constitutionality of the ordinance in regulating commercial speech. Unlike the *Metromedia* plurality, however, the Hawaii Supreme Court faithfully applied all four elements of the test subjecting the ordinance to an intermediate level of scrutiny. This effectively provided greater protection for commercial speech in Hawaii.[157]

Under the first element of the *Central Hudson* test, the court determined that the *Bloss* handbill was not inaccurate, misleading or related to unlawful activity.[158] The court then found, under the second element, that commercial handbilling in Waikiki adversely affected Hawaii's tourist industry.[159] However, in applying the third element of the test,[160] the court exhibited far less deference to legislative intent than did the plurality in *Metromedia;* the court questioned whether the ordinance was in fact necessary to improve the environment for tourism in Waikiki.[161]

Kapahulu Avenue thence along the diamond head property line of Kapahulu Avenue to the ocean, thence along the ocean back to the entrance of the Ala Wai Canal. HONOLULU, HAWAII, REV. ORDINANCES, ch. 13, § 26-6.2 (b) (7) (1969).

[155] *Bloss*, 64 Hawaii at 167.

[156] *See supra* notes 77-81 and accompanying text for elements of the *Central Hudson* test. *See also Metromedia*, 453 U.S. at 507; *Bloss*, 64 Hawaii at 158.

[157] The extreme deference of the *Metromedia* plurality to legislative findings of the San Diego City Council placed the burden of proving the ordinance's invalidity upon its challengers. In effect, this decreased the protection accorded commercial speech since the burden was shifted in favor of those regulating the commercial speech. In contrast, the Hawaii Supreme Court in *Bloss* refused to exhibit such deference in applying the four-part *Central Hudson* test to Honolulu's handbill ordinance. Instead, the burden fell upon the state to prove that the handbill ordinance was constitutional.

[158] *Bloss*, 64 Hawaii at 159.

[159] *Id.* The Hawaii Supreme Court found a substantial governmental interest in preserving and maintaining an attractive environment for tourists in Hawaii. *Id.* In a footnote, the court observed that the ordinance had been enacted only after the City Council's receipt of complaints about handbilling in Waikiki. In a letter to the Council, the president of the Waikiki Improvement Association had expressed concern over the rash of solicitors using public sidewalks to impose upon passing pedestrians and noted that handbilling created a detrimental nuisance in Waikiki. *Id.* at 156-60 n.10.

[160] *See supra* note 80 for the third element of the *Central Hudson* test.

[161] The Hawaii Supreme Court found a direct relationship between the ban on commercial handbilling and the state's interest in preventing detrimental nuisances, especially to tourists. *Bloss*, 64 Hawaii at 160.

It was in the application of *Central Hudson*'s fourth element,[162] however, that the Hawaii Supreme Court deviated most from *Metromedia*'s deferential treatment of commercial speech regulations. Expanding upon the fourth element of the *Central Hudson* test, the Hawaii Supreme Court stated that a reasonable time, place and manner analysis is required[163] in order to determine whether a total prohibition of commercial handbilling in Waikiki is more extensive than necessary to serve the asserted governmental interest.[164] Neither *Metromedia* nor *Central Hudson* recognized such a requirement. By incorporating this time, place and manner analysis into the fourth element of the *Central Hudson* test, Hawaii now provides more in the way of commercial speech protection than does the United States Supreme Court.

3. *The Time, Place and Manner Requirements*

Strict scrutiny of content-based regulations of speech is required under a time, place and manner analysis; such analysis is employed to ensure that governments do not prohibit speech simply because of disagreement with expressed views.[165] Under this heightened level of scrutiny, the *Bloss* court found Honolulu's handbill ordinance deficient in several respects.[166]

The court in *Bloss* relied on two United States Supreme Court decisions[167] which expanded upon the time, place and manner analysis of *Linmark Associates*;[168] these cases were cited for the proposition that a place regulation, such as the banning of handbill distribution in Waikiki, is valid only if the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.[169] The court concluded that the handbill ordinance was not a permissible place regula-

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[162] *See supra* note 81 for the fourth element of the *Central Hudson* test.

[163] *Bloss*, 64 Hawaii at 160. Under *Linmark Associates*, 431 U.S. at 93-95, time, place and manner restrictions are valid if they: (1) do not refer to the content of the regulated speech; (2) serve a significant governmental interest; and (3) leave open ample alternative channels of communication for the regulated speech.

[164] *Bloss*, 64 Hawaii at 160-61.

[165] *See, e.g.*, Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 536 (1980).

[166] The court concluded that the ordinance was an improper regulation as to time or manner because it prohibited commercial speech at all times and in any manner in Waikiki. *Bloss*, 64 Hawaii at 161. Moreover, the ordinance singled out speech of a particular content and sought to prevent its dissemination completely, thus violating the requirement of content-neutrality. *Id.* The handbill ordinance also discriminated on the basis of content by permitting noncommercial speech and handbills while banning all commercial handbilling in Waikiki. *Id.*

[167] *See* Schad v. Borough of Mount Emphraim, 452 U.S. 61, 75 (1981) and Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[168] *See supra* notes 71-74 and accompanying text for the three elements of the *Linmark Associates* time, place and manner analysis.

[169] *Bloss*, 64 Hawaii at 161.

tion because commercial handbilling in Waikiki was not incompatible with the activities of the district[170]—an area with an already high concentration of retail commercial activity.

Adoption of an analysis which requires even more than the *Linmark Associates* time, place and manner analysis poses dire consequences for Hawaii's statewide billboard statute. As mentioned, Justice Brennan's concurring opinion in *Metromedia* raised the strong and valid argument that a community banning all billboards should be required to justify the ban within its commercial and industrial zones, areas where billboards carrying commercial messages may be an integral part of the economic scene.[171] Yet *Bloss* invalidated the handbill ordinance—on the ground that commercial handbilling was not incompatible with the commercial activity of Waikiki—despite the unquestioned fact that such handbilling constitutes a grave nuisance and is extremely detrimental to Hawaii's tourist industry. Indeed, it is difficult to conceive of this same court upholding a statute which bans billboards in commercial and industrial areas where few tourists venture.[172] Thus, a constitutionally secure billboard statute would have to provide strong justification for banning billboards in such areas.

Under the third element of *Linmark Associates'* time, place and manner analysis, the *Bloss* court concluded that the handbill ordinance was invalid because it did not leave open ample alternative channels of communication.[173] Such a finding poses an added threat to Hawaii's billboard statute in view of its broad application. Unlike the *Bloss* handbill ordinance, which prohibited commercial handbilling in limited, specific scenic and tourist areas,[174] Hawaii's statute bans billboards throughout the state. The impact on would-be billboard advertisers under Hawaii's statewide billboard ban is thus far greater than the ban on handbill solicitors,

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[170] *Id.*

[171] *Metromedia*, 453 U.S. at 530-33.

[172] The Hawaii Supreme Court recently reaffirmed its decision in *Bloss*. *See* State v. Hawkins, 64 Hawaii 499, 643 P.2d 1058 (1982). In a *per curiam* decision, the court applied the *Central Hudson* test, with its accompanying time, place and manner analysis, to the same Honolulu handbill ordinance. In *Hawkins*, defendant-appellee was arrested for stopping pedestrians on the sidewalk and giving them handbills. *Id.* at 500. On appeal to the Hawaii Supreme Court, the state argued that the ordinance constituted a valid use of the police power and that the impact of the regulation upon speech was minimal. *Id.* at 501. The court held that its conclusion in *Bloss*—that the handbill ordinance is more extensive than necessary to serve the asserted governmental interest of preserving the attractiveness of Waikiki for tourism—was equally applicable to this decision. *Id.*

[173] *Bloss*, 64 Hawaii at 162. The court noted that while would-be commercial handbillers could advertise by way of newspaper, radio and other media, such alternatives were far from satisfactory since they might entail greater expense and might prove to be less effective means of communicating messages. *Id.*

[174] The ordinance applied to Waikiki as well as the Pali Lookout, Makapuu Lookout, Diamond Head Road, Tantalus Drive, Waimea Bay and Laie Point. *Bloss*, 64 Hawaii at 149 n.2.

who retain access to areas other than Waikiki in which they may distribute their handbills. Clearly, under the strict scrutiny of *Bloss*, Hawaii's billboard statute must leave open alternative, equally inexpensive means of communication to Hawaii's would-be billboard users or be declared unconstitutional.[175]

Bloss recognized that the prevention of nuisances is of critical importance to a viable tourist industry. However, the court found this rationale insufficient to justify the total suppression of commercial speech, especially where such speech disseminates information that is neither false, misleading nor related to illegal activity.[176] This finding parallels the conclusion reached in *Metromedia* that, by limiting the size and placement of billboards, a more carefully drafted ordinance could have achieved the same ends with fewer restrictions.[177]

IV. Recommendations and Conclusions

Despite apparent constitutional deficiencies of Hawaii's billboard prohibition, it is possible to modify the statute to accommodate the concerns raised by *Metromedia* and *Bloss*. It should be noted that the billboard ordinance in *Metromedia* was held to be valid as applied to commercial billboards.[178] Although *Bloss*, through its stringent analysis, invalidated regulations prohibiting certain forms of commercial speech, a more precise law which prohibits commercial billboards while merely regulating noncommercial billboards could be upheld.[179]

As a necessary step in correcting the constitutional deficiencies of Hawaii's billboard statute, legislators must delineate specific, identifying dimensions of billboards.[180] While Hawaii's billboard statute does define the terms "outdoor advertising device"[181] and "billboard,"[182] it fails to

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[175] In the absence of alternative, equally inexpensive means of communication, messages of Hawaii's would-be billboard users will be banned solely because the medium in which they are advertised is aesthetically unpleasant.

[176] *Bloss*, 64 Hawaii at 162. The court also noted the state's failure to show that a more limited regulation could not adequately protect its asserted interest. *Id.*

[177] *Metromedia*, 453 U.S. at 508. After *Bloss*, it is clear that the same conclusion could be reached in analyzing Hawaii's billboard statute.

[178] *See supra* notes 100-01 and accompanying text.

[179] Under the holdings in *Metromedia* and *Bloss*, commercial speech may be prohibited if the regulation meets the four-part *Central Hudson* test or is valid under a time, place and manner analysis. Noncommercial speech is rarely prohibited unless it pertains to libel, slander, fighting words or other violations of the free speech privilege. *See supra* note 87.

[180] The ordinance in *Metromedia* failed to define *outdoor advertising display sign*, and, while allegedly encompassing billboard regulation, it failed to make explicit reference to billboards.

[181] Hawaii Rev. Stat. § 445-11 (1):

(1) "Outdoor advertising device" means any device which is:

(A) A writing, picture, painting, light, model, display, emblem, sign, or similar device situated outdoors, which is so designed that it draws attention of persons in any public

specify the definitive size of such signs, leaving the determination instead to each of Hawaii's four counties.[183] Development of a uniform size standard would facilitate foolproof determination of whether a sign is a billboard and therefore subject to regulation under the statute.

The *Metromedia* plurality accepted size standards of twelve feet by twenty-four feet for "poster panels," and fourteen feet by forty-eight feet for "painted bulletins."[184] While these are useful guidelines, the proposed measurements in *Metromedia* are probably too large for Hawaii.[185] It is therefore suggested that public hearings be held by the Hawaii State Legislature to determine a size standard for billboards which is acceptable to the general public.

Second, references to specific types of speech must be excised from Hawaii's statute. Both the *Metromedia* ordinance and Hawaii's billboard statute impermissibly regulate noncommercial speech on the basis of content through exemptions of certain categories of speech.[186] To avoid the resultant constitutional problems identified in *Bloss*,[187] Hawaii's billboard statute should be amended to eliminate exemptions based on speech content. Valid time, place and manner regulations should be incorporated

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highway, park, or other public place to any property, services, entertainment, or amusement, bought, sold, rented, hired, offered, or otherwise traded in by any person, or to the place or person where or by whom such buying, selling, renting, hiring, offering, or other trading is carried on;

(B) A sign, poster, notice, bill, or word or words in writing situated outdoors and so designed that it draws the attention of and is read by persons in any public highway, park, or other public place; or

(C) A sign, writing, symbol, or emblem made of lights, or a device or design made of lights so designed that its primary function is not giving light, which is situated outdoors and draws the attention of persons in any public highway, park or other public place.

[183] HAWAII REV. STAT. § 445-11 (2):

(2) "Billboard" is any board, fence, or similar structure, whether free-standing or supported by or placed against any wall or structure, which is designed or used for the principal purpose of having outdoor advertising devices placed, posted, or fastened upon it.

[183] HAWAII REV. STAT. § 445-13 (2):

The several counties may adopt ordinances regulating billboards and outdoor advertising devices not prohibited by sections 445-11 to 445-121. The ordinances may:

(2) Regulate the size, manner of construction, color, illumination, location, and appearance of any class of billboard or outdoor advertising device . . . .

[184] *See* Metromedia v. City of San Diego, 453 U.S. at 523 n.1 (joint stipulation of facts No. 25).

[185] Billboards have been absent from Hawaii's landscape for nearly 80 years. Thus, any sign of such dimensions could be highly obtrusive to a public unaccustomed to billboard advertisement. In addition, well-developed public concern for Hawaii's fragile environment would likely produce strong opposition to a statute permitting signs of such dimensions.

[186] *See supra* note 143.

[187] 64 Hawaii at 160-61. Time, place and manner restrictions are permissible provided they are justified without reference to the content of the regulated speech. *Id.* at 160.

into Hawaii's billboard statute.[188]

Third, Hawaii's billboard statute should be amended further to prohibit all billboards—commercial and noncommercial—throughout the state except for those areas which are zoned for commercial or industrial use.[189] Within these two zones, the state should permit only those billboards which advertise products manufactured or services provided on the premises; this exception is consistent with the *Bloss* approach of according greater protection to commercial speech in those areas where commercial activity is most vigorous and concentrated.

More importantly, the amendment must also allow noncommercial billboards wherever commercial billboards are permitted. Such an amendment would eliminate that section of Hawaii's billboard statute which presently accords commercial speech greater protection than noncommercial speech.[190] In addition, this proposal will ensure that noncommercial speech is not unduly restricted, thus avoiding first amendment challenges.[191]

An amended billboard statute might also prohibit billboards in Hawaii's industrial and commercial zones, provided it complies with the objective criteria of Justice Brennan's concurring opinion in *Metromedia*.[192] A community could eliminate all billboards from within its borders if it demonstrated a strong and comprehensive commitment to improving the aesthetic character of its commercial and industrial areas. Therefore, Hawaii's billboard statute could be amended to provide expressly that where a strong commitment to improve the aesthetic nature of a commercial or industrial zone is shown, all billboards may be banned from that zone. For example, Honolulu might demonstrate its strong commitment to improving the appearance of Nimitz Highway, between the Honolulu International Airport and downtown Honolulu, through the extensive landscaping of this major traffic artery. Such commitment toward the aesthetic improvement of one of the state's most industrial areas would permit a total ban on billboards in this area of Oahu.

It should be noted that these recommended changes to Hawaii's billboard statute are, at best, temporary saving measures. Left unresolved is the question of whether a total ban of billboards in Hawaii leaves open alternative, equally effective means of communication to would-be bill-

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[188] This can be accomplished by imposing reasonable restrictions on the location and size of all billboards without referring to the content of billboard messages. *See Linmark Associates*, 413 U.S. at 93-94.

[189] Residential and rural areas, where aesthetic preservation concerns may be strongest, would be protected from any billboard advertising.

[190] HAWAII REV. STAT. § 445-112(3) and (4) exempts on-site commercial billboards while prohibiting noncommercial billboards at the same location.

[191] It also ensures content-neutrality by permitting both commercial and noncommercial billboards in commercial and industrial zones.

[192] 453 U.S. at 528 (Brennan, J., concurring).

board users.[193]

Despite the many problems with Hawaii's billboard statute, there is room for optimism on the part of lawmakers. Explicit language in Hawaii's constitution, authorizing the use of the police power for aesthetic purposes, confers upon the state greater authority for regulating billboards than is found in other jurisdictions.[194] Additionally, Hawaii's very limited land area and the natural beauty of its mountains and coastlines necessitate stringent regulation of billboards if the state is to protect the fragile scenic environment so important to its tourist industry. Thus, unique and compelling circumstances support the desirability of banning billboards in Hawaii. It is earnestly hoped that courts, called upon to review such billboard regulatory schemes, shall not fail to recognize that "unless special protection is given to our special natural resources, Hawaii will no longer be a special place."[195]

Kirk Caldwell

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[193] Under the holding in *Bloss*, commercial speech regulation is unconstitutional if it does not leave open ample alternative channels of communication. *Bloss*, 64 Hawaii at 161-62. The *Bloss* court held that the alternative forms of communication available to would-be handbillers "are far from satisfactory since they may involve greater expense and may be less effective means for communicating messages." *Id.* at 162.

[194] *See supra* note 140.

[195] Honolulu Star-Bulletin, March 11, 1983, at A-14, col. 3.

PETERS V. PETERS: IS THERE REALLY A CHOICE-OF-LAW UNDER HAWAII'S INTEREST ANALYSIS?

I. INTRODUCTION

In *Peters v. Peters*,[1] the Hawaii Supreme Court set forth the method by which future choice-of-law[2] problems in tort cases would be resolved by rejecting the traditional rule of *lex loci delicti*[3] and adopting *interest analysis* methodology in its place. The court was called upon to decide whether the law of the plaintiff's domicile (New York) or the law of the forum and place of injury (Hawaii) should determine the plaintiff's ability to sue her spouse for a tort arising out of an automobile accident. The *Peters* court concluded that "only upon an assessment of the various interests of the states whose laws are involved" could a desirable result be reached.[4] The analysis of each state's interests prompted the court to invoke Hawaii's rule of interspousal immunity,[5] which effectively prohibited the plaintiff from maintaining the suit against her husband in this jurisdiction.

Following a discussion of the development of choice-of-law theory in tort cases, this note examines the *Peters* decision. While the Hawaii Supreme Court can be commended for its decision to adopt a modern choice-of-law theory, the court failed to establish clear guidelines for resolution of future choice-of-law problems.

A. Facts

In 1975, Lilien Peters was injured when a rented automobile driven by her husband collided with a truck on the Island of Maui.[6] Lilien brought

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[1] 63 Hawaii 653, 634 P.2d 586 (1981).

[2] In this note the term *Choice-of-Law* will be used instead of the broader term *Conflict-of-Laws*. The term *Choice-of-Law* "has come to refer to those problems in the broader 'Conflict of Laws' other than those relating to jurisdiction, judgments, or characterization." GOODRICH & SCOLES, CONFLICT OF LAWS 5-6 (1964).

[3] Also commonly referred to as *the law of the place of injury*.

[4] 63 Hawaii at 663, 634 P.2d at 593.

[5] HAWAII REV. STAT. §573-5 (1976) states: "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."

[6] 63 Hawaii at 655, 634 P.2d at 588.

suit in Hawaii circuit court, charging her husband with negligent driving.[7] At the time of the accident and the time of the suit, both parties were residents of New York.[8] New York law[9] permits interspousal tort suits, whereas Hawaii retains the interspousal immunity doctrine.[10] That trial court granted Mr. Peters' Motion for Summary Judgment, basing its decision on the strength of Hawaii's immunity rule.[11] On appeal, the Hawaii Supreme Court affirmed the lower court's decision.[12]

II. HISTORY

Over the past two decades, many jurisdictions have retreated from the traditional rule of *lex loci delicti* in tort cases.[13] Under *lex loci delicti,* the law of the place of wrong invariably governs all of the substantive issues in tort litigation,[14] irrespective of its content or the justice of the result. *Lex loci delicti* has come under fire as an inflexible rule that ignores the

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[7] *Id.*

[8] *Id.*

[9] The relevant New York law on interspousal tort suits states:

1. A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved.

2. A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law, or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any personal injury to her husband or to his property, as if they were unmarried.

N.Y. GEN. OBLIG. LAW §3-313 (McKinney 1978).

[10] HAWAII REV. STAT. §573-5 (1976).

[11] 63 Hawaii at 655, 634 P.2d at 588.

[12] *Id.* at 668, 634 P.2d at 595.

[13] *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 266-67 (2nd ed. 1980); R. LEFLAR, AMERICAN CONFLICTS LAW § 132 (1968); H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 165-67 (1964); A. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 226-29 (1940); A. EHRENZWEIG, CONFLICT OF LAWS §211 (1962); RESTATEMENT OF CONFLICT OF LAWS §377 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (1971); Moreland, *Conflicts of Law — Choice of Law in Torts — A Critique,* 56 KY. L.J. 5 (1967-68); Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws,* 56 KY. L.J. 27, 42 (1967-68); Leflar, *The Torts Provisions of the Restatement (Second),* 72 COLUM. L. REV. 267 (1972); Annot., 29 A.L.R.3d 603, 622 (1970).

[14] *See* RESTATEMENT OF CONFLICT OF LAWS §377 (1934). A territorialist theory of *vested rights* dominated academic analysis in American choice-of-law for years. Professor Joseph Beale developed the idea that designation of some single factor in a transaction should identify the place (state) whose law should govern the transaction. A function of conflicts law was thus to specify the significant factors for the various events by analyzing the nature of each type of claim. In the area of torts it was deemed that "the right to recover for a tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and the extent *solely* on such law."

policies underlying the laws in conflict.[15] Dissatisfaction with the traditional rule has led to the development of several modern policy-oriented approaches.

This note will survey three of the most influential modern approaches to choice-of-law issues[16] — the *Restatement (Second)'s most significant relationship* formula,[17] Professor Currie's *governmental interest analysis* approach,[18] and Professor Leflar's *choice-influencing considerations.*[19] To date, no single theory has emerged as the clear successor to *lex loci delicti.*[20] Moreover, many courts purporting to adopt a policy-oriented approach cite the modern methodologies interchangeably, in effect combining and modifying them to reach a fair result.[21]

A. The Traditional Rule of Lex Loci Delicti

Under the traditional rule of *lex loci delicti,* the law of the place where the tort was committed governs all substantive issues that arise in tort litigation.[22] Conceptually, the rule is a product of the *vested rights* doctrine[23] which posited that the "right to recover for a tort owes its creation

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[15] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (1971); Cavers, *A Critique of the Choice-of-Law Problem,* 47 HARV. L. REV. 173 (1933); Cheatham, *American Theories of Conflicts of Laws: Their Role and Utility,* 58 HARV. L. REV. 361 (1945); Cook, *Tort Liability and the Conflicts of Laws,* 35 COLUM. L. REV. 202 (1935); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflicts of Laws,* 63 COLUM. L. REV. 1233 (1963); Ehrenzweig, *The "Most Significant Relationship" in the Conflicts of Law of Torts,* 28 LAW & CONTEMP. PROBS. 700 (1963).

[16] R. LEFLAR, AMERICAN CONFLICTS LAW 264 (3d ed. 1977).

[17] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (1971) [hereinafter referred to as RESTATEMENT (SECOND)].

[18] Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9 (1958).

[19] R. LEFLAR, *supra* note 16, at 233-65, 331-33. *Accord* Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U. L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Consideration,* 54 CALIF. L. REV. 1584 (1966). *See also* Yntemna, *The Objectives of Private International Law,* 35 CAN. BAR REV. 721 (1957)(Yntemna's proposal essentially mirrors Leflar's choice-influencing considerations).

[20] Comment, *Choice of Law: The Abandoment of Lex Loci Delicti — Should Virginia Follow the Trend?,* 13 U. RICH. L. REV. 133, 137 (1978). *See also* A. EHRENZWEIG, *supra* note 13, at §211; A. ROBERTSON, *supra* note 13, at 228-29; R. WEINTRAUB, *supra* note 13, at 266-67; Morris, *The Proper Law of a Tort,* 64 HARV. L. REV. 881, 893-95 (1950).

[21] *See* Palmisano v. News Syndicate Co., 130 F. Supp. 17, 19 n.2 (S.D.N.Y. 1955) (the court listed nine possible choice-of-law alternatives in multistate libel cases); Dale System, Inc. v. General Teleradio, Inc., 105 F. Supp. 745, 748 (S.D.N.Y. 1952) (the court examined five conflict rules and a number of authorities without selecting a clear alternative). *See also* Note, *Invasion of Privacy,* 19 U. PITT. L. REV. 98 (1957) (suggesting fourteen alternative choice-of-law approaches in tort cases); R. LEFLAR, *supra* note 13, at 333-38 (illustrates the confusion in defamation cases); Ludwig, *"Peace of Mind" in 48 Pieces v. Uniform Right of Privacy,* 32 MINN. L. REV. 734, 760 (choice-of-law considerations in Right to Privacy cases).

[22] RESTATEMENT OF CONFLICT OF LAWS §377 (1934).

[23] Choice-of-law under a vested rights (territorial) approach assumes an almost mechani-

to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law."[24] A forum state is barred from granting a right to recovery under its local law when the law of the state where the tortious conduct occurred would deny recovery.[25] The forum's only task is to apply the law of the state where the *last act* necessary to the existence of the tort transpired.[26]

Critics of *lex loci delicti* have branded it as a mechanical and often unjust rule that overlooks the interests and policies of other states which are affected by the litigation.[27] It is conceded, however, that the beauty of the rule lies in its ease of administration, certainty and uniform application.[28]

The rule functions as a rational choice-of-law method when the issue before the court is whether a tort has been committed.[29] It is agreed that the place of the wrong has a predominant interest in regulating conduct

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cal stance. Dean Falconbridge stated that "the analysis of any conflicts case 'should . . . be divided into three stages. . .Characterization, Selection, and Application.'" R. LEFLAR, *supra* note 13, at 206-07 (quoting Falconbridge, *Characterization in the Conflict of Laws*, 53 L.Q. REV. 235 (1937).

> The Court should, in the first place, characterize or define the juridical nature of, the subject or question upon which its adjudication is required. . . . It is only when the court has characterized the subject or question that it can decide whether that subject or question falls within a given conflicts rule of the forum. . . .
>
> The Court should, in the second place, select the proper law, that is, the law (whether that of England or of some other country [or state]) indicated by its appropriate rule of conflict of laws as being the law which ought to govern the decision upon the subject or question already characterized. The conflicts rule of the forum will of course merely indicate in general terms that a particular local element in the factual situation (as, for example, the domicile of a person, the place of making a contract, or the situs of a thing) is the connecting factor, that is, the element which connects the factual situation with a particular country; and the court, following this conflicts rule, is enabled, by the use of this connecting factor, to select the law of the country thus indicated as the proper law.
>
> The Court should, in the third place, apply the selected proper law to the factual situation for the purpose of deciding what, if any, legal consequences result from that situation or, if a thing is in question, what interests are created in the thing.

Falconbridge, *Characterization in the Conflict of Laws*, 53 L.Q. REV. 235 (1937), *quoted in* R. LEFLAR, *supra* note 13, at 207.

[24] *See supra* note 14.

[25] *See supra* note 15.

[26] "The law of the place (the legal or political area) in which the alleged tort occurred has traditionally said to determine whether it was tortious." R. LEFLAR, *supra* note 13, at 317. *See* RESTATEMENT OF CONFLICT OF LAWS §§377-83 (1934) (guidelines for ascertaining where the *last act* was committed).

[27] *See supra* note 15. *See also* Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1944).

[28] *See* Cheatham and Reece, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 976 (1952).

[29] R. CRAMTON & D. CURRIE, CONFLICT OF LAWS 15 (1968); A. EHRENZWEIG, *supra* note 13, at 546; H. GOODRICH & E. SCOLES, *supra* note 13, at 165-67; R. WEINTRAUB, *supra* note 13, at 278-89.

within its jurisdiction.[30] However, courts have fashioned escape devices to circumvent rigid application of the rule when issues other than whether a tort has been committed arise. The rule's inadequacy to determine issues such as capacity to sue, survival of actions, and measure of damages,[31] has prompted courts to employ legal fictions such as procedural labeling,[32] renvoi,[33] and characterization[34] to justify application of forum law. These

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[30] Babcock v. Jackson, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750-51 (1963).

[31] One of those weaknesses of *lex loci delicti* has been its inability to adjust to new issues brought on by technological advances:

> Of the several developments that began to expose the weaknesses of the lex loci rule, which chooses the law of the place of the wrong to govern everything in a tort case, perhaps the most outstanding were technological advances in means of transportation and an expanding economy that put those means into the hands of vast numbers of people at diverse economic levels. The car became a common possession in most families. After World War II, it became common for suburban families to own two cars. One major American car manufacturer built an advertising campaign around a slogan of two-car ownership. Good times made money available. Young people hardly out of infancy, and many still in, bought cars, or were given them by their parents. These went faster and faster, and while they did the airplane was gearing up and the jet age preparing to follow. Air travel contracts continents and shrinks worlds. And a booming economy put travel within the reach of millions. Commercial transactions as well as tortious events with multi-state elements began to proliferate. Choice of law rules could no longer meander on at leisure. Through the sheer numbers of the cases that tested them, their weaknesses became glaring. Forward movement could no longer be delayed.

D. SIEGEL, CONFLICTS 242-43 (1982).

[32] Procedural labeling occurs when a court deems the issue to be one which relates to the rules governing the conduct of cases in the forum court, and the relevant considerations support use of forum law. *See* Klingebiel v. Lockheed Aircraft Corp., 372 F. Supp. 1086 (N.D. Cal. 1971), *aff'd*, 494 F.2d 345 (9th Cir. 1974) (statute of limitations procedural matter governed by law of forum regardless of place of injury); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953) (survival of actions is a matter of procedure to be determined by law of forum).

[33] *See* R. CRAMTON & D. CURRIE, *supra* note 29, at 63:

> Renvoi has a vocabulary all its own. Choice-of-law rules may refer either to a state's "internal" law — the law that would be applied to a purely domestic case without conflicts complications — or to its "whole" law — the law that state would apply to the multistate case actually presented, by reference to its own choice-of-law rules. If the forum state refuses to consider the choice-of-law rules of the state to which it refers it is said to "reject" the renvoi; if it finds in the foreign choice-of-law rule a reference back to the law of the forum and applies its own internal law, it is said to "accept" the renvoi. The renvoi is said to be "partial" if the foreign choice-of-law is found to refer to the internal law of a state and "total" if the foreign reference is also to whole law. If the state whose choice-of-law rules are examined refers the case back to the law of the forum state, there is said to be "remission"; if it refers to a third state, "transmission."

See also Richards v. United States, 369 U.S. 1, 10-11 (1962) (Federal Tort Claims Act refers to whole law of state, including choice-of-law rules); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 299 (9th Cir. 1954) (place of contract law avoided by declaring New York statute procedural and Alaska statute substantive); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1166-70 (1938); J. BEALE, CONFLICT OF LAWS 55-58 (1935); H. GOODRICH, CONFLICT OF

escape devices, in turn, have eroded the certainty of the rule.[35]

In the interspousal immunity context, the courts have carved an exception to *lex loci delicti* by characterizing[36] the immunity issue as one that falls within the ambit of domestic relations rather than tort. Courts have traditionally applied *lex domicilii*, the law of the parties' domicile, to family law issues in the belief that the substantive rights between family members are of greater concern to the domicile than to the place of injury.[37] Thus, in *Haumschild v. Continental Cas. Co.*,[38] where a couple domiciled in Wisconsin, the forum state, had been involved in an automobile accident in California, the Wisconsin Supreme Court side-stepped California's interspousal immunity doctrine by applying the law of the domicile to determine the wife's capacity to sue her spouse for negligence.

A majority of jurisdictions[39] have abandoned *lex loci delicti* as it fails

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LAWS §10 (1st ed. 1927).

[34] Characterization is a process by which courts classify concepts, terms or facts in order to predetermine the outcome of the choice of law question. *See* Haumschild v. Continental Cas. Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959) (action by wife against husband for personal injury was question of family, not tort law, thereby avoiding application of interspousal immunity doctrine). *See also* Cook, *"Characterization" in the Conflict of Laws*, 51 YALE L.J. 191 (1941); Lorenzen, *The Qualification, Classification, and Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743 (1941); Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949).

[36] Weintraub, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 556 (1968).

[38] *See supra* note 34. *See also* A. EHRENZWEIG, *supra* note 13, at 582; A. ROBERTSON, *supra* note 13; R. WEINTRAUB, *supra* note 13, at 51-55; Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts and Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962).

[37] Application of domicile law is motivated by a state's desire to protect or control the individuals who reside within its boundaries. *See* Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955); Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968) (torts between family members characterized as family law rather than tort so that law of domicile rather than the place of tort would govern).

[38] 7 Wis.2d 130, 95 N.W.2d 814 (1959).

[39] Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1001-02 n.2 (Fla. 1980):

> Twenty five states and the District of Columbia have already rejected the place of injury rule and adopted one of several *multiple factors* theories. Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977); Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); First Nat'l Bank v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973); Ingersoll v. Klein, 46 Ill.2d 42, 262 N.E.2d 593 (1970); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Jagers v. Royal Indem. Co., 276 So.2d 309 (La. 1973); Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Pevoski v. Pevoski, 371 Mass. 358, 358 N.E.2d 416 (1976); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Mitchell v. Craft, 211 So.2d 509 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Mellk v. Sarahon, 49 N.J. 226, 229 A.2d 625 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917, *cert. dismissed*, 393 U.S.

to consider factors more significant than the place of the wrong in selecting the appropriate law. Several alternative methodologies conceived by conflicts scholars have filled the void left by the demise of *lex loci delicti.*

B. Second Restatement's Most Significant Relationship Test

The New York Court of Appeals broke with tradition in its landmark decision of *Babcock v. Jackson*[40] by its adoption of the *most significant relationship* test, later incorporated in the *Restatement (Second) of Conflict of Laws.*[41] In *Babcock,* the plaintiff was injured while on a weekend trip to Ontario. The law of the place of injury, Ontario, excused a host driver from liability to his guest unless there was a showing of gross negligence.[42] The plaintiff brought suit for negligence in New York, the state of the parties' common domicile.[43] Under New York law,[44] a guest could recover for her host's ordinary negligence. The court announced that "[j]ustice, fairness and 'the best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."[45] Examination of the relevant contacts revealed that the suit involved a New York guest's attempt to recover for injuries caused by a New York host's operation of a motor vehicle that was garaged, licensed, and insured in New York.[46] Furthermore, the guest-host relationship had been established in New York and the journey began and was to end there. In contrast, Ontario's only claim to the litigation lay in its purely fortuitous status as the situs of the accident.[47] The court held that New York law

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957 (1968); Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979); Johnson v. Spider Staging Corp., 87 Wash.2d 577, 555 P.2d 997 (1976); Wilcox v. Wilcox, 26 Wis.2d 617, 133 N.W.2d 408 (1965); Gaither v. Meyers, 404 F.2d 216 (D.C.Cir. 1968).

[40] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[41] RESTATEMENT (SECOND), *supra* note 17.

[42] 12 N.Y.2d at 477, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

[43] *Id.* at 476-77, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

[44] *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. N.Y. VEH. & TRAF. LAW §388 (McKinney 1970) states:

> 1. Every owner of vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. Whenever any vehicles as hereinafter defined shall be used in combination with one another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder.

[45] *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

[46] *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

[47] *Id.*

should govern the suit since it had the most significant relationship with the litigation.[48]

The *Restatement (Second)* lists a series of factual contacts to consider in ascertaining the state that has the most significant relationship with the occurrence.[49] In the area of torts, the relevant factual connections include:

> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, or place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.[50]

When the question presented involves interspousal capacity to sue, the state where the couple is domiciled is presumptively the state that has the most significant relationship with the issue of immunity.[51] Under the *Restatement (Second)* approach, a tortfeasor domiciled in a state that allows interspousal suits is subject to suit for personal injuries suffered by his or her spouse even though the law of the state where the accident occurs retains the common law of immunity.[52]

The *Restatement (Second)* method has been employed by a number of courts who believe that it combines the elements of all major theories,[53] but the method has also drawn its share of criticism from scholars.[54] There is concern that the concept is subjective,[55] fosters forum shop-

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[48] *Id.* at 483, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 751.

[49] RESTATEMENT (SECOND), *supra* note 17.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See* Brown v. First Ins. Co., 295 F. Supp. 164 (D. Or. 1968) (Oregon courts to apply law of state with the most significant relationship to the occurrence and parties); Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969) (Illinois law states that the law of the place where the tort occurred will govern); Conradi v. Boone, 316 F. Supp. 918 (S.D. Iowa 1970) (law of the place where the accident occurred governs the determination of when the statute of limitations begins); Johnson v. Hertz Corp., 315 F. Supp. 302 (S.D.N.Y. 1970) (laws of the jurisdiction having the greatest interest in the litigation will govern); Marra v. Bushee, 317 F. Supp. 972 (D. Vt. 1970) (alienation of affections action governed by Vermont law under the RESTATEMENT (SECOND) analysis).

[54] Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM L. REV. 1233 (1963). *See, e.g.*, WEINTRAUB, *supra* note 13, at 277; Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762 (1963); Ehrenzweig, *American Conflicts Law in Its Historical Perspective: Should the Restatement Be "Continued"?*, 103 U. PA. L. REV. 133 (1954).

[55] Any interest analyzing method is by definition subjective. The Second Restatement approach, which features a highly structured analysis, is among the least subjective. *But cf.* R. LEFLAR, *supra* note 13, at 277 (the RESTATEMENT (SECOND) approach may be exercised to attain results that are considered *better law*).

ping,[56] and that courts tend to choose the applicable law on the basis of quantity, as opposed to quality of contacts.[57]

C. *Governmental Interest Analysis*

Professor Brainerd Currie fathered the *governmental interest analysis*[58] approach to choice-of-law. Courts employing this method select the appropriate law by first identifying the policies behind the laws of the involved states and then assessing the relative interests of each state, in light of those policies, in having its law applied.[59] If upon analysis of the content and objectives of the competing laws, it is found that only one state has a valid interest in the outcome, a *false conflict* is deemed to exist, and the law of the interested state is applied.[60] When analysis reveals that the policies of each state will be advanced by selection of its law, a *true conflict* exists, and Currie's approach automatically chooses forum law.[61]

In the case of a tort action that has multistate components, *governmental interest analysis* prevents application of the law of a disinterested state by flushing out false conflicts.[62] *Babcock v. Jackson*[63] exemplifies a false conflict situation. Examination of the policies behind Ontario's guest-host statute revealed that it was designed to avert fraudulent claims against local insurance companies.[64] The policy behind Ontario's statute would not be furthered by its use as a shield to protect the defendant's New York insurer — it was clearly meant to shield Ontario insurers from fraudulent claims.

The shortcomings of *governmental interest analysis* surface when a true conflict presents itself.[65] In a true conflict situation, the forum must weigh the respective interests of the involved jurisdictions. In recognition of the tendency of a forum state to accord its own interest greater weight, Professor Currie established a principle of forum preference to resolve

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[56] *See supra* note 54. *See also* Sparks, *Babcock v. Jackson — A Practicing Attorney's Reflections upon the Opinion and Its Implications*, 31 INS. COUNSEL J. 428 (1964).

[57] *See supra* note 54. *See also* R. LEFLAR, *supra* note 16, at 136.

[58] The late Professor Brainerd Currie was the leading proponent on governmental interest analysis. Currie's suggested approach was set out in Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963). *Accord* Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958-1959); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

[59] *Id.*

[60] *Id. See also* R. CRAMTON & D. CURRIE, *supra* note 29, at 261-65.

[61] *Id. See also* R. CRAMTON & D. CURRIE, *supra* note 29, at 277-334.

[62] *Id. See also* R. CRAMTON & D. CURRIE, *supra* note 29, at 295-97.

[63] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[64] *Id.* at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

[65] *See supra* note 61.

true choice-of-law problems. This principal dictates that a forum that has an interest in the outcome of the suit should invariably apply its own law.[66] Thus, in the face of a true conflict, Currie's approach resembles a mechanical *lex fori* rule.[67]

D. Choice-Influencing Considerations

Professor Robert Leflar[68] advocated the *choice-influencing considerations* approach in which a tribunal considers five factors in making choice-of-law determinations.[69]

(a) *Predictability of Result:* This consideration is based on the premise that knowledge of the governing law influences the behavior of the individual.[70] A predictable result seeks to protect the justifiable expectations of the parties, as well as minimize any unfair surprise stemming from selection of foreign law.[71] In addition, the evils of forum shopping are diminished since uniform results are assured regardless of the forum chosen.[72]

(b) *Maintenence of Interstate Order:* This consideration requires that the forum give due deference to the interest of states in order to preserve harmony and orderliness between the states.[73] Equal consideration should be given to the interest of the involved states as failure to do so may result in resentment and later retaliation.[74]

(c) *Simplification of the Judicial Task:* Judicial efficiency often depends upon the ease with which the law can be administered. Forum law, being more familiar, is thus easier to apply. Conversely, the difficulty of applying foreign law can threaten to disrupt judicial efficiency. While

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[66] *See* Note, *Choice of Law: The Abandonment of Lex Loci Delicti — Should Virginia Follow the Trend?*, 13 U. RICH. L. REV. 133, 143 (1978).

[67] The potential of *lex fori* to lead to unjust results characteristic of *lex loci delicti* is illustrated by the following hypothetical. A wife brings suit against her husband for negligent driving. The state in which the injury occurred allows interspousal tort actions, but the wife sues in their domicile state which retains the interspousal immunity doctrine. Under *governmental interest analysis* this is a true conflict — the forum state has an interest in preventing collusive suits against local insurers, while the place of injury also has a vital interest in reimbursing medical creditors who provided aid to the tort victim.

[68] Professor Robert Leflar, while not the originator, is primarily associated with the approach. Among the first to analyze such factors were Professors Cheatham and Reese who listed nine factors relevant to choice-of-law determinations. *See* Cheatham & Reese, *supra* note 28. Professor Yntemna culled seventeen relevant *policy considerations*. *See* Yntemna, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721 (1957). It is Leflar who has distilled the varying considerations down to five.

[69] No priority among the considerations is intended from the order of listing.

[70] R. LEFLAR, *supra* note 16, at 245-47. *See supra* note 19.

[71] *Id.* at 245-46.

[72] *Id.* at 245.

[73] *Id.* at 247-49.

[74] *Id.* at 249.

simplification of the judicial task is desirable, it should never distract the court from achieving justice.[76]

(d) *Advancement of the Forum's Governmental Interests:* This consideration assumes that the forum will strive to advance the governmental interests of its state.[76] Courts are directed to give "thoughtful consideration to the current socioeconomic, cultural, and political attitudes of the community,"[77] instead of listing every conceivable governmental interest of the forum.

(e) *Application of the Better Rule of Law:* When a court is faced with a choice between two laws — one notably anachronistic, the other reflecting the modern values of society — this consideration suggests that the court should be more inclined towards application of the superior or *better rule of law.*[78]

The weight given to each of Leflar's considerations will vary on a case-by-case basis.[79] The court's job is to ascertain the considerations relevant to the issue at hand. For example, in an interspousal tort case arising out of an auto accident, predictability of result and maintenance of interstate order will weigh less heavily than other factors.[80]

Several jurisdictions have utilized Leflar's theory as a basis for decision.[81] It is considered the least structured of the modern approaches.[82] However, its flexibility and emphasis on the concept of the *better rule of law* tends to make it the most subjective and result-selective of the modern theories.[83]

III. Analysis of Peters

The court in *Peters* confronted the issue of whether domiciliary or fo-

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[76] *Id.*

[76] *Id.* at 251-54. Courts are nonetheless cautioned against the temptation to turn the search for governmental interest into a device to sustain application of forum law.

[77] *Id.* at 251.

[78] *Id.* at 254-59.

[79] *Id.* at 264.

[80] *Id.* at 261-63.

[81] *See* Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973) (application of guest statute rejected under *better law* consideration); Mitchell v. Craft, 211 So.2d 509 (Miss. 1968) (wrongful death action concerning two Mississippi residents killed in a collision in Louisiana governed by Mississippi law); Brown v. Church of the Holy Name of Jesus, 105 R.I. 322, 252 A.2d 176 (1969) (applied Rhode Island wrongful death statute where both parties were Rhode Island residents, but accident occurred in Massachusetts); Zelinger v. State Sand and Gravel Co., 38 Wis.2d 98, 156 N.W.2d 466 (1968) (Wisconsin has *better law* for purpose of determining whether a Wisconsin resident in a Wisconsin auto accident can recover from an Illinois resident).

[82] *See* Woodward v. Steward, 104 R.I. 290, 243 A.2d 917, 923, *cert. denied,* 393 U.S. 957 (1968); Heath v. Zellmer, 35 Wis.2d 578, 151 N.W.2d 664, 672 (1967); Clark v. Clark, 107 N.H. 351, 222 A.2d 205, 210 (1966).

[83] *See supra* note 55.

rum law should determine the plaintiff's ability to sue her spouse in tort. The viability of plaintiff's suit turned on the court's resolution of the choice-of-law issue. Under forum law, Hawaii's interspousal immunity doctrine[84] would bar her suit, while the law of the parties' domicile, New York,[85] would permit it. The factual setting of *Peters* presented the court with an opportunity to break ground in an uncharted realm of Hawaiian jurisprudence as this jurisdiction lacked "authoritative choice-of-law decisions in the area of torts."[86] The court clearly rejected the traditional rule of *lex loci delicti*[87] and declined to adopt the *dominant contacts* approach of the *Restatement (Second)*.[88] After surveying the various modern choice-of-law methodologies,[89] the court declared that the proper approach entailed an "assessment of the interest and policy factors involved with a purpose of arriving at a desirable result in each situation."[90]

The court first examined the competing policies implicated by interspousal tort actions. The court surmised that Hawaii's immunity doctrine was designed to preserve marital harmony and prevent collusive suits.[91] New York's allowance of interspousal suits, on the other hand, evidenced its legislative judgment that the compensation of tort victims outweighed the risks of marital discord and fraudulent claims.[92] The court enunciated each state's interest in having the policies underlying its interspousal tort law applied in the case at bar. New York had a predominant interest in the parties' marriage as the state of domicile,[93] but Hawaii as the forum had an interest in excluding potentially collusive suits from its courts.[94]

The *Peters* court extended its search for factors relevant to the choice-of-law determination beyond the announced policies of Hawaii's interspousal tort rule. Several general Hawaii interests were recognized that precluded application of New York law. The court noted that Hawaii as the forum had an interest in "preserving the integrity and economy of its

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[84] *See supra* note 5. While *Peters* was the first Hawaii Supreme Court decision to squarely address the issue of what choice-of-laws rules govern in Hawaii, there were several previous federal court decisions that dealt with choice-of-laws problems in Hawaii. *See* United California Bank v. THC Financial Corp., 557 F.2d 1351 (9th Cir. 1977) (in a contract dispute involving federal securities regulations, California law was applied in determining attorneys' fees); Gates v. P.F. Collier, Inc., 378 F.2d 888 (9th Cir. 1967) (court applied prevailing American choice-of-law rules in the absence of guiding Hawaii precedents); DeRoburt v. Gannett Co., 83 F.R.D. 574 (1979) (motion for summary judgment denied as to the applicability of Nauru law in a defamation action brought in Hawaii).

[85] *See supra* note 9.

[86] 63 Hawaii at 656 n.1, 634 P.2d at 588 n.1.

[87] *Id.* at 664, 634 P.2d at 593.

[88] *Id.*

[89] *Id.* at 661-63, 634 P.2d at 591-93.

[90] *Id.* at 663, 634 P.2d at 593.

[91] *Id.* at 664, 634 P.2d at 593.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 665, 634 P.2d at 594.

judicial process."[95] That process might be disrupted by litigation of interspousal tort claims that Hawaii residents were precluded from filing.[96] The forum also had an interest in fulfilling the "general expectations which the Hawaiian insurer may have had regarding capacity to sue and adjustment of premiums."[97] As the insurance policy that covered the vehicle lease to Mr. Peters was written with the laws of Hawaii in mind, Mrs. Peters' suit for the proceeds threatened to contravene the insurer's expectations.[98] The court pigeonholed a third class of state interests under the rubric of "predictability of result and simplification of the judicial task."[99] Unpredictable results might ensue if the law of the parties' domicile were applied in a tourist destination like Hawaii to determine capacity to sue, since amenability to suit would vary depending on the visitor's residence.[100] Finally, an increase in insurance premiums paid by residents might result from the opening of Hawaii's courtroom doors to interspousal tort suits.[101]

The foregoing state interests prompted the *Peters* court to disavow the *Restatement (Second)* position that the law of the parties' domicile should be applied in interspousal tort suits. The court held that Hawaii law should determine the plaintiff's ability to sue her spouse for a tort of local inception.[102] Thus, Hawaii's interspousal immunity rule barred plaintiff's negligence action.[103]

IV. Hawaii Adopts Interest Analysis

Peters v. Peters provided the Hawaii Supreme Court with the opportunity to articulate the method by which future choice-of-law problems in tort will be resolved. While the court surveyed the major methodologies, then clearly rejected both *lex loci delicti* and the *Restatement (Second)* approach, it did not explicitly label the approach it was adopting. The test enunciated lends little in the way of guidance for resolving future choice-of-law issues, especially since the court seemed to assess the interests of only one involved state — Hawaii. While the court can be praised for departing from the traditional rule, it can also be criticized for the vagueness of its opinion for there is neither close analysis of all of the interests involved nor a careful delineation of the chosen methodology.

The court's reference to "providing predictability and simplifying the

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[95] *Id.*
[96] *Id.*
[97] *Id.* at 666, 634 P.2d at 594.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 667, 634 P.2d at 595.
[102] *Id.*
[103] *Id.* at 668, 634 P.2d at 595.

judicial task,"[104] its lengthy assessment of Hawaii's governmental interests, as well as its perfunctory support of the interspousal rule,[105] suggests that the court chose to base its choice-of-law rule on Leflar's choice-influencing considerations.[106] The court's failure to cite the last of Leflar's considerations — maintenance of interstate order — could have stemmed from the belief that the consideration was irrelevant to the issue at hand. In automobile cases, application of the law of the place of injury does not severely threaten interstate order,[107] especially when the accident occurs in an island state.[108]

While the Hawaii Supreme Court can be commended for rejecting *lex loci delicti,* it should have utilized the opportunity to provide a more definitive approach to future conflicts problems. A good example of the actual process of analysis under Leflar's approach is the New Hampshire Supreme Court's decision in *Clark v. Clark.*[109] *Clark,* while factually not on all fours with *Peters,*[110] will be presented as a vehicle for demonstrating the correct application of Leflar's approach. The reasoning of *Clark* and *Peters* will then be laid side by side for purposes of comparison. This comparison will demonstrate that the true interest analysis requires more than mere recital; it is actual understanding and concise application which prevents an approach from being labeled mechanical or result-oriented.

A. The Clark Decision

In *Clark v. Clark,*[111] the plaintiff rode as a passenger in the automobile her husband was driving from their home in New Hampshire to another part of the state. On route, the parties passed through Vermont where the accident which resulted in plaintiff's injuries occurred.[112] Mrs. Clark brought an action in tort against her husband in New Hampshire, the place of their common domicile,[113] and the court addressed the issue of whether forum law or the law of the place of injury should govern. Application of *lex loci delicti* would have resulted in dismissal of the suit for under Vermont law[114] a host driver is liable to his guests only for injuries inflicted by gross and willful negligence. New Hampshire, on the other hand, had no guest statute and thus required a lesser showing of ordinary

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[104] *Id.* at 666, 634 P.2d at 594.
[105] *Id.* at 658, 634 P.2d at 590.
[106] *See supra* text accompanying notes 68-83.
[107] *See* Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).
[108] *See infra* text accompanying notes 132-34.
[109] 107 N.H. 351, 222 A.2d 205 (1966).
[110] *See infra* p.
[111] 107 N.H. 351, 222 A.2d 205 (1966).
[112] *Id.*, 222 A.2d at 206.
[113] *Id.*
[114] *Id.* at 351-52, 222 A.2d at 206.

negligence.[115]

The court rejected *lex loci delicti*,[116] and adopted in its place Leflar's five *choice-influencing considerations*.[117] Of the five factors, the court reasoned that only two — advancement of the forum's governmental interests and application of the better rule of law — were truly relevant to the issue at hand.[118] It reasoned that since the Clarks' car was licensed and insured in New Hampshire, application of the Vermont guest statute would not meaningfully advance Vermont's interest in protecting local insurers.[119] Vermont's only relation to the suit lay in the fact that the accident occurred there, while all of the factors that bore on the guest-host relationship centered in New Hampshire.[120] The court concluded that New Hampshire's was the better rule of law, finding guest statutes practically medieval in light of society's mobility and the availability of insurance.[121] Based on these considerations, the court decided that New Hampshire's ordinary negligence rule controlled.[122]

B. Clark: A Vehicle for Comparison

Clark can be distinguished from *Peters* for several reasons — unlike *Peters*, *Clark* dealt with a plaintiff who brought suit in the state of domicile, and turned upon the applicability of a guest-host statute. The decision does, however, provide a workable model by which comparison of the reasoning process in each case can be made. Of particular value is the *Clark* court's review of the relevant choice considerations, followed by its demonstration of how the approach was to be applied in both present and future conflicts situations. For purposes of this Note, consideration of each factor in Leflar's approach will provide the basic framework for comparison and suggested application.

1. *Predictability of Result*:[123] This consideration seeks to protect the justifiable expectations of the parties. The court in *Clark* stated that in the case of automobile accidents, this consideration is largely irrelevant since accidents are unplanned events.[124] In other words, it is unlikely that the parties shaped their conduct in accordance with the applicable laws of liability for negligence. The court did focus its attention on the fact that as residents of New Hampshire, the parties could reasonably expect New

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[115] *Id.*
[116] *Id.* at 352, 222 A.2d at 207.
[117] *Id.* at 353, 222 A.2d at 207-08.
[118] *Id.* at 355-56, 222 A.2d at 209.
[119] *Id.* at 356, 222 A.2d at 209.
[120] *Id.*
[121] *Id.* at 357, 222 A.2d at 210.
[122] *Id.*
[123] *See supra* text accompanying notes 68-83.
[124] 107 N.H. at 355, 222 A.2d at 209.

Hampshire law to protect them as they passed through Vermont.[125] The negligent New Hampshire driver would not be unduly surprised at a tort suit because he would expect to be liable under New Hampshire law, and would thus insure against potential liability.

In contrast, the court in *Peters* made no reference to Mr. & Mrs. Peters' justifiable expectations. It is submitted that as a New York resident, Mr. Peters would not have been surprised by his wife's suit. It is more likely that he expected the rental charge for the vehicle to include liability insurance. The court's discussion concerning predictability of result centered on the justifiable expectations of the Hawaiian insurer, rather than the nominal parties. As the real defendant, the court stressed that the Hawaii insurer needed the protection of predictability. This contention is, however, unpersuasive. First of all, Hawaii actively solicits its out-of-state visitors, fully expecting a number of them to rent autos instead of troubling to ship their own cars to the islands for a short duration.[126] The insurer's professed reliance on the application of Hawaii law in every multi-state tort case is therefore misplaced, especially since prior to *Peters*, there was no choice-of-law doctrine to rely upon and the general rule in interspousal tort cases was to apply *lex domicilii*.[127] Furthermore, the court's concern over increased premiums seems unwarranted as there are other methods of preventing any increase from reaching Hawaii residents, such as the use of *kama'aina* discount rates.[128] Lastly, Hawaiian insurers would not balk at other types of intrafamily tort actions, such as parent-child suits, although the danger of collusion would remain.[129] In short, the court's vigorous protection of the insurer's expectations appears result-oriented.

Even less desirable than its failure to consider the parties' justifiable expectations is the court's indifference to the evils of forum shopping. This could be due to the interpretation placed by the court on the predictability of result factor. The court interpreted this factor to mean that all future interspousal tort claims will be barred from Hawaii courts. From a broader perspective, predictability of result seeks to reduce the chances that a wily plaintiff will select the forum whose choice-of-law rule is most favorable to his or her suit. The court's directive that Mrs. Peters would have been better off suing her husband in New York[130] seems to

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[125] *Id.* at 356, 222 A.2d at 209.

[126] 63 Hawaii at 666, 634 P.2d at 594.

[127] *See supra* text accompanying notes 84-103.

[128] *Kama'aina* is the Hawaiian word for *native born* or residents of Hawaii. *See* PUKUI & ELBERT, HAWAIIAN DICTIONARY 115 (1971).

[129] *Cf.* Peterson v. City & County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970) (court abolished parent-child immunity since denial of suit would more likely disrupt family harmony due to increased financial burden. Court sought to further Hawaii's policy of compensating tort victims).

[130] 63 Hawaii 664, 634 P.2d at 593. The court states: "Mrs. Peters could have addressed her plea for damages to the courts of her domicile, and it is likely that they would have

encourage parties to search for a hospitable forum. It is difficult to reconcile this attitude with the basic notions underlying predictability of results.[131]

2. Maintenance of Interstate Order:[132] This consideration reminds courts to fairly consider the interests of each of the states involved in the conflict. In *Clark*, the court suggested that interstate order is not seriously threatened as long as the choice-of-law does not offend the sensibilities of the involved states.[133] Application of forum law would be justified under the *Peters* facts because the forum is substantially connected to the facts and issues — it is the place of injury, place of insurance and place of medical treatment. The court's failure to mention this consideration may be due to the fact that Hawaii's insular locale removes us from interstate movement. It is also possible that the court was convinced that Hawaii law governed regardless of the effect on interstate order.

Deliberate preference for local law and local persons, without independent justification, does pose a threat to interstate harmony. After *Peters*, it is clear that until the legislature acts, non-resident spouses injured in Hawaii will be denied access to Hawaii's courts. Consideration should be given to the possible ramifications of the court's holding. Non-resident spouses will be forced to shop for a more favorable forum on the mainland. The distance of the forum from the evidence and witnesses will probably increase the length and cost of litigation.[134]

3. Simplification of the Judicial Task:[135] This consideration addresses the forum's desire to administer justice with speed and efficiency. The court in *Clark* recognized that application of New Hampshire law would ease the judicial task,[136] but noted that, if justice required, Vermont law could also be applied with relative ease.[137]

The *Peters* court concluded that "reliance on the law of the domicile to determine the variability of interspousal actions"[138] would complicate the judicial task. Instead of hiding behind generalizations the court should have examined the situation and determined the difficulty of applying the New York statute to allow suit. This appears to require nothing more than reading the applicable statute and deciding that the plaintiff can or

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honored an attempt to prove her husband's fault and the resultant injury. She nonetheless chose to assert her claim in Hawaii, presumably with knowledge that the courts were subject to restraint when interspousal actions are concerned."

[131] *See supra* text accompanying notes 68-83.

[132] *Id.*

[133] 107 N.H. at 356, 222 A.2d at 209.

[134] McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 334-35 (1959); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1053 (1930).

[135] *See supra* text accompanying notes 68-83.

[136] 107 N.H. at 356, 222 A.2d at 209.

[137] *Id.*

[138] 63 Hawaii at 666, 634 P.2d at 594.

cannot sue under the statute. Furthermore, according to *Babcock v. Jackson*, "there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction."[139] This provides that Hawaii would only have to utilize New York law on the issue of plaintiff's capacity to sue, and is free to apply Hawaii law on all other substantive issues. Therefore, a tort suit between non-resident spouses would hardly be more difficult to preside over than any other action brought in tort in Hawaii.

4. Advancement of the Forum's Governmental Interests: In *Clark* the court found that New Hampshire had a valid governmental interest in allowing resident guests to recover for injuries inflicted by resident hosts.[140] As a corollary, the court was convinced that Vermont had a minimal interest in subjecting non-residents to a statute aimed at protecting Vermont drivers and insurers, especially since New Hampshire did not extend such protection to its residents.[141]

While the court in *Peters* did not attach labels to this portion of its analysis, it nonetheless undertook a weighing of governmental interests. The court noted that Hawaii has a valid interest in preserving the integrity of its law prohibiting interspousal suits. Analysis of the policies underlying the immunity rule indicate that there was little danger of offense. The court cited "preservation of marital harmony" and the "prevention of collusive suits" against insurers as two reasons for the immunity rule.[142] Both of these fears had been dispelled earlier when Mrs. Peters candidly informed the court that her suit was one "brought to avail herself of the insurance proceeds," and also reassured the court that the marital relationship was in no way endangered.[143] It is questionable whether advancement of this interest requires the rule to be extended over non-residents. Hawaii has a minimal interest in preserving the marital relationship of non-residents who visit here, and the danger of collusion can be avoided by allowing liberal discovery and increasing the party's burden of proof. As the parties' domicile, New York has a vital interest in the Peters' relationship, and obviously believes that victim compensation considerably outweighs the risk of disharmony and fraud. Absent these dangers, there is no real justification to extend the immunity doctrine over New York residents.

The court also believed that the integrity and economy of the judicial process would be disrupted by litigation of interspousal tort claims that Hawaii residents were precluded from filing.[144] This protective attitude is inappropriate under the circumstances. Hawaii law mandates that every

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[139] 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

[140] 107 N.H. at 356-57, 222 A.2d at 209-10.

[141] *Id.* at 356, 222 A.2d at 209-10.

[142] 63 Hawaii at 664, 634 P.2d at 593.

[143] *Id.* at 661, 634 P.2d at 591.

[144] *Id.*

driver (resident or non-resident) be insured against liability,[145] yet the court seeks to deny non-resident victims from enforcing valid claims they may have against the insurer. This, in essence, insulates the Hawaii insurer from judgments against a particular class of victims — non-resident spouses, and allows the insurer the windfall of having non-residents pay for coverage, knowing that a number of them will not receive the benefits of such coverage. Such a windfall is inherently unfair to our non-resident visitors as both consumers and as potential tort victims.

5. Application of the Better Rule of Law:[146] In identifying the better rule of law, the court in *Clark* reflected upon the declining use of guest statutes over the years.[147] Guest statutes were enacted in the 1920's to protect uninsured motorists against liability for injuries to ungrateful guests (usually hitchhikers).[148] The court then noted that with the advent of no-fault insurance such protection was no longer necessary. It then easily concluded that New Hampshire's ordinary negligence rule was preferable to applying Vermont's guest statute.[149]

While the *Peters* court did not name either as the better rule of law, it did support Hawaii's interspousal rule, somewhat half-heartedly, by stating that it was "unable to conclude" that the rule is totally irrational, despite unanimous criticism by legal commentators.[150] The court refused to undertake judicial legislation, and chose to leave revision of the rule to the Hawaii legislature.[151] It would have been more rational for the court to simply interpret the Hawaii statute as inapplicable to non-resident spouses.

Furthermore, had it exerted the effort, the court would have recognized that there is currently a clear and decisive trend throughout the nation to abrogate the doctrine of interspousal immunity.[152] Courts[153] and commentators[154] criticize the immunity rule on three grounds: first, that the im-

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[145] *Id.* at 667 n.22, 634 P.2d at 595 n.22.

[146] *See supra* text accompanying notes 68-83.

[147] 107 N.H. at 356-57, 222 A.2d at 210.

[148] *Id.*

[149] *Id.* at 357, 222 A.2d at 210.

[150] 63 Hawaii at 659-60, 634 P.2d at 590-91.

[151] *Id.* at 659, 634 P.2d at 590.

[152] *See* Comment, *Brown v. Brown: The Current Status of Interspousal Immunity in Massachusetts*, 16 NEW ENG. L. REV. 573, 578 n.37 (1981) (the following states have abrogated in whole or in part, the doctrine of interspousal immunity: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Idaho, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Washington, Wisconsin).

[153] *Id.*

[154] *See* Note, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251 (1975); Comment, *The Law of Interspousal Immunity in Ohio*, 28 CLEV. ST. L. REV. 115 (1979); Comment, *Interspousal Tort Immunity: An Analysis of a Dying Doctrine and Its Status in Tennessee*, 47 TENN. L. REV. 123 (1979); Comment, *Lewis v. Lewis: Dissolving the "Metaphysical" Merger in Interspousal Torts*, 12 NEW ENG. L. REV. 333 (1976).

munity is an offspring of the now obsolete theory of the legal unity of husband and wife; second, that immunity does not promote its stated objectives of protecting domestic tranquility because it precludes compensation for injuries; and finally, that potential for collusion is a discredited rationale since there are adequate procedural safeguards to prevent it. While the court had reason to defer to the legislature, its application of the immunity doctrine without further question or comment betrays the fact that it had an imperfect understanding of the chosen methodology.

Assuming that *Peters* adopted LeFlar's *choice-influencing considerations,* the court's faulty understanding of the approach and its practical application destroys the merit of any attempted *interest analysis.* The court's desire to prohibit all interspousal tort suits in Hawaii precluded any real analysis of the interests which New York had regarding the issue of plaintiff's ability to sue. As such, the *Peters* decision stands as a case decided on the law of the forum, under the guise of *interest analysis.*

V. The Aftermath of Peters

One possible ramification of the court's failure to supply adequate guidelines by which to apply *interest analysis* is that future courts may apply *interest analysis* only superficially. The recent decision by the United States District Court of Hawaii in *Jenkins v. Whittaker Corporation*[155] manifests such a tendency toward cursory analysis. In *Jenkins,* the plaintiff's decedent was a serviceman involved in a military training exercise on the Island of Hawaii who was killed by a malfunctioning atomic explosion simulator manufactured by the defendant.[156] The court applied the choice-of-law doctrine enunciated in *Peters* to decide the issue of whether Hawaii, California (place of manufacture) or Indiana law (plaintiff's residence) would govern the action in tort.[157] The court determined that Hawaii law should govern for several reasons. First, application of Hawaii law simplified the judicial task.[158] Second, application of Hawaii law to product liability claims arising from injury to military personnel stationed in this state provided significant predictability of result.[159] Finally, Hawaii possessed a substantial interest in having its law applied in order to "give its citizens the level of protection the state deems appropriate."[160]

Jenkins presented essentially a false conflict situation in which the facts and circumstances evidence that only one state had a significant interest in the outcome. The fact that the plaintiff in *Jenkins* was stationed

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[155] 82-1 Hawaii Legal Reporter 82-0533 (1982).
[156] *Id.* at 82-0535.
[157] *Id.* at 82-0536.
[158] *Id.* at 82-0537.
[159] *Id.*
[160] *Id.*

in Hawaii for military duty, that the defendant corporation could reasonably expect to be held liable for its defective products, and that Hawaii had an interest in protecting its citizens from the dangers of defective products, all served to significantly outweigh any interests asserted by California or Indiana. The correctness of the *Jenkins* decision is not questioned, but one wonders why *interest analysis* could not provide the right result in *Peters*. One answer lies in the different fact patterns of the two cases; *Peters* dealt with the plaintiff's capacity to sue while *Jenkins* dealt with the question of whether a tort was committed. Also, *Peters* is an example of a true conflict, since both New York and Hawaii had valid interests to be advanced by application of their laws.

Jenkins confirms the fact that future Hawaii courts will rely upon at least three of the five factors suggested by Leflar — predictability of result, simplification of the judicial task, and advancement of the forum's governmental interests. Whether these are sufficient to achieve the goals of *interest analysis* depends upon the court's ability to distinguish between true and false conflicts, and lend appropriate weight to the factors relevant to the issue at hand. When faced with situations similar to *Jenkins*, the court may be able to apply interest analysis superficially and still reach a justifiable result. For future *Peters* situations, however, in order for interest analysis to retain its credibility, Hawaii must adhere to the spirit as well as the letter of the approach, and give earnest consideration to the legitimate interests of all involved states.

VI. Conclusion

Courts and commentators have recognized that the traditional rule of *lex loci delicti* fails to examine the significant interest of jurisdictions having connections with the parties or occurrence in tort litigation. As a result, the great majority of jurisdictions have replaced *lex loci delicti* with *interest analysis* as a method for resolving choice-of-law problems in tort.

Hawaii has joined the majority in rejecting *lex loci delicti* and apparently chosen in its place a modified version of Leflar's *choice-influencing considerations*. Analysis of *Peters*, however, indicates that the court was not faithful to its adopted approach. It instead presumed that a showing of Hawaii's public policy and demonstrated interests discounted the need to meaningfully consider the policies of the other interested jurisdiction. The precedent set by *Peters* threatens to establish a preference for *lex fori* in multistate tort litigation in Hawaii.

Amy Emiko Ejercito

CORPORATE GOVERNANCE IN JAPAN: THE POSITION OF SHAREHOLDERS IN PUBLICLY HELD CORPORATIONS

CONTENTS

I. INTRODUCTION

In June of 1981, Japan's Commercial Code[1] underwent a major revision affecting many areas of corporate governance.[2] The 1981 Code amendments,[3] which became effective on October 1, 1982, are principally

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[1] SHOHO (Commercial Code), Law No. 48 of 1899 [hereinafter cited as "Commercial Code"].

[2] This was the "most significant revision" of Japan's Commercial Code since 1950. Morimoto, *Kabunushi Teianken to Shomen Tohyo Seido* (Shareholder Proposal Rights and the System of Authorizing Votes) (pt. 1), 750 JURISUTO 125 (Oct. 1, 1981). The 1950 amendments are described *infra* at note 26.

[3] Shoho nado no Ichibu o Kaisei suru Horitsu (Law to Amend Certain Parts of the Commercial Code, etc.) (Law No. 74 dated June 9, 1981). The legal form used by publicly listed

designed to exact greater accountability on the part of management and encourage broader shareholder participation in corporate decision-making. Unlike many statutory changes in the past, the 1981 amendments have attracted a great deal of attention in Japan and are expected to have a significant impact on actual corporate practices.

This survey examines the general status of corporate governance in Japan in light of the impact the recent Code amendments have had on Japanese corporate law. Because the amendments portend significant changes in the role played by shareholders in Japan, the focus will be on the position of the shareholder. To aid the reader in understanding the nature of Japanese corporate governance, examples from our own hotly debated problem of corporate governance in America are used as reference points to Japan's situation.[4]

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corporations as well as by most other companies in Japan is that of the "stock company" ("*kabushiki gaisha*"). The portion of the Commercial Code dealing with stock companies is Part II (Chapters IV, VI, VII). (For a description of the various types of legal forms used by business entities in Japan, see *infra* note 88). Law No. 74 of 1981 also amended Kabushiki Gaisha no Kansa nado ni Kansuru Shoho no Tokurei ni Kansuru Horitsu (Law Regarding Exceptional Rules of the Commercial Code Concerning the Auditing, etc. of Stock Corporations) (Law No. 22 dated Apr. 2, 1974) [hereinafter cited as "Special Audit Law"]. While Part II of the Commercial Code applies to all stock corporations, the Special Audit Law contains a set of exceptional rules for "large" corporations, those with stated capital of at least 500 million yen or with liabilities of at least 20 billion yen, and another set of exceptional rules for "small" corporations, those with stated capital of no more than 100 million yen and liabilities of less than 20 billion yen. Most of Japan's publicly listed companies fall into the category of "large" corporations. *See also* Chart I. Law No. 74 of 1981 also includes a set of rules to facilitate the transition to the new law. Fusoku (Supplemental Rules) [hereinafter cited as "Supplemental Rules"]. For an unofficial translation of Part II of the Commercial Code and the Special Audit Law, as amended, and of the Supplemental Rules, see 2 JAPAN BUS. L.J. No. 9 (Oct. 1981). The extensive revision of the Commercial Code required amendments to many other Japanese laws. Most of these reconciling changes were made in Shoho nado no Ichibu o Kaisei suru Horitsu no Shiko ni Tomonau Kankeihoritsu no Seiri nado ni Kansuru Horitsu (Law to Adjust Related Laws Accompanying the Implementation of the Law to Amend Certain Parts of the Commercial Code) (Law No. 75 dated June 9, 1981).

[4] In both countries issues in such areas as corporate social responsibility, employee rights, abuse of corporate power, corporate liability for third party injuries, corporate disclosure and protection of investors, social costs and benefits of monopolies and economic concentration, shareholder rights and the relationship of corporate ownership and corporate control are the subject of debate. These issues are debated not only within the corporate world, but in court rooms and legislative bodies, as well as among legal scholars, political groups and social reformers in general. In the United States, one commentator has described the literature generated from these debates to be a "sea of writing. . .which is so vast that it could not be cited comprehensively." Kripke, *The SEC, Corporate Governance, and the Real Issues*, 36 BUS. LAW. 173 (1981). For U.S. references, see e.g., Kripke, *supra*, at 173 n.1; *Symposium on Corporate Governance*, HOFSTRA L. REV. 1 (1979); THE ATTACK ON CORPORATE AMERICA: THE CORPORATE ISSUES SOURCEBOOK (M. Johnson ed. 1978) (containing an extensive bibliography on corporate governance).

Additionally, intelligent debate about these issues is hampered by many inadequacies in the available data. In January of 1974 the U.S. Senate published a document, SUBCOMMS. ON INTERGOVERNMENTAL RELATIONS AND BUDGETING, MANAGEMENT AND EXPENDITURES OF THE

Section II outlines the historical development and structure of Japan's modern publicly held corporation.[5] It examines the rise of enterprise groups which has impeded widely dispersed stock ownership by concentrating shareholdings in the hands of corporate insiders. It also reviews the key provisions of Japan's Commercial Code governing the rights and duties of company directors and auditors.

Section III focuses on the position of the individual shareholder in view of the impact the recent Code amendments have had on the individual's role in the corporate structure. There has been little meaningful experience with shareholder democracy in Japan, notwithstanding the fact that Japanese statutes are modeled after U.S. corporate laws and in some instances provide shareholders with even more rights than do their American counterparts. It is argued that the status of the individual shareholder in Japan is akin to a short-term creditor rather than an owner as a result of the high degree of cross-shareholdings among companies affiliated with an enterprise group. Several revisions to the Commercial Code, in particular the addition of shareholder proposal rights and changes in the proxy system and the conduct of general shareholder meetings, are expected to facilitate greater shareholder participation in corporate affairs.

Although it is too early to predict whether the 1981 Code amendments will produce significant changes in shareholder and corporate behavior, the amendments are timely. There are social and economic pressures on corporations to attract greater numbers of individual investors, which will foster increased shareholder activism. These non-legal forces should complement the statutory expansion of shareholders' rights.

II. Corporate Governance

Although significant cultural differences separate Japan and the United

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Senate Comm. on Government Operations, Disclosure of Corporate Ownership, S. Doc. No. 62, 93d Cong., 2d Sess. (1974) (The Committee's name has been changed to the Committee on Governmental Affairs, and the latter Subcommittee involved is now that on Reports, Accounting and Management.), which "broadened interest in the inaccuracy and inadequacy of the Federal Government's information concerning ownership of U.S. corporations." Staff of Senate Comm. on Government Operations, 94th Cong., 1st Sess., Corporate Ownership and Control 1 (Comm. Print 1975) [hereinafter cited as "1975 Study on Corporate Ownership"]. Hearings and studies followed, *id.*, and in 1975 the Committee published its findings regarding the extent to which information was not available and ways in which obtainable information was inaccurate. *Id.*

[5] Corporations listed on Japan's stock exchanges are divided into two sections, the larger companies being listed on the First Section and the smaller ones on the Second Section. There are currently about 1000 First Section companies representing over 90% of the market value of all listed shares nationwide and 85% of the trading volume of all exchanges. There are about 750 Second Section firms. In addition, there are about 100 companies with stock traded over the counter in Tokyo. Manual of Securities Statistics 56-57, 58, 66-67, 70-72, 92-93 (Nomura Research Institute ed. 1982).

States,[6] the theoretical legal framework underlying Japanese corporate

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[6] In particular there are differences between the legal systems of Japan and the United States that the Western reader must be conversant with before undertaking a study of corporate governance in Japan. Predominantly, the scarcity of case law in Japan and the absence of federalism greatly affects the manner in which statutory laws are viewed and applied.

The utilization of case law, is perhaps, the most illustrative example of the difference between the two systems. As contrasted to the practice in the United States, the reliance on case law in Japan is almost nonexistent. Beer & Tomatsu, *A Guide to the Study of Japanese Law*, 23 AM. J. COMP. L. 284, 288 (1975); Yamada, *Comparative Study on the Binding Force of Legal Precedents* (summary in English) 26 HIKAKU HO ZASSHI (COMP. L. J.) 167 (1965). For example, while Section 10(b) and Rule 10b-5 under the U.S. 1934 Securities Exchange Act have produced volumes of cases, Article 58 of the Securities Exchange Law (SEL), the Japanese equivalent of Section 10(b), has produced no reported cases. Sato, *Securities Administration*, in LECTURES ON JAPANESE SECURITIES REGULATION 97, 101 (Japan Securities Research Institute ed. 1980). The small number of lawsuits in Japan is, in part, a result of the way the Japanese view the judicial process. The Japanese legal consciousness places a premium on avoiding formal methods of dispute settlement such as arbitration or litigation since intervention by strangers is considered to be humiliating. 2 D. F. HENDERSON, CONCILIATION AND JAPANESE LAW, TOKUGAWA AND MODERN 205-06 (1965); THE JAPANESE LEGAL SYSTEM 494-500 (H. Tanaka ed. 1976) [hereinafter cited as "Tanaka"]. Legal tools used by shareholders are not well developed. For example, there is no device for class actions nor are there any provisions empowering the finance minister to bring civil suit on behalf of a private party as ancillary relief. Tatsuta, *Enforcement of Japanese Securities Legislation*, 1 J. COMP. CORP. L. & SEC. REG. 95, 97 (1978). Furthermore, Japanese attorneys do not view bringing suit as a way to challenge and define interpretations of the law. Judges are similarly disinclined to judicial activism. Tanaka, *supra;* Itoh, *How Judges Think in Japan*, 18 AM. J. COMP. L. 775 (1970). As a result, legal proceedings are rarely reported. However, this does not mean that violations of securities and business law do not occur in Japan. For each lawsuit which is fully litigated many more disputes are resolved or settled at some earlier stage than would be the case in the United States.

The second important difference is the absence of federalism in Japan. The dual existence of state and federal laws has greatly complicated issues in the United States and has often become the focal point of debate. Chang, *The Role of the State Courts After the Model Business Corporation Act*, 3 U. HAWAII L. REV. 171, 175 (1981). This problem does not exist in Japan because the applicable laws are all national. In theory, it is much easier to determine what the "law" is. However, application of the law is not a simple matter. Although based on American models, Japan's corporate statutory schemes function very differently in practice. Browne, *The Capital Structures of Japanese Corporations*, ASIAN FINANCE, Aug. 15, 1980, at 32 [hereinafter cited as "Browne"]. While some provisions have been ignored, amended, or applied in ways different from their U.S. counterparts, others function side by side with traditional Japanese institutions. One reason for this is the Japanese view of the role of statutory law. The Japanese are less bothered by disparities between the law as enacted and the law as applied. Browne, *supra;* Johnson, *The Japanese Legal Milieu and its Relationship to Business*, 13 AM. BUS. L.J. 335, 341 (1976); S. Takeuchi, *Wide Latitude of Allowablility of Laws is Pragmatic Solution to Gap With Reality*, Japan Econ. J., June 10, 1980, at 28, col. 1 [hereinafter cited as "S. Takeuchi"]. For example, there has been serious consideration of an amendment to the Commercial Code prescribing social responsibilities for corporate management even though it fails to establish clear means of enforceability and also fails to define what or to whom the responsibility is owed. A Takeuchi, *Should There Be a General Provision on the Social Responsibility of Enterprise in the Commercial Code?*, 11 LAW IN JAPAN: AN ANNUAL 37, 46-47 (1978), *translated from* SHOJI HOMU (No. 722) 33 (1976).

governance is based on the traditional American notion of corporate democracy. This notion contemplates a balance of power among the different interest groups within the corporation. In theory, shareholders, directors and management impose controls upon one another at different levels of the corporate hierarchy. For example, the board delegates to management the power to conduct the day-to-day business transactions of the corporation; however, the board retains the power to oust ineffective management. Shareholders, in turn, may replace unresponsive board members with more accommodating directors. Moreover, if the majority shareholders abuse their power, the minority shareholders may protect their interests by bringing derivative suits.[7]

For publicly held U.S. companies, the process of corporate governance functions quite differently in practice. "Students of the evolution of the modern corporation will note that shareholders once had the right to remove directors at will. Today management tells the owners to remove themselves from the corporation."[8] In the U.S. the rise of corporate giants with tens of thousands of shareholders has contributed to the decline of corporate democracy.[9] In Japan, democratic corporate governance is even less viable. The Japanese experience with corporate democracy did not for the most part take place until post-World War II reforms were imposed by Americans.[10] Moreover, the post-war emergence of large publicly-listed companies has made corporate democracy impractical.

A. Development of the Stock Market and the Modern Public Corporation in Japan

1. The Rise of Industrial Japan - 1868-1945

The rapid industrialization of Japan from the late 1800's through the 1930's was fueled by bank financing and government funding, in contrast

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[7] When differences of opinion between management (and directors and majority shareholders) on the one hand and minority shareholders on the other arise, the "Wall Street Rule" prevails: "if you don't like management sell your stock." *Protection of Shareholders' Rights Act of 1980: Hearings on S. 2567 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 132, 135 (1980) (statement of David S. Ruder, Dean, Northwestern University Law School) [hereinafter cited as *"Shareholders' Rights Act"*].

[8] *Id.* at 4 (statement of Howard M. Metzenbaum, U.S. Senator, quoting David Norr).

[9] The unwieldy volume of shareholders also raises the price of corporate decision-making. "Enhanced shareholder decision-making would not only impose costs on individual investors, it would also impose additional costs on each corporation. If all shareholders participated in the corporate decision-making process, large costs and substantial delays would result before a corporation could take any action at all." Lebowitz, *Are Corporations Undemocratic Private Minigovernments?*, in THE ATTACK ON CORPORATE AMERICA: THE CORPORATE ISSUES SOURCEBOOK 21, 23 (M. Johnson ed. 1978).

[10] *See infra* note 17 and accompanying text.

to the American tradition of equity capitalization. Although stock exchanges, established in both Tokyo and Osaka in 1878, experienced increased trading after the rise of business enterprises in the 1890's, Japanese corporations were rarely capitalized by public offerings of stock.[11] Large tightly controlled industrial conglomerates called *"zaibatsu"*[12] dominated pre-war industrial growth. This phenomenon resulted in tremendous economic concentration. The *zaibatsu* did not list their stock on the exchange, but conducted their operations on a self-financing basis.[13] Thus, "in contrast to the striking develop[ment] of the banks, Japanese stock markets came to possess the unusual feature of having its trading market dominated by speculative transactions on a few issues and the inability to function as a supplier of long-term industrial capital."[14]

Many of the independent companies that did list their stock had poor public images unrelated to their economic performance.[15] Participation in the stock market was considered by many to be as socially degrading as gambling.[16]

2. *The Allied Occupation and Its Legacy - 1945-1952*

During the Occupation following World War II, the American-dominated Supreme Commander for the Allied Powers (SCAP) instituted many reforms designed to dilute economic concentration, disperse stockholdings and invigorate shareholder democracy.[17] The *zaibatsu*, as well as many other monopolistic entities and holding companies, were dissolved or reorganized.[18] A mass release of stocks known as the "Securities De-

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[11] JAPAN SECURITIES RESEARCH INSTITUTE, SECURITIES MARKET IN JAPAN 1 (1980) [hereinafter cited as "SECURITIES MARKET IN JAPAN"].

[12] The *zaibatsu* were giant holding companies and financial oligarchs with close government ties. For a description of a *zaibatsu*, see Caves & Uekusa, *Industrial Organization*, in ASIA'S NEW GIANT 459, 494-504. (H. Patrick & H. Rosovsky eds. 1976) [hereinafter cited as "Caves & Uekusa"].

[13] SECURITIES MARKET IN JAPAN, *supra* note 11, at 1.

[14] *Id.* at 1-2.

[15] ZAIKEI SHOYOHOSHA, TOSETSU NIHON NO SHOKEN SHIJO (Japanese Securities Market) 18 (K. Shozo ed. 1977) hereinafter cited as "TOSETSU NIHON NO SHOKEN SHIJO"].

[16] Interview with Mr. Hiroshi Miyamura, Senior Vice-President and Manager of Nomura Securities International, Inc., Honolulu Office (Mar. 30, 1983).

[17] For example, post-war legislative measures reflecting Anglo-American origin were enacted in response to pressures by SCAP. Amendments to Japan's Commercial Code in 1950 promoted corporate democracy by strengthening shareholder rights, redistributing corporate powers among shareholders, the board of directors and the corporate auditors and provided for a new method of stimulating capital investment. In addition, Japan's Security Exchange Act, enacted in 1948, emulated United States legislation by mandating disclosure of corporate information. Yazawa, *The Legal Structure for Corporate Enterprise: Shareholder-Management Relations Under Japanese Law*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 547, 547-48 (A. T. von Mehren ed. 1963) [hereinafter cited as "Yazawa"]. *See also infra* note 26.

[18] SECURITIES MARKET IN JAPAN, *supra* note 11, at 5. For a brief description on the disso-

mocratization Movement"[19] was undertaken. Antimonopoly laws tightly limited shareholdings of financial institutions and completely prohibited the acquisition of stock by other companies.[20] The stock exchanges were also reorganized.[21]

These reforms permitted dramatic increases in shareholdings by individuals[22] and greatly expanded Japan's stock market.[23] As a result, an enduring legacy of the Occupation is the modern Japanese publicly held corporation.[24] While much of Japan's wealth during the immediate postwar era was controlled by a few families, today economic power is primarily held by large listed companies run by professional management teams.[25]

B. Return of Economic Concentration

1. Failure of Democratization Efforts

The Occupation forces rewrote Japan's Commercial Code using an American model.[26] However, the new corporate management class in Ja-

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lution of the *zaibatsu*, reorganization of the stock exchanges and democratization of securities ownership, see T. F. M. ADAMS & I. HOSHII, A FINANCIAL HISTORY OF THE NEW JAPAN 23-26, 37-41, 43-48 [hereinafter cited as "ADAMS & HOSHII"]. A more detailed study is presented in E. M. HADLEY, ANTITRUST IN JAPAN (1970) [hereinafter cited as "HADLEY"].

[19] SECURITIES MARKET IN JAPAN, *supra* note 11, at 5. *See also* ADAMS & HOSHII, *supra* note 18, at 43-47 (briefly describing the Democratization Movement).

[20] ADAMS & HOSHII, *supra* note 18, at 25.

[21] SECURITIES MARKET IN JAPAN, *supra* note 11, at 5-6.

[22] Corporate holdings dropped from 24.7% in March 1946 to 5.6% in March 1950; concurrently, individual ownership increased from 53.1% to 69.1%. ADAMS & HOSHII, *supra* note 18, at 26.

[23] In 1945 there were 1.7 million shareholders of 631 companies listed on the First Section of Japan's stock market. *See supra* note 5. The number of shares listed was a mere 444 million. By the end of the Occupation in 1952 the number of shareholders had increased over fourfold to 7 million. Seven hundred seventy companies were listed with 5.4 billion shares outstanding, 1200 times the number of shares listed seven years earlier. By 1980, there were 18 million shareholders owning 203 billion shares in 1022 First Section companies. MANUAL OF SECURITIES STATISTICS 88-93 (Nomura Research Institute ed. 1982) [hereinafter cited as "NRI MANUAL"].

[24] In 1981 there were 1745 companies listed on all of Japan's exchanges with a total stock market value of about $431 billion. NRI MANUAL, *supra* note 23, at 72. ($1.00 = ¥220.) Of these companies, 974 were listed on the First Section of the Tokyo Stock Exchange with a market value of $440 billion. *Id.* In comparison, 1565 companies were listed on the New York Stock Exchange in 1981 with a market value of $1143 billion. NEW YORK STOCK EXCHANGE FACT BOOK (1982).

[25] R. CLARK, THE JAPANESE COMPANY 85-86 (1979) [hereinafter cited as "CLARK"].

[26] Prior to the 1950 Occupation-inspired revisions, Japan's Commercial Code reflected European influences. Herman Rossler of Germany who served as legal advisor to the Japanese Ministry of Justice between 1881 and 1884 was the principal author of the original Code. Salwin, *The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals*, 50 GEO. L. J. 478, 484 (1962) [hereinafter cited as "Salwin"]. Pre-war

pan and the growing number of individual shareholders were not pre-

corporate law was thus primarily a Germanic transplant, although it incorporated French and English laws as well. *Id.*

SCAP instigated Code revisions in order "to strengthen the democratic forces in Japan and to prevent economic activity from being used in support of military ends." Blakemore & Yazawa, *Japanese Commercial Code Revisions Concerning Corporations*, 2 AM. J. COMP. L. 12, 13 (1953) (quoting Far Eastern Commission, 27 NIPPON KANRI HOREI KENRYU 27 (1947)) [hereinafter cited as "Blakemore & Yazawa"]. A committee of Japanese officials and Occupation representatives was entrusted with developing Code amendments reflecting SCAP's democratization policies. The Uniform Stock Transfer Act of 1909 and the Illinois Business Corporation Act of 1947 were utilized by the committee members as a framework for their proposals. The use of the Illinois measure "apparently was not a result of the excellence of the legislation of that state but simply of the fact that the particular SCAP officials in charge of revision hailed from Chicago." *Id.* at 15.

To achieve democratization objectives, amendments to the Japanese Commercial Code were designed to produce three major effects: (1) redistribution of corporate powers, (2) provision of new capital investment mechanisms and (3) strengthening of individual shareholders' rights. *Id.* at 15-22.

(1) *Redistribution of Corporate Power.* During the *zaibatsu* era, major management decisions were made at shareholders' meetings attended by members of the family who controlled the equity of the corporation, to the exclusion of public investors. Following the post-war dissolution of the *zaibatsu*, ownership of shares by individuals became widespread. *See supra* note 22 and accompanying text. As in the American corporate scene, the dispersal of ownership produced a concomitant dilution of direct management control by shareholders. In the interest of operational efficiency, the American concept of a board of directors exercising corporate management functions was adopted. The board thus replaced the shareholders' meeting as the principal forum for decision-making. Accordingly, the 1950 Code amendments restricted the scope of shareholders' meetings to those areas specified by law or by articles of incorporation and eliminated the general authority of directors to act individually on behalf of their corporation. Blakemore & Yazawa, *supra* at 16-17 (*see* footnotes accompanying the cited text for citations to relevant Japanese Commercial Code articles).

(2) *New Capital Investment Mechanisms.* The amendments sought to eliminate the *zaibatsu* system of limited capitalization subscription. Participation by public investors was to be facilitated by the introduction of authorized capital stock and nonpar value stock, ideas borrowed from American corporate law. In addition to provisions for convertible bonds and stock adopted in 1938, new provisions in the Code permitted redeemable stock, stock dividends, stock splits and transfers from reserves to stated capital. Blakemore & Yazawa, *supra* at 18-19 (*see* footnotes accompanying cited text for citations to relevant Japanese Commercial Code articles).

(3) *Strengthened Shareholders' Rights.* Considered by SCAP to be of prime importance to the attainment of democratization, the expansion of shareholders' rights was bitterly opposed by Japanese officials, who felt that such a move "would encourage shareholder-strife and hamper honest management." *Id.* at 20. Despite Japanese reluctance, measures to protect minority shareholders' rights were enacted. The free and equitable exercise of voting rights at shareholders' meetings was reinforced by, among other things, the elimination of voting rights restrictions in articles of incorporation, the introduction of cumulative voting and the specification of certain quorum restrictions. In addition, shareholders were provided the means by which direct control could be exerted upon management. For example, shareholders acquired the right to review corporate records under certain circumstances, to institute actions against individual directors on behalf of the corporation and to receive financial reports for each accounting period. Moreover, directors' fiduciary responsibilities to their corporations were articulated and the property rights of shareholders were enlarged by the

pared to embrace the democratization of corporate governance.[27] Moreover, as the tide of world events changed during the latter half of the Occupation, Japan was no longer viewed as a threat to the Western powers;[28] hence pressure to break up economic concentration was eased.[29] If economic power had remained dispersed and individual shareholdings had remained large for a sustained period, it is arguable that shareholders would have gradually utilized their newly gained rights. However, after the Occupation a new form of economic concentration - the enterprise group - emerged, replacing the dissolved *zaibatsu*. Thereafter any chance of meaningful democratization of the corporate entity was lost.

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absolute prohibition of any bar to free alienation of shares. *Id.* at 19-22 (*see* footnotes accompanying cited text for citations to relevant Japanese Commercial Code articles). *See also* Y. Taniguchi, Shareholders' Judicial Remedies — A Comparative Study: Japanese-American at 10-30 (Sept. 1964) (unpublished doctoral thesis available at Cornell University presenting a detailed explanation of specific 1950 amendments to the Japanese Commercial Code).

[27] Occupation authorities attempted to encourage individual stock holdings. However, the public's unfamiliarity with its newfound power resulted in voting rights abuses. In addition, management's attitude toward corporate democratization was a begrudging tolerance of shareholder participation, which it sought to avoid whenever possible by use of legitimate corporate mechanisms. S. Takeuchi, *supra* note 6, at 30, col. 3-4.

A commentator hypothesizes that the Japanese corporate system's inability to assimilate participatory governance was due to the absence of a social structure of "mass democracy," a reinforcement, or at least a catalytic ingredient, for corporate democratization. Yamaji, *The Function of Modern Corporate Financial Reporting in a Mass Democratic Society*, 27 KOBE ECON. & BUS. REV. ANN. REP. 69, 78-79 (1981) [hereinafter cited as "Yamaji"].

[28] Initially it has been the intention of the United States to impose a harsh settlement on Japan. The notion was to adopt a modified "Morgenthau Plan" that would permit very limited industrialization so as to prevent a rebuilding of Japan's war machine. But Japan's dense population relative to arable land as well as world events—specifically the outbreak of the cold war—underlined the impracticality of that policy.

. . .Most efforts at economic reform occurred in the first two years of the occupation. Thereafter the policy emphasis shifted to economic recovery, in response to the cold war, the failure of American policy in China, and the American desire to reduce the burden of aid to Japan on American taxpayers.

. . . .

. . .The [Korean] [W]ar also tied Japan and the United States even more closely together politically. The. . .[w]ar reinforced Washington's perception of the threat of communist aggression in the area and its recognition that a revitalized and independent Japan would be a valuable ally.

Patrick & Rosovsky, *Japan's Economic Performance: An Overview*, in ASIA'S NEW GIANT 9-11 (1976).

[29] "[General] MacArthur realized that the 325 companies designated under the Deconcentration Law were excessive and set about to effect large-scale releases. He now believed that only those concerns which were 'interfering seriously with economic recovery' should be recognized under the Deconcentration Law." HADLEY, *supra* note 18, at 166.

2. *The Emergence of Enterprise Groups*

Following the Occupation, the antimonopoly laws that had been enacted to dissolve industrial and banking combinations in Japan were modified in order to accelerate economic recovery.[30] The amendments liberalized restrictions on mergers, acquisitions and intercorporate stockholdings and led to the resurgence of economic concentration. Many small companies which had been created by the fragmentation of the *zaibatsu* merged to form larger enterprises.[31] While the *zaibatsu* conglomerates were not permitted to re-form, many companies joined into loosely organized confederations known as "enterprise groups."[32]

Each enterprise group is comprised of both listed and unlisted companies that are linked by a web of mutual cooperation. Each group is dependent upon a core of related financial institutions.[33] A group's members are independent legal entities with independent management. The membership spans a wide variety of industries although competitors within a single industry rarely participate in the same enterprise group.[34]

Today there are six major enterprise groups as well as numerous smaller ones.[35] The "big six" enterprise groups exemplify the high degree

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[30] J. B. BENNETT & N. DOELLING, INVESTING IN JAPANESE SECURITIES, 25-27 (1972) [hereinafter cited as "BENNETT & DOELLING"]; HADLEY, *supra* note 18, at 198-99.

[31] A good example of this reconcentration is the famous trading company Mitsubishi Shoji Kaisha. Its origins can be traced to the largest of the pre-war *zaibatsu*. The Mitsubishi *zaibatsu* was dissolved during the Occupation, but by 1954 many of the smaller companies which had comprised Mitsubishi Shoji's predecessor consolidated to form Mitsubishi Shoji Kaisha, Ltd. BENNETT & DOELLING, *supra* note 30.

[32] *"Kigyo shudan"* (also translated as "industrial groups"). These new enterprise groups are not mere revivals of the old *zaibatsu*. They are referred to as *keiretsu*, a less tightly structured type of association. Wallich & Wallich, *Banking and Finance*, in ASIA'S NEW GIANT 294 (H. Patrick & H. Rosovsky eds. 1976) [hereinafter cited as "Wallich & Wallich"].

[33] *See infra* text accompanying notes 59-66.

[34] For an extensive statistical survey of Japan's 15 largest enterprise groups, *see* DODWELL MARKETING CONSULTANTS, INDUSTRIAL GROUPINGS IN JAPAN (rev. ed. 1978) [hereinafter cited as "DODWELL"]. For other descriptions of Japan's enterprise groups in English language sources, *see generally* CLARK, *supra* note 25; Caves & Uekusa, *supra* note 12; GIBNEY, JAPAN THE FRAGILE SUPERPOWER 169-91 (1975); D. F. HENDERSON, FOREIGN ENTERPRISE IN JAPAN 113, 129-44 and bibliography (1973) [hereinafter cited as "HENDERSON"]; ADAMS & HOSHII, *supra* note 18, at 23-27, 217-21; ADAMS & KOBAYASHI, THE WORLD OF JAPANESE BUSINESS 27-69 (1st ed. 1969).

While enterprise groups are a popular theme for research, it should be emphasized that the extent to which economic cooperation exists among group members and the overall impact that group dynamics have on corporate governance are not well understood even by the Japanese. Japan Econ. J., Dec. 12, 1978, at 1.

[35] The six major enterprise groups are: Mitsui, Mitsubishi and Sumitomo, each of which were formed by remnants of a former *zaibatsu* carrying the same name, and Fuyo, Sanwa and Dai-Ichi Kangyo, which were formed around key post-war banking institutions. The next nine largest enterprise groups include seven groups dominated by independent industrial giants: Nippon Steel, Hitachi, Nissan, Toyota, Matsushita, Toshiba-IHI and Tokyo; and two groups centered around leading banks: Tokai and Industrial Bank of Japan (IBJ).

of economic concentration in Japan. Each of these six groups has a core of key companies and financial institutions whose presidents meet on a regular basis.[36] A total of 185 companies and financial institutions belong to one of these six inner circles, an average of thirty-one firms per group.[37] In 1977, these 185 firms accounted for twenty-five percent of Japan's GNP, sixteen percent of the country's sales and six percent of Japan's workforce.[38] If all major companies affiliated with the "big six" are taken into account, the total membership of the "big six" amounted to 593 companies in 1976, an average of ninety-nine major firms per group.[39] These 593 companies accounted for over twenty-three percent of the country's sales and almost twelve percent of the workforce.[40] In addition, over 8000 smaller firms are affiliated with one of these "big six" groups.[41] Other enterprise groups, although not nearly as large as the "big six," are nevertheless substantial in size: the next nine largest groups included 250 major firms among their members.[42] Combined, Japan's fifteen largest enterprise groups included 843 major companies in 1976, 746 of which were listed on the stock exchanges.[43]

3. *Stock Ownership and Cross-Shareholdings*

The corporate landscape in Japan is marked by the concentration of listed stock in "safe hands" and by a high incidence of cross-shareholdings among companies affiliated with an enterprise group. These phenomena have contributed to the growth and stability of enterprise groups in the post-war era.

Most of Japan's listed companies have a controlling block of their stock

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DODWELL, *supra* note 34, at 6-7, 10.

[36] *See* HADLEY, *supra* note 18, at 206-09, 258-59, 265. For a list in English of the member companies of each of these groups see JAPAN COMPANY HANDBOOK 1072-75 (Toyo Keizai Shinposha/The Oriental Economist, English ed. 2nd half 1982) [hereinafter cited as "JAPAN COMPANY HANDBOOK"].

[37] KOSEI TORIHIKI KYOKAI (Fair Trade Association), KIGYOSHUDAN NO JITTAI CHOSA NI TSUITE (Concerning the Investigation of the Realities of Enterprise Groups) 3-4 (Dec. 1979) (publication authorized by the Fair Trade Commission of the Japanese Government) [hereinafter cited as "FTC STUDY"]. The membership of the old *zaibatsu* groups is small (23 for Mitsui, 28 for Mitsubishi, 21 for Sumitomo) and intra-group solidarity is strong. Membership in the bank-led groups is larger (29 for Fuyo, 39 for Sanwa, 45 for Dai-Ichi Kangyo) but true intra-group solidarity is lacking. JAPAN COMPANY HANDBOOK, *supra* note 36, at 1072.

[38] FTC STUDY, *supra* note 37, at 20.

[39] DODWELL, *supra* note 34, at 10.

[40] *Id.* at 10-11 (figures are for 1976).

[41] Japan Econ. J., Dec. 12, 1978, at 1.

[42] DODWELL, *supra* note 34, at 10-11 (figures are for 1976).

[43] *Id.* at 8. There were a total of 1719 companies listed at the time. *Id.* The 746 listed companies belonging to one of the 15 largest enterprise groups accounted for 72% of the income and turnover of all listed companies. *Id.*

permanently held by "safe shareholders"[44] who include not only banks and other members of the same enterprise groups, but also the issuer's own directors, employees and main customers.[45] Maintaining a high portion of stock in the hands of safe shareholders is considered essential by most companies.[46] The reasons most frequently given for this attitude are that insider control strengthens enterprise group relations, reinforces management control and ensures that shareholder meetings proceed harmoniously.[47] One of the original reasons that Japan's corporate leaders strived to place a controlling portion of a company's stock into safe hands was to prevent takeover attempts by foreign, primarily U.S., corporations.[48] Fifteen percent of companies surveyed still cited this was a rationale for concentrated shareholdings.[49]

As a result of efforts by Japanese firms to acquire stock in companies affiliated with their enterprise group, the share of listed stock held by individuals has dropped dramatically.[50] By the end of 1980, the percentage of outstanding stock held by individual investors amounted to only 28.6%, in comparison to the 38.5% owned by financial institutions and the 25.2% held by other domestic corporations.[51] In contrast, direct stock ownership by banks in the U.S. is prohibited[52] and American industrial companies own very little listed stock.[53] Individual stockholdings in the U.S. declined during the early 1970s but had increased to forty-two percent of outstanding stock by 1980.[54] Today, the major stockholders in the U.S. are the "institutional investors"[55] that control over fifty percent of the listed stock in the U.S. for other parties.[56]

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[44] "*Anzen kabunushi.*"

[45] SHOJI HOMU KENKYUKAI (Commercial Law Research Group), KABUNU-SHI SOKAI HAKUSHO (White Paper on Shareholder Meetings) 24 (Shoji Homu No. 956, 1982) (a publication of the Daiwa Securities Research Institute) [hereinafter cited as "White Paper"].

[46] *Id.* 660 out of 661 listed stock companies responded affirmatively to the question "Do you think it is necessary to have a stable [level of] safe shareholders?" in a 1982 survey.

[47] *Id.*

[48] HENDERSON, *supra* note 34, at 266-67.

[49] White Paper, *supra* note 45, at 24.

[50] *See* Table 1.

[51] *See* Table 1. Individual shareholdings dropped again by the end of 1981, to 28.4%. Japan Econ. J., Oct. 12, 1982, at 20, col. 1.

[52] National banks are prohibited from owning corporate stock for their own accounts. 12 U.S.C. § 24(7) (1976); *see also* 10 AM. JUR. 2D *Banks* §292 (1963). State banks are typically under similar restrictions. *See, e.g.*, HAWAII REV. STAT. § 403-99 (1976).

[53] A review of 122 major U.S. corporations shows that as of the end of 1976 almost none of their top shareholders were industrial companies. STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., VOTING RIGHTS IN MAJOR CORPORATIONS 30-249 (Comm. Print 1978) [hereinafter cited as "VOTING RIGHTS"]. One exception is ITT, but its position among the top five shareholders in three major corporations, *id.* at 276, is derived by aggregating the stockholdings of its insurance company subsidiaries. *Id.* at 73, 206, 219.

[54] *See* Table 2.

[55] Bank trusts, insurance companies, pension fund managers and investment companies.

[56] *See* Table 2. Stockholdings by institutional investors in Japan, although growing, are

Member companies of a single enterprise group are linked by cross-shareholdings and interlocking directorates, rather than by the cloak of a common parent corporation, as is the case with American conglomerates. A U.S. conglomerate is a single company which holds a controlling block of stock in its subsidiaries. The financial position of the subsidiaries is consolidated with the parent and the parent's stock is listed on an exchange. In Japanese enterprise groups, the relationship between member companies is not that of related subsidiaries. Instead, the cement that binds members is cross-sharings,[57] interlocking directorates and personnel crossovers.[58] The shares of each member can be independently listed on an exchange.

4. *Financial Structure of Japanese Companies*

Along with concentrated shareholdings, the essential factor in the success of Japan's enterprise groups has been the role played by financial institutions. Before World War II, the ownership of subsidiary companies by the *zaibatsu* conglomerates provided the critical cohesive element for business groupings; today it is credit.[59] Banks provide about eighty percent of total corporate funds from external sources in Japan,[60] and most Japanese companies are considered to have higher debt-equity ratios than their American counterparts.[61] Banks have not, however, inherited the

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very small. *See* Table 1. *See also* Inoue, *Investment Trust*, in LECTURES ON JAPANESE SECURITIES REGULATION 187, 190 (Japan Securities Research Institute ed. 1980) [hereinafter cited as "Inoue"]; FUJI BANK BULL. 91 (May 1981).

[57] In 1977 each of the main members of one of the big six groups had an average of 23% of its stock held by other core members of its group. FTC STUDY, *supra* note 37, at 11. Cross-shareholdings among the major firms in each of Japan's enterprise groups is even higher. *See* Table 3.

[58] In the case of the nucleus members of the six big enterprise groups, there were directors concurrently sitting on two or more boards within the core group in 29% of the companies. In 66% of the companies there were directors who had previously been with another core company of the same group. In total, 8.3% of all the directors of these 185 companies were either concurrently sitting on at least one other member's board, or had previously been with another member company. FTC STUDY, *supra* note 37, at 12-13 (figures are for 1977). In 130 major firms comprising Mitsubishi's broader grouping, 90% of the firms had an average of over three directors each from other group members. In many of these cases the directors had been sent from one of the group's leaders. DODWELL, *supra* note 34, at 132-69 (figures are for 1976).

[59] HADLEY, *supra* note 18, at 270.

[60] NRI MANUAL, *supra* note 23, at 278-79.

[61] *See, e.g.*, Kuroda & Oritani, *Wagakuni no 'Kin'yu Kozo no Tokucho 'no sai Kento* (A Reexamination of the Unique Features of Japan's Corporate Financial Structure), in KIN'YU KENKYU SHIRYO (Financial Studies) No. 2 (Bank of Japan, Special Economic Studies Dep't ed. 1979), *reprinted in* 8 JAPANESE ECON. STUDIES 82 (summer 1980) [hereinafter cited as "Kuroda & Oritani"]; Browne, *supra* note 6; BENNETT & DOELLING, *supra* note 30, at 19-20; H. STOKES, THE JAPANESE COMPETITOR 15 (1976) [hereinafter cited as "STOKES"]. The implication of this is that creditors of a Japanese company have more influence on management

top holding company role of the former *zaibatsu*.[62] Instead, the banks of an enterprise group, by providing a substantial source of funds for member companies, act as coordinating centers for business within the group. Member companies also depend on funds from affiliated trust banks and insurance companies of the same group, as well as from rival group financial institutions, independent institutions and government sources.[63]

The relationship between a company and its major bank creditors is considered permanent and is an integral part of the company's existence. Banks and other financial institutions are major shareholders in most of the companies in their groups,[64] and bank representation on the boards of member companies is very high.[65] A bank in this situation has a commitment to protect the corporation-customer in all but the most extreme circumstances by lending it money or otherwise finding financial sources for it.[66]

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than do shareholders. The assertion that debt-equity ratios are higher in Japan has not gone unchallenged, however. A 1976 study showed that among profitable companies of either country there was no difference in average debt-equity ratios. STOKES, *supra*, at 15-17. A 1980 study argues that, if differences in accounting practices are taken into consideration, the gap between debt-equity ratios in Japan and the U.S. narrows considerably. Kuroda & Oritani, *supra*. Whatever the actual level of debt-equity ratios in each country, the fact remains that the degree of *bank* indebtedness is much higher in Japan. ADAMS & HOSHII, *supra* note 18, at 346; Browne, *supra* note 6; FUJI BANK BULL. 6 (Jan. 1981); Mikuni, *How Japanese Companies Finance Their Growth*, 2 ASIAN FINANCE Dec. 15, 1976/Jan. 14, 1977, at 79, 81 [hereinafter cited as "Mikuni"]; Kuroda & Oritani, *supra*, at 101. *See also* CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 31 (J. O. Haley ed. 1978).

[62] HADLEY, *supra* note 18, at 246.

[63] *Id.* at 232. In 1977 the main companies of the big six groups carried an average of 21% of their debt with the financial institutions of their own group. FTC STUDY, *supra* note 37, at 15. The Dai-Ichi Kangyo group has only one bank, the other five groups each have two banks. Dai-Ichi Kangyo has four insurance companies, Sanwa has one insurance company and the other four groups each have two insurance companies. *Id.* at 3-4. The largest creditor or "main bank" ("*shui ginko*") for 64% of these companies was a bank from the company's group. *Id.* at 17.

[64] In 1977 an average of 7.5% of the stock of all the main companies in each of the big six groups was owned by that group's one or two banks. FTC STUDY, *supra* note 37, at 11. In addition, a group's insurance companies owned an average of four percent of the stock of every main member in the group. *Id.* The leading bank of the Mitsubishi group, Mitsubishi Bank, was among the top 10 shareholders in 101 out of 129 major firms in its group in 1976. It was the largest shareholder in 24 of these firms. DODWELL, *supra* note 34, at 132-69.

[65] Among core members in each of the big six groups, the group's bank or banks were represented on the boards of 55% of the companies. FTC STUDY, *supra* note 37, at 13. The two banks of the Mitsubishi group, Mitsubishi Bank and Mitsubishi Trust & Banking Corp., were represented by an average of almost two directors on each of 75 firms out of the group's 130 major companies. DODWELL, *supra* note 34, at 132-69. Among the smaller enterprise groups, the IBJ group is particularly dominated by its one bank member, the Industrial Bank of Japan. The bank was the first or second largest shareholder in 17 out of 19 firms and was represented on all 19 boards by an average of almost three directors per board. *Id.* at 299-304.

[66] Wallich & Wallich, *supra* note 32, at 295. This strong tie to a bank, however, does not guarantee a line of credit as in the United States, even for companies belonging to enter-

A high degree of indebtedness to a few major banks that also own stock in the company and often have a director on the company's board places financial institutions in a very influential position. The role played by banks in an enterprise group along with the cross-holding of shares by other members contributes to a complex relationship that concentrates corporate control in the hands of insider shareholders to the exclusion of others.

5. *Restrictions on Shareholdings*

Under Japan's Antimonopoly Act banks and insurance companies may not hold more than ten percent of the outstanding stock of any single company.[67] An amendment in 1977 reduced this ceiling on bank holdings to five percent effective in 1987.[68] The 1977 amendments also placed ceilings on stockholdings by companies, but this did little to restrict the mutual holdings of stock among companies.[69] The high incidence of cross-shareholdings among enterprise groups has been criticized as being detrimental to the interests of outside shareholders because it may lead to such evils as the depletion of capital and undue influence by other companies upon shareholder decisionmaking.[70] The growing interdependence of allied companies has also been cited as a major cause for the steady decline of the share of stock held by individuals in Japan.[71]

The 1981 Commercial Code amendments include several provisions designed to address the cross-shareholding problem. One provision prohibits a subsidiary from owning stock in the parent company where the parent owns fifty percent or more of the subsidiary's outstanding stock.[72] This prohibition also applies in the situation where the parent's stockholdings, in combination with that of its fifty percent subsidiaries, is greater than fifty percent of a company.[73] Beginning October 1, 1982 (the effective date of the new Code), any subsidiary which still holds stock of its parent company has a "reasonable period" within which to sell the

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prise groups. "If the Bank of Japan orders a cutback or a slowdown in credit expansion, the group bank must cut credit or slow it down." *Id.* at 295. A large amount of a company's bank debt will be in the form of 90-day notes. To cover such a debt structure, Japanese companies have to maintain a high amount of liquidity. Mikuni, *supra* note 61, at 81.

[67] ADAMS & HOSHII, *supra* note 18, at 82.

[68] Yabe, *The Revised Antimonopoly Act*, in LECTURES ON JAPANESE SECURITIES REGULATION 41, 51 (Japan Securities Research Institute ed. 1980) [hereinafter cited as "Yabe"].

[69] *Id.* at 49-50.

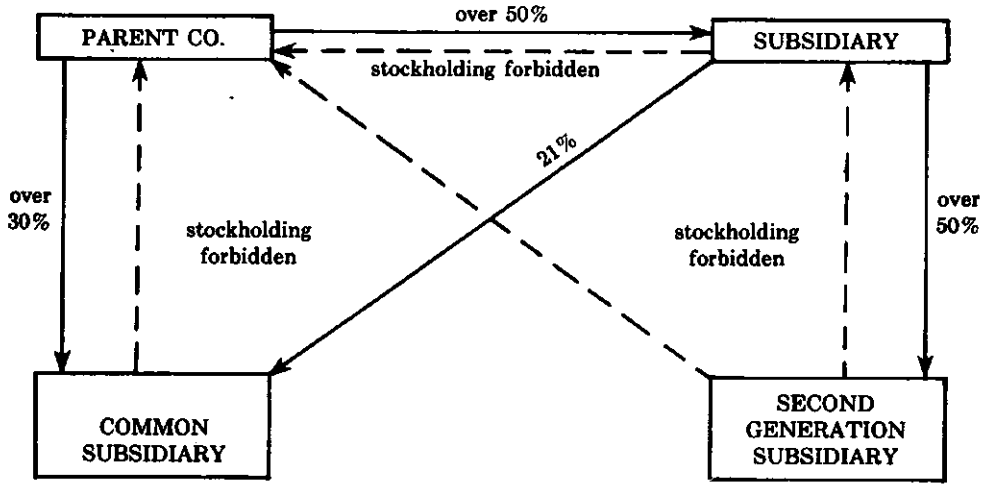
[70] Johnson, Kosugi & Motoki, *Explanation of the Amended Stock Corporation Law*, 2 JAPAN BUS. L.J. 309, 315 (1981) [hereinafter cited as "Johnson, Kosugi & Motoki"].

[71] TOSETSU NIHON NO SHOKEN SHIJO, *supra* note 15, at 33.

[72] Commercial Code, art. 211-2.

[73] *Id.* art. 211-2, para. 3. For example, to illustrate:

stock of its parent.[74] Under the old Code a 100% owned subsidiary could not own stock in the parent, but it was not clear whether such prohibition applied to cases where the subsidiary was less than 100% owned by the parent.[75] Although the new law will not affect the shareholdings of most listed companies, it will have a significant impact upon others. For example, within the Matsushita group[76] there are several listed companies which are more than fifty percent owned by Matsushita Electric Industrial.[77] These companies must sell their stock of Matsushita Electric Industrial.[78] One such company, Matsushita Communication Industrial, has disposed of its stock in the parent by selling it off to its Employee Stock



Source: Nomura Securities International, Inc., Honolulu Office [hereinafter cited as "Nomura Securities International"].

[74] Commercial Code, art. 211-2, para. 2. Here, to sell within a "reasonable period" means to avoid selling such stock in bulk so quickly that the company causes a decline in its market price to the detriment of the other stockholders. Johnson, Kosugi & Motoki, *supra* note 70, at 315.

[75] Johnson, Kosugi & Motoki, *supra* note 70, at 315. There had been much debate concerning this question prior to the change in the law.

[76] Major firms in the Matsushita group include Matsushita Communications Industrial, Matsushita Electric Trading, Matsushita Electric Works, Matsushita-Kotobuki Electronic Industries, Matsushita Reiko and Matsushita Seiko. These members of the group are listed on the First Section of the Tokyo Stock Exchange. JAPAN COMPANY HANDBOOK, *supra* note 36.

[77] Matsushita Electric Industrial is the largest appliance enterprise in the world; it sells under "Panasonic," "National," "Technics" and "Quasar" brands. As of May, 1982, the company had 153,823 stockholders. JAPAN COMPANY HANDBOOK, *supra* note 36, at 595.

[78] Nomura Securities International.

Options Plans (ESOP).[79]

In another case, ten companies that were more than fifty percent owned by Nissan Motor Co. held a total of four million shares of Nissan's stock as of March, 1982.[80] Nissan planned to lower its stockholdings below the fifty percent level in four of these subsidiaries and to have the other companies sell their Nissan stock.[81]

Under another provision of the new Code designed to discourage mutual shareholdings, if, for example, Company A holds stock of Company B, and Company B, together with its subsidiaries,[82] holds more than twenty-five percent of the stock of Company A, then Company A may not exercise its voting rights in Company B.[83] While this twenty-five percent limit on shareholding for voting rights affects more companies than the fifty percent restriction on owning shares of a parent company,[84] neither amendment will greatly reduce the aggregate amount of cross-shareholdings within an enterprise group. This is because in most cases the top shareholder of a member company already holds less than twenty-five percent of that company's stock. Even when the limit is exceeded, the top shareholders can sell the excess stock to other members of the group. It is anticipated that many companies will try to keep "interlocking shareholdings with their subsidiaries at the legally highest levels and increase the stocks held by employee stockholding associations and similar 'safe' stockholders."[85] It remains to be seen how effective these restrictions will be, but it is considered significant that the new Code at least "takes a negative attitude toward this problem."[86]

C. Company Profile: Internal Governance in Theory and Practice

Part 2 of the Commercial Code is the primary source of Japanese law affecting the internal corporate governance of stock companies.[87] The stock company is the most widely used corporate form in Japan.[88] Ap-

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[79] Nomura Securities International. Although Matsushita Communication Industrial is listed on the Tokyo First Exchange, with 11,597 shareholders as of May, 1982, it is considered a consolidated subsidiary of Matsushita Electric Industrial, which owned 61.3% of its stock as of the same date. JAPAN COMPANY HANDBOOK, *supra* note 36, at 613.

[80] Japan Econ. J., Oct. 12, 1982, at 20, col. 1. Four million shares represented about 0.25% of all outstanding Nissan stock. *Id.*

[81] *Id.*

[82] Only subsidiaries that are more than 50% owned by Company B.

[83] Commercial Code, art. 241, para. 3. *See* T. INABA, KASEI KAISHA HO (The Amended Corporate Law) 119 (1982) [hereinafter cited as "INABA"].

[84] For example, in the case of Nissan Motor Co., there were 42 related firms as of March 1982 which would lose their voting rights in a total of 92 million shares of Nissan stock. Japan Econ. J., Oct. 12, 1982, at 20, col. 1.

[85] Japan Econ. J., Oct. 5, 1982, at 11, col. 5.

[86] Johnson, Kosugi & Motoki, *supra* note 70, at 315.

[87] "*Kabushiki gaisha.*"

[88] *Id.*, Johnson, Kosugi & Motoki, *supra* note 70, at 337. In addition to the stock company

proximately one million stock companies are in existence with the vast majority being small-scale family-owned enterprises.[89]

Although the Commercial Code is based on an American model,[90] it is more detailed and less flexible than its statutory counterparts in the United States "where procedures and formalities have been eliminated to the extent possible."[91] The Code originally applied uniformly to all stock companies, but various amendments passed over the years interjected distinctions among companies based on size and whether or not their stock was listed. The major amendments to the Commercial Code and related laws passed in 1981 expanded these distinctions.[92] Thus, while most of the description below applies to all stock companies, distinctions are noted that in particular affect Japan's approximately 1850 publicly listed stock companies.[93]

1. *Directors*

Every stock company must have at least three directors.[94] Directors are elected at shareholder meetings[95] and serve terms of office of two

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there are three other types of companies under Japanese law: partnership company (*gomei kaisha*), limited partnership company (*goshi kaisha*), and limited liability private company (*yugen kaisha*).

The partnership company is a separate entity from its partners. Each partner has unlimited liability and the power to contract in the name of the partnership. The company has articles of incorporation which must be registered and by which the powers of certain partners may be restricted. Only natural persons can be partners (Commercial Code, art. 55), thus excluding juristic persons, such as corporations, from participation in a partnership company.

In the limited partnership company, the liability and involvement in management of certain partners is limited. Although other companies may be limited partners, the restrictions on the role of the limited partner make this company form useful only to a party with very narrow objectives.

The characteristic feature of the limited liability private company is simplified corporate procedures which eliminate the more cumbersome legal formalities that burden the ordinary Japanese corporation. The private company is usually associated with family businesses, thereby making it a less attractive form to companies which place a premium on name and prestige. Birmingham, *The Japanese Corporation as a Business Vehicle for Foreign Business*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 58, 60-62 (J. O. Haley ed. 1978) [hereinafter cited as "Birmingham"]; Matsueda & Ihara, *Company Law in General*, 1 DOING BUSINESS IN JAPAN § 7.03 (Z. Kitagawa ed. 1980) [hereinafter cited as "Matsueda & Ihara"].

[89] Morimoto, *Kabunushi Teianken to Shomen Tohyo Seido* (Shareholder Proposal Rights and the System of Documenting Votes) (pt. 1), 750 JURISUTO 125 (Oct. 1, 1981) [hereinafter cited as "Morimoto"].

[90] *See supra* note 26.

[91] Birmingham, *supra* note 88, at 61.

[92] *See* chart I. *See also* Johnson, Kosugi & Motoki, *supra* note 70, at 309-10, 337, 349.

[93] *See supra* note 5.

[94] Commercial Code, art. 255.

[95] *Id.* art. 254, para. 1.

years or less.[96] The board of directors is granted broad statutory powers to "manage" the corporation.[97] Japanese boards do not delegate their management powers to corporate "officers" as they commonly do in the U.S. The American concept of corporate "officers" does not exist in Japan. Everyone who would be considered "senior management" by American standards occupies a place on the board of directors. Consequently, Japanese boards tend to be large, often numbering over thirty.[98]

The directors are split into a hierarchy of several ranks.[99] Seniority usually determines ranking.[100] The lower ranking directors tend to be salaried employees, such as department chiefs. Higher up are "managing directors"[101] who have in essence retired from employee status. Above the one or more ranks[102] of managing directors are a variety of vice-presidents[103] and a president.[104] The most senior members of the typical board take on such titles as vice-chairman,[105] chairman,[106] advisor[107] and senior advisor.

The size of the typical Japanese board of directors necessitates division into more compact decisionmaking units. Directors often form working and executive committees that meet more frequently than the full board. These committees are not recognized by statute.[108] However, the Code does recognize the position of "representative director."[109] Representative directors are appointed by the board from its ranks to act on behalf of the corporation.[110] The boards of most large stock companies appoint sev-

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[96] *Id.* art. 256, para. 1.

[97] *Id.* art. 260.

[98] Birmingham, *supra* note 88, at 62. *See also* HENDERSON, *supra* note 34, at 113; Tatsuta, *Governance and Shareholder's Rights Under the Corporation to Manage*, in LECTURES ON JAPANESE SECURITIES REGULATION 12, 14 (Japan Securities Research Institute ed. 1980) [hereinafter cited as "Tatsuta"].

[99] The number of ranks and the titles given vary from company to company depending on the articles of incorporation or past practice.

[100] Browne, *supra* note 6, at 32.

[101] "*Jomu torishimariyaku.*"

[102] For example, in addition to "managing directors," some companies have "senior managing directors" ("*senmu torishimariyaku*").

[103] "*Fuku shacho.*"

[104] "*Shacho.*"

[105] "*Fuku kaicho.*"

[106] "*Kaicho.*"

[107] "*Sodan yaku.*"

[108] Matsueda & Ihara, *supra* note 88, at § 7.46; HENDERSON, *supra* note 48, at 113.

[109] "*Daihyo torishimariyaku.*"

[110] Commercial Code, art. 261, para. 1. Representative directors are those with authority to represent the company. They usually have a title such as president, executive vice-president, senior managing director or managing director. To protect bona fide third parties, the Commercial Code provides that a company shall be liable to a bona fide third person for any act done by an apparent representative director. *Id.* art. 262. An apparent representative director is a director with a title from which it may be assumed he has authority to represent the company, although he actually has no such power. Tatsuta, *supra* note 98, at 14. *See also* Birmingham, *supra* note 88, at 62.

eral directors, including the president, to function as representative directors to deal with third parties on behalf of the company. Representative directors implement decisions made at shareholders' or board meetings and are empowered to make decisions on matters delegated by the board.[111]

Beginning with incidents such as the Lockheed scandal,[112] concern grew that individual directors needed to be more accountable to the board as a whole and that the board's supervising authority needed to be strengthened.[113] Disagreement existed over what kind of matters could be delegated by the board to a representative director.[114] Thus, the 1981 Commercial Code amendments specifically enumerated four subjects[115] which the board may *not* have a director decide and further prohibits the board from delegating the "execution of any other important business affairs."[116]

The new Code has other provisions designed to exact greater responsibility on the part of individual directors. For example, the amended Code provides that "[a] director shall report to the board of directors the status of execution of business affairs not less than once every three months."[117] These reports must include concrete descriptions of how corporate affairs are being handled, thus providing the entire board with all the information necessary to enable proper supervision.[118] The new Code also imposes heavier duties and liabilities on directors,[119] increases an individual

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[111] Tatsuta, *supra* note 98, at 14; Johnson, Kosugi & Motoki, *supra* note 70, at 321; Takano, *Torishimariyaku-Torishimariyakukai to Kaisha Keiei* (Directors, Board of Directors and Corporate Governance), 747 JURISUTO 149 (Aug. 1, 1981) [hereinafter cited as "Takano"].

[112] Takano, *supra* note 111, at 149; *Ato Ikkagetsu! Kaisei ho Norikiri Sodo—Gurei-zon Jissen Nanatsu no Pointo* (Only One Month Left! The Chaos Following the Amended Law: Seven Pointers Concerning the "Grey Zone" in Practice), in Shukan Daiyamondo (Weekly Diamond), Sept. 4, 1982, at 16, 19 [hereinafter cited as "Only One Month Left!"].

[113] Takano, *supra* note 111, at 149; Johnson, Kosugi & Motoki, *supra* note 70, at 318, 321.

[114] Johnson, Kosugi & Motoki, *supra* note 70, at 321.

[115] Commercial Code, art. 260, para. 2. The four subjects which the board as a whole must decide upon are: (1) disposal or acquisition of substantial assets; (2) borrowing in substantial amount; (3) appointment or removal of a manager or other senior employee; and (4) substantial organizational changes.

[116] *Id.*

[117] *Id.* art. 260, para. 3. While normally only representative directors would be in a position of responsibility requiring such reports back to the board, this provision places the duty to report on all directors, thus anticipating occasions where other directors might be in positions of such responsbility. S. MOTOKI, KAISEI SHOHO CHIKU JO 115 (Yokoyama Insatsu, Inc. ed. 1981) [hereinafter cited as "MOTOKI"]; *see also* INABA, *supra* note 83, at 235-37.

[118] Johnson, Kosugi & Motoki, *supra* note 70, at 321; MOTOKI, *supra* note 117, at 115-116.

[119] *E.g.*, article 264 of the Commercial Code used to provide that a director who planned to effect a personal transaction in competition with the company must first obtain the approval of the shareholders by a majority vote of at least two-thirds of the outstanding stock. Because in practice this approval was difficult to achieve in companies whose stocks were widely dispersed, both companies and the courts would construe the competitive transaction in a narrow sense in order to obviate the need for shareholder approval. Johnson, Kosugi &

director's ability to carry out his duties[120] and specifies criteria for the disqualification of directors.[121]

The board has other enumerated obligations including: convocation of general meetings of shareholders,[122] approval of transactions between a director and the company,[123] submission of certain financial reports to the auditors prior to each ordinary general meeting of shareholders[124] and then again to the shareholders at the general meeting,[125] transfer from

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Motoki, *supra* note 70, at 318. The new Code requires the director to disclose all the material facts relating to the competitive transaction at a meeting of the board of directors and obtain its approval. This will make it easier to obtain approval, but also will result in a stricter scrutiny of the transaction. *Id.* Also, a director who had received shareholder approval under the old law was released of liability in the event of damage to the company resulting from the transaction. Because under the new law approval is obtained from the board, the individual director involved will still be liable if any damage results. *Id.* In cases where a director does not get board approval, there is a presumption that the damage to the company resulting from such a competitive transaction is the amount of the profit obtained by the director or a third person from the transaction. Commercial Code, art. 266, para. 4.

[120] *E.g.*, under the new Code any director has the power to demand that a meeting of the board of directors be called when the director designated to call such meetings refuses to do so. Commercial Code, art. 259. *See also*, Johnson, Kosugi & Motoki, *supra* note 70, at 321.

[121] Article 254-2 of the new Code reads:

> The following persons may not be directors:
> (1) An interdict or a quasi-interdict;
> (2) A person who was declared bankrupt and has not yet been reinstated;
> (3) A person who was subject to any penalty on account of having committed any crime set forth in this Code, the Law regarding Exceptional Rules of the Commercial Code concerning Auditing, etc. of Stock Corporation or Law of Limited Corporation, where two years have not yet lapsed since the date on which the execution thereof is completed or the date on which the execution thereof is discontinued; or
> (4) A person who was subject to penalty of imprisonment or of a severer nature on account of having committed any crime other than that set forth under the preceding item, where the execution thereof is yet to be discontinued; provided, however, that the restriction hereunder shall not apply to the person under probation.

(*translation from* Nakatsu in 2 JAPAN BUS. L.J. 374-75 (1981)).

[122] Commercial Code, art. 231.

[123] *Id.* art. 265.

[124] *Id.* arts. 281, 281-2. These reports include the following documents and accompanying statements of details:

(1) A balance sheet;
(2) A profit and loss statement;
(3) A business report; and
(4) A proposal concerning disposition of profit or dealing with a loss.

[125] *Id.* arts. 283, 281, para. 1; Special Audit Law, art. 16. Before the 1981 amendments all of the above financial reports had to be approved by a general resolution of the shareholders. Under the new Code, business reports (item 3, *supra* note 124) are now approved by the board of directors and merely reported to the shareholders. Where the auditors have found no reason to require shareholder approval for balance sheets and profit/loss statements (items 1 and 2, *supra* note 124), these are also merely reported to the shareholders. Special Audit Law, art. 16, para. 1. These changes were made in order to clarify the liability of each director and to prevent directors from hiding behind a shareholders' resolution to

statutory reserve to stated capital,[126] and declaration of stock-splits[127] and interim dividends.[128] Unless stricter requirements are provided in the articles of incorporation, a majority of the board constitutes a quorum,

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avoid liability. Johnson, Kosugi & Motoki, *supra* note 70, at 324-25, 327-28; INABA, *supra* note 83, at 347-48. Also, as a practical matter these reports are too detailed and complicated to adequately explain to shareholders at a general meeting and obtain an informed approval. INABA, *supra* note 83, at 347-48.

[126] Commercial Code, art. 293-3.

[127] *Id.* art. 293-4.

Although stock-splitting by resolution of the board of directors was possible under the pre-1980 Code, it was very rare. A variety of factors was responsible for this. For one, the 1950 Commercial Code raised the minimum par value of stock to 500 yen. Commercial Code, 1950, art. 202, para. 2. This change did not affect the par value of companies already existing at the time which continued to use their original par value, usually 50 yen. However, the 500 yen minimum prevented stocks with a lower par value from being further split. Johnson, Kosugi & Motoki, *supra* note 70, at 311. Also, if a company decided to split its stock it would also have to adjust its stated capital or reduce the amount of the par value in proportion of the stock split. This was bothersome because a shareholders' resolution is required to change the amount of par value. Shukan Daiyamondo (Diamond Weekly) July 17, 1982, at 44, 45; Japan Econ. J., Oct. 5, 1982, at 11, col. 1. Thus, rather than split stocks, companies would, by shareholder resolution, declare stock dividends out of profits. *See infra* note 184. Or, more frequently, companies would issue stock dividends out of capital reserves by resolution of the board of directors. T. SUZUKI & A. TAKEUCHI, KAISHA HO (Corporate Law) 344 (1981) [hereinafter cited as "SUZUKI & TAKEUCHI"]. *See also* Johnson, Kosugi & Motoki, *supra* note 70, at 329.

Under the new Code, a company may convert shares with par value issued by it to shares without par value and *vice versa* by a resolution of the board of directors. Commercial Code, art. 213, para. 1. The issuance of no-par stock thus makes stock-splitting easier as a company need not tamper with its capitalization nor bother with shareholder resolutions. SUZUKI & TAKEUCHI, *supra;* Japan Econ. J., Oct. 5, 1982, at 11, col. 1.

The prospect of being able to issue no-par stock and to declare stock-splits with ease has received much attention in Japan. Activity in the stock market has also been affected as investors try to speculate on which companies will split stocks and how prices will be affected. *See, e.g.,* Shukan Daiyamondo (Diamond Weekly) July 17, 1982, at 44; Nihon Keizai Shinbun, Aug. 31, 1982, at 3 (evening ed.). By June 1982, 1299 listed companies out of 1413 surveyed by the Tokyo Stock Exchange had amended their articles of incorporation to enable the issuance of non-par stock by resolution of the board of directors in anticipation of the Code amendments taking effect in October. Shukan Daiyamondo (Diamond Weekly) Dec. 11, 1982, at 72. On the day the Code changes took effect, the Seven Eleven Japan company converted all of its outstanding stocks into no-par stock and announced that it was planning to split stock in June 1983. Japan Econ. J., Oct. 5, 1982, at 11, col. 1.

The first company to experiment with a stock-split under the new law was Tokyo Electron Ltd. which is listed on the Second Section of the Tokyo Stock Exchange. A stock-split was announced by the board of directors on November 27, 1982, to take place on December 14. Trading began four days earlier, on December 10. Although Tokyo Electron had been selling for 4600 yen a day earlier, large orders were received for the two-for-one split stock at 2500 yen, instead of the more logical price of 2300 yen. Nomura Securities International. More stock splits are expected, especially among high growth firms. Japan Econ. J., Oct. 5, 1982, at 11, col. 1. This is important for small investors as stock units which might otherwise become too expensive for them to buy will become cheaper after a split. *Id.* Also, corporations will find it easier to increase dividend payments. *Id.*, at col. 2.

[128] Commercial Code, art. 293-5.

and all board resolutions must be passed by a majority of those present at a board meeting.[129]

In practice many boards have been ineffective in overseeing the affairs of the company, often being considered just "hollow shells"[130] controlled by powerful presidents.[131] Regardless of how actively these directors in fact supervise the company, their loyalties are not generally to the shareholders but to the corporate insiders and to the employees.[132] While the trend for publicly held firms in the U.S. has been toward greater numbers of "outside directors,"[133] Japanese boards continue to be comprised almost entirely of "inside directors."[134] Most of these directors are the survivors of a seniority system in which they worked their way up to the position of director after many years with the same firm.[135] Outsiders are few in number and are usually not independent from the company in the American sense of outside directors.[136] Instead, they are transplanted or retired from major bank creditors, sister companies and government agencies that regulate the company.[137]

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[129] *Id.* art. 260-2, para. 1.

[130] Johnson, Kosugi & Motoki, *supra* note 70, at 321.

[131] *Id. See also* Ballon, *Management Style*, in BUSINESS IN JAPAN 124 (P. Norbury & G. Bownas eds. 1980) [hereinafter cited as "Ballon"]; Matsueda & Ihara, *supra* note 88, at § 7.06.

[132] *See infra* text accompanying notes 213-16.

[133] Recent studies indicate that there has been a significant change in the composition of boards of directors in the U.S. The trend has been toward more nonmanagement directors, more "outside" directors unfettered by business ties to management and more board committees — such as nominating, audit and social responsibility committees. The directors of board committees are increasingly outside directors. A survey done by the New York Stock Exchange showed that in 1978, 80% of the responding companies had boards in which nonmanagement directors comprised a majority. NEW YORK STOCK EXCHANGE, INC., CORPORATE GOVERNANCE: SURVEY OF CORPORATE BOARDS, STRUCTURE AND COMPOSITION (1979) *reprinted in Shareholders' Rights Act*, *supra* note 7, at 447-49. *See also id.* at 142 (statement of Robert Neuschel, professor, Northwestern University).

[134] *See* HENDERSON, *supra* note 34, at 113; Browne, *supra* note 6; S. Takeuchi, *supra* note 6; Japan Econ. J., Oct. 24, 1978, at 6, col. 1; Japan Econ. J., Nov. 7, 1978, at 4, col. 4.

[135] Ballon, *supra* note 131, at 122-29; CLARK, *supra* note 25, at 100-01; Browne, *supra* note 6. Contemporaries of these directors who don't reach the position of director or auditor usually must retire after reaching middle management positions. A by-product of the seniority system is that most directors are older than their American counterparts. Japan Econ. J., Oct. 24, 1978, at 6, col. 1.

[136] *See* Browne, *supra* note 6.

[137] Ballon, *supra* note 131, at 121-24. The practice of placing on a company's board retired government officials who used to regulate the company is referred to in Japan as "*amakudari*" which translates as "descent from heaven." *See*, C. JOHNSON, JAPAN'S PUBLIC POLICY COMPANIES (AIE-Hoover Policy Studies) 102-14 (1978); BUREAU OF INTERNATIONAL COMMERCE, U.S. DEPT. OF COMMERCE, JAPAN, THE GOVERNMENT-BUSINESS RELATIONSHIP (1972).

2. *Auditors*

The shareholders must also appoint auditors,[138] who are in charge of supervising the management track record set by the directors.[139] They are appointed for two-year terms[140] and may not concurrently serve as directors or employees of the company.[141] Most companies fill these positions with retiring employees who did not quite excel enough to become directors; in some cases middle level directors who are not going to be promoted to a more powerful position on the board are appointed as auditors.[142] Auditors may be employed on a full-time[143] or part-time[144] basis.[145]

Amendments in 1974 strengthened auditors' powers and duties.[146] Auditors are empowered to: investigate corporate affairs and documents,[147] make reports to the directors and at the shareholders' meetings,[148] enjoin directors' illegal acts[149] and bring certain suits on behalf of the corporation.[150] Auditors are jointly and severally liable to the company for damages due to nonperformance of their duties.[151] In spite of the 1974 amendments, auditors often function as mere "rubber stamps" for the board of directors and often lack the professional expertise to carry out their duties.[152]

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[138] Commercial Code, arts. 254, 280; Special Audit Law, art. 18, "*Kansayaku*," also translated as "Statutory auditor." Because auditors are individuals who usually work solely for the company in question and often were previously employed by that company in other capacities, they are also known as "inside auditors."

[139] Commercial Code, art. 274, para. 1. The auditor shall examine the directors' performance and may call on the directors at any time for a report on the business or to investigate the company affairs.

[140] *Id.* art. 273, para. 1. The auditor's term of office shall extend until the end of an ordinary general meeting dealing with the last settlement of accounting within two years after entering office.

[141] *Id.* art. 276.

[142] Retiring directors that have some particular expertise that their company desires will also sometimes be retained nominally as part-time auditors.

[143] "*Jokin kansayaku*" (full-time auditor).

[144] "*Hijokin kansayaku*" (part-time auditor).

[145] The distinction between full-time auditors and part-time auditors is prevalent. *See, e.g., Only One Month Left!, supra* note 112, at 19; Suzuki, *Kansayakukansa* (Auditing by Auditors), 747 JURISUTO 153 (Aug. 1, 1981) [hereinafter cited as "Suzuki"].

[146] Some of these powers apply only to auditors of "large" and "medium" corporations. *See supra* note 3 and Chart I. The powers and duties of auditors of "small" companies are limited. Special Audit Law, arts. 22, 25.

[147] Commercial Code, arts. 274, 275.

[148] *Id.* arts. 260-3, 275.

[149] *Id.* art. 275-2.

[150] *Id.* arts. 247, para. 1, 275-4, 280-15, para. 2, 380, para. 2, 415, 428, para. 2.

[151] *Id.* art. 277.

[152] Browne, *supra* note 6, at 32-33; Tatsuta, *supra* note 98, at 17. The auditor's role in the company is sometimes so insignificant that some Japanese, instead of saying "*kansayaku*" ("auditor"), jokingly make a play on words and say "*kansanyaku*" which translates as "offi-

In an effort to strengthen the self-regulating functions of the company, the auditors' powers and duties were greatly enlarged by the 1981 Code revisions.[153] Large companies must now have at least two auditors, of which at least one must be full-time.[154] Auditors have the option of obtaining employee reports from the directors or can circumvent the directors and obtain the report directly from the employee.[155] Auditors may also demand the convocation of a meeting of the board of directors whenever necessary.[156] Auditors' rights to remuneration and compensation for expenses have been increased.[157] This further shields auditors from undue influence by directors and makes it easier for them to hire specialists to assist in their auditing and other technical duties.[158] The duties which expose auditors to liability to the company have been expanded and clarified.[159] The new Code imposes liability against third persons as well where false statements have been made in any audit report.[160]

Unlike many statutory changes in the past, these amendments are expected to significantly increase the effectiveness of auditors in practice.[161] There is already concern about the role of part-time auditors,[162] and spec-

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cial of leisure." *Only One Month Left!, supra* note 112, at 19.

[153] Johnson, Kosugi & Motoki, *supra* note 70, at 322; Suzuki, *supra* note 145, at 153.

[154] Special Audit Law, art. 18; INABA, *supra* note 83, at 274. *See* Chart I. The old law made no mention of the number of auditors required or that some auditors must be full-time.

[155] Commercial Code, art. 274, para. 2. A director has the duty to immediately report to an auditor facts which give rise to an apprehension that significant damage may be incurred by the stock company. *Id.* art. 274-2.

[156] *Id.* art. 260-3, para. 3.

[157] *Id.* art. 269.

[158] Johnson, Kosugi & Motoki, *supra* note 70, at 323; INABA, *supra* note 83, at 264-67, 268-70.

[159] Johnson, Kosugi & Motoki, *supra* note 70, at 323. *See, e.g.*, Commercial Code, art. 260-3, para. 2. The facts for disqualification of directors, listed at note 121, *supra*, also apply to auditors. Commercial Code, arts. 254-2, 280.

[160] Commercial Code, art. 280, para. 2. *See* Johnson, Kosugi & Motoki, *supra* note 70, at 323; SUZUKI & TAKEUCHI, *supra* note 127, at 237-38.

[161] *See, e.g.*, INABA, *supra* note 83, at 248; Suzuki, *supra* note 145, at 153-56; *Only One Month Left!, supra* note 112, at 19. However, in a 1982 survey of 669 listed companies, only 19.3% responded that they thought the amendments would be effective at stengthening and improving audits done by auditors, while 58.4% responded that the quality of audits depends upon the efforts of those conducting the audits and that the change in the law cannot be expected to significantly affect this. White Paper, *supra* note 45, at 88-89.

[162] *Only One Month Left!, supra* note 112, at 19. The requirement of having two auditors in large companies presents little problem in practice, as over 99% of listed companies and 87% of large, but unlisted companies already had two or more auditors before the law was passed. INABA, *supra* note 83, at 273; Suzuki, *supra* note 145, at 153. There is a problem, however, in determining when a company has a "full-time" auditor. According to one survey the ratio of "part-time" to "full-time" auditors in listed companies is 1 to 1.76. Suzuki, *supra* note 145, at 153. However, many of these companies are making a distinction between being merely an "auditor" (*kansayaku*) and a "regular auditor" (*jonin kansayaku*). The latter term designates a higher rank but does not necessarily mean that the auditor in question has the expertise or is spending the time necessary to be considered a "full-time" audi-

ulation that the average salaries of auditors will increase substantially.[163]

3. *Accounting Auditors*

In large companies financial statements must not only be audited by company auditors but also by outside "accounting auditors."[164] An accounting auditor must be a certified public accountant or an audit corporation.[165] Accounting auditors were previously appointed and removed by the board of directors but the new Code shifts these powers to the general meeting of shareholders.[166] Other new provisions further insulate accounting auditors from undue influence by directors or inside auditors.[167] Accounting auditors are liable to the company and to third parties for damages caused by their negligence.[168]

4. *Shareholders*

a. *Stock System*

Although different classes of stock are allowed,[169] almost all stock issued in Japan is voting common stock.[170] Until October 1982, most stock had a par value of fifty yen, which is considered excessively low given the current value of the yen.[171] Consequently, the 1981 amendments provide

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tor as the term is used in the new law. *Id.* at 153-54. While the actual qualifications required for the new "full-time" auditors are open to interpretation and must eventually be clarified, Suzuki, *supra* note 145, at 154, the amendments decree that many companies will have to expand the role played by their auditors. *Id.; Only One Month Left!, supra* note 112, at 19. Uncertainties also surround the role of "part-time" auditors.

[163] *Only One Month Left!, supra* note 112, at 19, 21.

[164] "*Kaikei kansanin.*"

[165] Special Audit Law, art. 4.

[166] *Id.* arts. 3, 6. The accounting auditors may also be removed by the inside auditors. *Id.* art. 6-2.

[167] For example, where the dismissal of an accounting auditor is considered at a shareholders' meeting, the accounting auditor may speak directly to the shareholders so that the shareholders do not have to rely solely on the opinions of the directors and inside auditors. Special Audit Law, arts. 6-2, 6-3. Accounting auditors may have no other associations with the company. *Id.* art. 4, para. 2, item 2. The amendments to the Special Audit Law add criteria for the disqualification of accounting auditors which are stricter than those found in either the Certified Public Accountants Law or Securities Exchange Law of Japan. Johnson, Kosugi & Motoki, *supra* note 70, at 340. *See* Special Audit Law, art. 4, para. 2.

[168] The accounting auditor shall be jointly and severally liable for damage caused to the company due to negligence in performance of his duties. Special Audit Law, art. 9. Accounting auditors are also liable for damage to third parties due to false statements in the auditing report. *Id.* art. 10.

[169] The corporation may issue either par value or no par value shares, or both. Commercial Code, arts. 199, 242.

[170] Browne, *supra* note 6, at 32; Johnson, Kosugi & Motoki, *supra* note 70, at 311.

[171] Johnson, Kosugi & Motoki, *supra* note 70, at 311. The 1950 amendments to the Com-

for raising the unit par value to a minimum of 50,000 yen, which for most companies will require consolidating 1000 shares of stock (at par of fifty yen each) into new stock "units."[172] The burden imposed on large investors is minimal since the nominal lot size for trading on the exchanges has been 50,000 yen.[173] However, those investors holding less than one "unit" of stock in a company[174] will lose their right to vote this stock, and presumably lose the corresponding right to attend shareholder meetings.[175] As each "unit" counts as one vote, even larger shareholders lose their voting rights with respect to any odd number of shares they own in excess of a multiple of one "unit."[176] However, these "fractional" shares do retain their negotiability, can be consolidated to create a unit share, and at the request of the holder must be repurchased by the company.[177]

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mercial Code raised the minimum par value of stock to 500 yen. Commercial Code (1950), art. 202, para. 2. However, this change did not affect the par value of companies already in existence at the time. The standard par value prior to the amendments was 50 yen and sometimes 20 yen. Newer companies avoided the 500 yen par minimum by merging with pre-1950 companies and adopting the older stock. Nomura Securities International.

[172] Supplemental Rules, *supra* note 3, art. 16. Converting to this new "unit" stock system is mandatory only for listed companies. *Id.* art. 15.

[173] Johnson, Kosugi & Motoki, *supra* note 70, at 311.

[174] In 1982 over 4.5 million shareholders held less than the required amount of stock in a company to be a "unit" stockholder of that company. INABA, *supra* note 83, at 447.

[175] Most commentators interpret the new law as denying shareholders with less than one unit the right to attend shareholder meetings. For arguments to the contrary, *see* S. MOTOKI & T. INABA, KAISHA HO SHITSUGIOTOSHU (Questions and Answers on Corporate Law) 64 (Bessatsu Shojihomu (Supplementary Volumes on Commercial Law) No. 56, 1982). Notice of shareholder meetings need not be sent to shareholders who have no voting rights. Commercial Code, art. 232, para. 4.

[176] Fractional shares present a record keeping problem. Under the old system there were 220.4 billion shares listed on Japan's exchanges in 1981. INABA, *supra* note 83, at 447. Of this, 4 billion shares or 1.8%, were held in odd numbers which would remain as fractional shares when the new system took effect on October 1, 1982. *Id.* Of these odd numbered shares, 1.1 billion were held by 4.53 million people who held less than 1000 shares in any one company and thus are not holders of stock "units." *Id.* The other 2.9 billion odd shares were held in addition to units of 1000 by 8.35 million people or 42.6% of all shareholders. *Id.* Only 6.69 million people or 34.2% of all shareholders, held their stock in exact multiples of 1000. *Id.* Because of the onerous bookkeeping required to account for fractional shares, some companies mounted large campaigns to repurchase fractional shares before the new Code became effective. Hitachi, Ltd., for example, sent notices to 148,000 holders of fractional shares offering to repurchase their odd numbered shares. Fifty-four thousand, or 37%, responded affirmatively. Shukan Daiyamondo (Diamond Weekly) Sept. 4, 1982, at 17.

[177] Holders of fractional shares may not, depending on the company, lay claim to dividends or preemptive rights. Johnson, Kosugi & Motoki, *supra* note 70, at 312. For a more detailed description of how fractional shares are handled and of the rights of fractional shareholders, see *id.* at 311-14, Commercial Code, arts. 230-2 through 230-9, 260-3, and Supplemental Rules, *supra* note 3, art. 18.

b. Voting

While the unit stock system[178] eliminates almost one-quarter of Japan's shareholders from participating in general meetings, the procedures for share voting have essentially remained the same.[179] The Commercial Code enumerates a limited number of matters upon which shareholders have the power to vote at a general meeting. These can be extended by the articles of incorporation.[180] Cumulative voting is possible for the election of directors,[181] but in practice is rarely, if ever, used.[182]

Most matters may be passed upon by a simple resolution of the shareholders. Some of the matters which may be passed by ordinary resolution include: declaration of cash dividends,[183] declaration of stock dividends,[184]

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[178] The creation of this "unit stock system" does not seem to have a parallel elsewhere in the world. A. TAKEUCHI, KAISEI KAISHA HO KAISETSU (Explanation of the Amended Corporate Law), at *i* (1981) [hereinafter cited as "TAKEUCHI"]; *see also* INABA, *supra* note 83, at 65.

[179] The Code used to prohibit the exercise of voting rights by "interested" shareholders; the former Article 239, paragraph 5 reads: "No person who has a personal interest in the subject matter of a resolution of a shareholders' general meeting can vote upon it." (*translation from* DOING BUSINESS IN JAPAN, at App. 5A-69 (statutory vol.) (Z. Kitagawa ed. 1980)).

While in theory this broadly worded provision was potentially troublesome for directors who held shares in a number of companies, its application had been significantly narrowed by judicial construction. It is one of the few provisions of the Commercial Code to undergo significant interpretation by Japanese courts. In a 1967 Supreme Court decision, the Court found that a shareholder-director was not a person with a special interest within the meaning of art. 239, para. 5 in regard to a shareholders' general meeting resolution to have the shareholder-director removed as a director. Watanabe v. Futaba Yuatsu Kogyo K.K., 21 Saihan minshū 378 (Sup. Ct., Apr. 14, 1967). (For an English translation of a comment on the case, see, Yazawa, *Comment on Watanabe v. Kogyo K.K.*, 3 LAW IN JAPAN: AN ANNUAL 190 (1969)). Later that year, the Supreme Court ruled that a shareholder was not an interested person for a shareholders' vote concerning the transfer of major assets to a company of which the shareholder was a director. Miyawaki v. Kowa Sangyo K.K., 21 Sai-han minshū 1669, 1971-72 (Sup. Ct., July 25, 1967). In the new Code this provision is deleted. However, to protect against abuse, art. 247, para. 1, item 3, of the new Code empowers shareholders, directors and auditors to seek an action to rescind a shareholders' resolution when it is "a grossly inappropriate resolution. . .adopted because of the fact that a shareholder having special interest in said resolution has exercised his voting right." (*translation from* Nakatsu in 2 JAPAN BUS. L.J. 373-74 (1981)).

[180] Commercial Code, art. 230-2.

[181] *Id.* art. 256-3, paras. 1 & 2. The Commercial Code as adopted in 1950 by SCAP allowed any shareholder to demand cumulative voting. Even if the articles of incorporation provided otherwise, any shareholder or group of shareholders holding 25% or more of the issued shares could demand cumulative voting. *Id.* art. 256-4 (1950). In practice, Japanese almost never used cumulative voting. HENDERSON, *supra* note 34, at 260. However, there were fears that foreign shareholders might take advantage of the right to cumulative voting. *Id.* In 1974 the Code was amended to delete art. 256-4, and to change art. 256-3 to its present form, providing that a company may prohibit cumulative voting.

[182] Tatsuta, *supra* note 98, at 25; Yazawa, *supra* note 17, at 554; *see also* HENDERSON, *supra* note 34, at 260.

[183] Commercial Code, art. 293.

[184] *Id.* art. 293-2. Stock dividends used to require special resolutions. For a description of why the change was made, see Johnson, Kosugi & Motoki, *supra* note 70, at 330.

approval of financial statements,[185] and election of auditors[186] and accounting auditors.[187] This requires a quorum of a majority of the outstanding voting shares and affirmative votes of a majority of the shares represented at the meeting.[188] These quorum and voting requirements for simple resolutions can be changed by the articles of incorporation,[189] but elections for directors and auditors must in any event have a quorum of not less than one-third of the outstanding voting stock.[190]

Certain matters can only be passed by special resolution requiring a quorum of a majority of the outstanding stock and the favorable vote of two-thirds of the shares represented at the meeting.[191] These requirements cannot be relaxed by the articles of incorporation. Some of the matters requiring a special resolution include: amending the articles of incorporation,[192] removing directors and auditors prior to the expiration of their terms,[193] approving mergers and consolidations,[194] reducing paid-in capital[195] and issuance of new shares at favorable prices to persons other than shareholders.[196] There are certain matters which require even more stringent voting or quorum requirements; for example, releasing directors and auditors from liability for various acts usually requires unanimous consent.[197]

c. *Dissenting Shareholders*

When a shareholders' meeting has passed a special resolution with regard to matters such as disposition of all or an important part of a company's business, merger, consolidation or a restriction on stock transfer, any shareholder who has notified the company in writing prior to the meeting that he opposes the resolution and then does in fact oppose the resolution at the meeting, may demand that the company purchase his shares at the fair market value of the shares prior to the resolution.[198] Where the price cannot be agreed upon the shareholder may apply to the

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[185] *See supra* note 125.

[186] Commercial Code, art. 280; art. 254, para. 1.

[187] Special Audit Law, art. 3, para. 1.

[188] Commercial Code, art. 239.

[189] *Id.* art. 239, para. 1.

[190] *Id.* arts. 256-2, 280.

[191] *Id.* art. 343.

[192] *Id.* arts. 342, para. 1, 343.

[193] *Id.* arts. 257, paras. 1 and 2, 280, 343.

[194] *Id.* arts. 408, paras. 1 and 3, 343.

[195] *Id.* arts. 375, para. 1, 376, para. 1, 343.

[196] *Id.* arts. 280-2, para. 2, 343.

[197] *Id.* art. 266. For a discussion of requisite approval for conflict of interest transactions, see *supra* note 119.

[198] Commercial Code, art. 245-2. *See also* Matsueda & Ihara, *supra* note 88, at 49.

appropriate court for an appraisal remedy.[199]

III. The Individual Shareholder

A. *The Individual Shareholder as an "Outsider"*

The process of "going public" in Japan never forced corporate leadership to relinquish ownership of a controlling block of stock. In most listed companies in Japan, a sizeable portion of the stock remains permanently in "safe" hands, thus assuring continued control by management. Shareholdings are fragmented between "insiders" and "outsiders." Insiders are small circles of executives and financiers often connected with the issuer's enterprise group. Outsiders consist primarily of individual investors, and to a lesser degree, of investment advisory firms, insurance companies, banks or other groups and foreign firms. Outsiders occupy a position analogous to second-class creditors; they receive dividends, smaller but more consistent than in the U.S., and capital gain treatment when they sell, but have no real voice over the way corporate affairs are conducted. The insiders are in charge, not by virtue of their position as shareholders, but as a product of the multiplicity of their roles in the firm; they are creditors, shareholders, lifetime employees, management and business partners.

1. Relationship to Management: The Weakness of the Individual Shareholder's Position

a. Orientation to Management

Insider control insulates Japanese corporate leadership from the influence of outsider shareholders. Typically, group members and creditors give blank proxies to a company's management, usually to a strong president.[200] In return the company gives blank proxies to the management of each company in which it owns stock. To do otherwise would be an insult.[201] As long as a company is not in serious financial trouble or engaging in activities that are detrimental to other members of the group, there is great deference paid to the company's management.[202]

Parallels can be drawn between the status of the Japanese individual

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[199] Commercial Code, art. 245-3.

[200] The locus of power varies from company to company, depending on the relative strengths of the president, chairman, main bank creditor, parent company and group influence.

[201] Interview with Mr. Hiroshi Miyamura, Senior Vice President and Manager of Nomura Securities International, Inc., Honolulu Office (Mar. 30, 1983).

[202] *Id.*

investor and his American counterpart in view of the fact that most stock in the U.S. is voted by proxy with instructions to vote the way management recommends. However, American management is of necessity more sensitive to the economic desires of outside shareholders. The insiders in the U.S. own a smaller portion of corporate stock than their Japanese counterparts and are therefore susceptible to the influence exerted by large institutional investors. As the interests of institutional investors and individual investors in maximizing the return on their investment coincide,[203] the presence of institutional investors protects the position of small investors in the U.S.[204] In contrast, the insiders in Japan are not motivated to make large dividend payouts or achieve short-term profits.[205] Instead, they are interested in long-term market share, and in ensuring the cooperation of the company as a borrower, customer or supplier.[206] Low, fixed dividend payouts allow insiders to maximize internal financing and growth through the retention of earnings, thus reducing the need for bank loans and stock issues.[207]

b. Equity Funding and New Issues

The relative unimportance of new issues in Japan has also placed shareholders in a subservient position in the eyes of management. For historical reasons, Japanese companies until the early 1970's invariably gave shareholders subscription rights at par on any new issue.[208] Because most stocks have a market value well above par and pay dividends based on a percentage of par, new issues were costly for companies, while bank loans, with relatively low, stable interest rates, were a more economical way to raise funds.[209] This situation is changing, as most companies have broken with tradition and make public offerings of new issues with no subscription rights for shareholders.[210] Also, interest rates in Japan are becoming less stable and bank loans more expensive.[211] Nevertheless,

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[203] CLARK, *supra* note 25, at 101-02.

[204] The emphasis on maximizing return has been criticized as detrimental to American corporations since it deters sound long-range planning and investment. *Id. See, e.g.*, R. Nader, M. Green & J. Seligman, Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations 3 (1976) (Report of the Corporate Accountability Research Group).

[205] CLARK, *supra* note 25, at 101-02; STOKES, *supra* note 61, at 25.

[206] CLARK, *supra* note 25, at 102; STOKES, *supra* note 61, at 25.

[207] Akabori-Shibuya, *A Study of the Shareholders' Position in Public Issue Corporations*, 10 LAW IN JAPAN: AN ANNUAL 101 (1977), *from* SHOJIHO NO SHOMONDAI: ISHII TERUHISA SENSEI TSUITO RONBUNSHU (Problems in Commercial Law: Collection of Essays in Memorium to Professor Teruhisa Ishii) 219 (1974).

[208] SECURITIES MARKET IN JAPAN, *supra* note 11, at 22-26; *cf.* STOKES, *supra* note 61, at 7.

[209] SECURITIES MARKET IN JAPAN, *supra* note 11, at 22-26; STOKES, *supra* note 61, at 5.

[210] SECURITIES MARKET IN JAPAN, *supra* note 11, at 22-23.

[211] Economist, Apr. 3, 1982, at 82, col. 2.

banks continue to play a far more central role in funding Japanese companies than do stock issues.[213]

c. *Lifetime Employment: Impact on Directors' Loyalties*

Inherent in the American notion of shareholding is the idea that the shareholders "own" a part of the company and management must be accountable to them as the owners. In Japan, any sense of duty on the part of management to the masses of individual shareholders is diluted by a phenomenon of Japanese society known as the lifetime employment system. A company's first duty is generally considered to be to its employees rather than to shareholder-owners.[213]

Japan has been described as a "vertical society"[214] in which an individual's primary identity lies with tight-knit groupings: the three-generation family unit, the village, the company. This strong group orientation produces a "we-they" mentality with the "we" being the vertical hierarchy of one's own group.[215] An electrician at Mitsubishi will consequently identify himself as a "Mitsubishi man" rather than as an electrician. The company becomes the predominant group in the lives of many Japanese. Lifetime employment is the norm for larger companies, and promotion up the hierarchy most often follows seniority. Because workers generally stay with one firm for life, the long range prosperity of the company is essential to their own security. It is not surprising that a company's directors feel more loyalty to the employees, from whose ranks they have risen, than to outside shareholders. To the Japanese way of thinking, company employees have more "ownership" interest in the company than do shareholders who merely are investing in the company.[216]

2. *Economic Position of Outside Shareholders*

The outside shareholders in Japan have very little control over corporate affairs. However, the weakness of the outside shareholders' position in the corporate hierarchy is offset by the economic benefits attached to shareholding. Indeed, the Japanese model of corporate governance does result in profitability.[217] The shareholders' dividend income, though usu-

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[213] Browne, *supra* note 6, at 33.

[213] Over 15% of top executives in Japan are ex-union leaders. Japan Econ. J., Nov. 7, 1978, at 4, col. 4.

[214] C. NAKANE, JAPANESE SOCIETY 23, 38 (1970).

[215] For example, labor unions are not organized by trade horizontally across all companies, but instead vertically, encompassing all the trades within a single company. Labor and management negotiate with each other within the larger framework of belonging to the same "we" group.

[216] Japan Econ. J., Nov. 7, 1978, at 4, col. 4.

[217] *See, e.g.*, Chart II; Browne, *supra* note 6, at 32-33.

ally only 10% to 20% of par (or 1% to 4% of equity),[218] is usually a stable source of income.[219] Furthermore, most stock transactions for individuals incur no capital gains taxes in Japan[220] and carrying charges are relatively low; hence, it is easy for an investor to buy and sell stock quickly, taking advantage of the staggered nature of business cycles to generate capital gains through a high turnover.[221] While a good portion of listed stock in Japan is held permanently, the remainder is traded so often that the Tokyo Stock Exchange has a higher turnover than the New York Stock Exchange.[222] What has been described as the "Monte Carlo"[223] view of a shareholder's interest in a corporation seems to be more applicable in Japan than in the U.S.: Like a "chip on a roulette table," a shareholder's interest "is fungible with other investments — mutual funds, savings accounts and pension interest."[224] The stock market is still considered to be speculative by some Japanese, and many investors shy away from it.[225] Not surprisingly, a relatively smaller portion of Japanese personal assets go into stock.[226] Even investment trusts, i.e., mutual funds, are not growing as fast in Japan as in the U.S.[227]

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[218] STOKES, *supra* note 61, at 15-16; NRI MANUAL, *supra* note 23, at 73, 87.

[219] STOKES, *supra* note 61, at 16. However, more and more companies are now changing to flexible dividends. Nomura Securities International.

[220] Coleman, *Taxation of Capital Gain in Japan and Korea in Light of the Concept of Taxable Income*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA, 253, 264-68 (J. O. Haley ed. 1978); Y. GOMI, GUIDE TO JAPANESE TAXES 1981-82, 266-68 (Zaikei Shohosha, Tokyo, 1981). Four cases in which tax is incurred are: (1) the taxpayer sells a total of more than 200,000 shares in more than 50 transactions in one year; (2) he sells 200,000 shares or more of one corporation in one year; (3) he buys the securities with the intention of making them soar in price; or (4) his sale results in the transfer of control of the corporation. Y. GOMI, *supra* at 166. *See also*, Browne, *supra* note 6, at 33; Arthur Andersen and Co., *Comparison of Individual Taxation of Long and Short Terms Capital Gains on Portfolio Stock Investments and Dividend and Interest Income in Eleven Countries* (Dec. 15, 1980) (prepared for Securities Industry Association), *reprinted in Tax Aspects of the President's Economic Program: Hearings Before the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 983-1003 (1981).

[221] *See, e.g.*, Grove, *Stocks, Securities and the Brokerage Market*, in BUSINESS IN JAPAN 102, 106-08 (P. Norbury & G. Bownas eds. 1980) [hereinafter cited as "Grove"].

[222] SECURITIES MARKET IN JAPAN, *supra* note 11, at 47.

[223] Chang, *supra* note 6, at 187.

[224] *Id.*

[225] There are two reasons for this tendency. One is the dual tax system that is applied to stock dividends in Japan. Since capital gains are not taxed, investors seek to have their yields classified as capital gains. The second reason is that the average yield for Japanese stocks is considerably less than that in the United States and other developed countries. Average stock dividends currently stand at two per centum (figure as of Mar. 30, 1983).

[226] FUJI BANK BULL. 6 (Jan. 1981); STOKES, *supra* note 61, at 15.

[227] FUJI BANK BULL. 6-7 (Jan. 1981); FUJI BANK BULL. 91 (May 1981).

B. Direct Internal Governance by Shareholders

Shareholder meetings in Japan in practice provide even less opportunity for shareholder participation in company affairs than they do in the U.S. While apathy is common to both countries,[228] shareholders in Japan face added obstacles to any meaningful use of their voting rights at meetings. Substantial changes produced by the 1981 revisions are designed to remove some obstacles to shareholder participation.

1. The General Meeting

a. Situation in Japan Until the Effective Date of the New Amendments on October 1, 1982

Stockholder meetings for listed U.S. companies have been described as follows:

> Many individual shareholders do not bother to exercise their voting rights, which in most instances are infinitesimal alongside those of institutional investors. The Soviet-style election typically held by corporations — with a single slate of directors and an auditor, sharply restricted communications among voters and procedural impediments to provisions of choice for them — does not induce participation, especially when one institution can outvote thousands of individuals.[229]

Descriptions of the Japanese situation reveal even less shareholder participation. "[I]n Japan, management power as it is actually administered is vastly different from the way it is perceived legally. . . . The fact is that the average stockholder has almost no power, rarely attends meetings, and if and when he does attend, he is at best ignored and sometimes bullied."[230]

As can be seen from Table A,[231] shareholder meetings are not well attended in Japan. In most years, about 75% of publicly held corporations surveyed had fewer than 100 people attend the general shareholder meeting in their individual capacity.[232] Table B reveals that the stock repre-

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[228] S. Takeuchi, *supra* note 6, at 29, col. 3; Browne, *supra* note 6, at 33; *Shareholders' Rights Act*, *supra* note 7, at 82 (statement on behalf of Business Roundtable), and 135 (statement by David S. Ruder, Dean, Northwestern University School of Law); VOTING RIGHTS, *supra* note 53, at 10.

[229] VOTING RIGHTS, *supra* note 53, at 10.

[230] Browne, *supra* note 6, at 32, 33. *See also* Morimoto, *supra* note 89, at 125-26; CLARK, *supra* note 25, at 99-102; Kawamoto & Monma, *Sokai-ya in Japan*, 6 HONG KONG L.J. 179 (Nov. 2, 1976) [hereinafter cited as "Kawamoto & Monma"].

[231] *See* Appendix. All Tables and Charts referred to hereinafter are found in the Appendix.

[232] *See also* Morimoto, *supra* note 89, at 126. The number of shareholders in most of the

sented by those attending for themselves comprised less than 20% of the company's outstanding stock in almost four out of every five cases. For those that do attend, the meeting is pro forma: cryptic reports are read, votes quickly cast and the meeting is adjourned with almost no questions being raised or debate taking place (see Tables J and K). The outcome of the voting is known in advance due to the proxies held by management.[233] In 1980 over two-thirds of the companies ended their meetings in less than twenty minutes.[234] Over 95% ended in less than one-half hour.[235] (Figures for other years can be seen in Table I.)

Another major reason for the lack of shareholder participation has been the presence at meetings of "professional shareholders" known as "*sokai-ya.*" The *sokai-ya* are hired by management to attend meetings to ensure that no debate takes place, that no embarrassing questions are asked, and that the meeting runs smoothly and ends quickly. These men each own a few shares to gain entrance to the meeting, and are paid handsomely from corporate funds funneled through some nondescript account. They have been described as "gangster-type groups. . . .who are hired by the company to 'preserve order' at these meetings."[236] *Sokai-ya* also make money by posing as a threat to management. They are "large men in flashy clothes who are professional blackmailers. They make a living out of extortion; managements pay for their silence on such matters as pollution, etc."[237]

b. Amendments Designed to Eliminate Sokai-ya

Article 294-2 which prohibits a corporation from giving "any person any benefit estimable in terms of properties with respect to the exercise of the rights of a shareholder"[238] is the main provision in the new Code attacking the activities of *sokai-ya.* Thus a company may not give cash or property to a shareholder in order to induce or prevent the shareholder's exercise of his rights, nor may a company bestow such benefits on a nonshareholder to prevent him from acquiring stock. The recipient of any such benefit is liable for its return to the company.[239] In addition, there are criminal penalties of a maximum jail sentence of six months and

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smallest of the listed companies is over 1000. *See, e.g.,* THE ORIENTAL ECONOMIST, SECOND SECTION FIRMS 1982, JAPAN COMPANY HANDBOOK (1982). Many companies in the First Section of the Tokyo Stock Exchange have tens of thousands of shareholders, and some have hundreds of thousands. *See* JAPAN COMPANY HANDBOOK, *supra* note 36.

[233] Morimoto, *supra* note 89, at 126.

[234] *Id.*

[235] *Id.*

[236] Browne, *supra* note 6, at 32.

[237] STOKES, *supra* note 61, at 11.

[238] Commercial Code, art. 294-2 (*translation from* Nakatsu in 2 JAPAN BUS. L.J. 396 (1981)).

[239] Commercial Code, art. 294-2, para. 3.

a maximum fine of 300,000 yen (about $1400)[240] which can be enforced against any director, auditor or employee of the company who gives such benefits, any recipient with knowledge or any person who directs that such benefits be given to a third person.[241]

In order to alleviate the difficulty of proof, the Code dictates that the benefits will be presumed to have been made to influence the exercise of shareholder rights any time the company has transferred property to a shareholder without consideration or for grossly inadequate consideration.[242] However, such presumption does not exist in the case of transactions between the company and nonshareholders.

The prohibition on bestowing benefits is expected to drastically curtail the activities of *sokai-ya*.[243] Among companies surveyed after the law was passed but before it became effective, 86% thought that the law was going to be very helpful in eliminating *sokai-ya* and another 10% thought it would be somewhat helpful while less than 1% thought that the situation would not change.[244] Many companies welcome the opportunity to be free of *sokai-ya* harassment. Even where there is an inclination to hire the "services" of *sokai-ya*, directors may hesitate because of the potential sanctions.[245] Forty percent of the companies surveyed responded that their contact with *sokai-ya* had decreased during the year preceding the effective date of the new law.[246] Seventy-eight percent planned to have absolutely no contact with *sokai-ya* after October 1, 1982, and another 13% indicated that they planned to attempt to eliminate all contact. Six percent indicated that they had previously had no dealings with *sokai-ya*, while only one company out of 669 polled responded that it was impossible to eliminate *sokai-ya*.[247] Another indication that companies are trying to ward off *sokai-ya* is the fact that increasing numbers of companies are relying on police to guard and monitor their shareholder meetings.[248] Moreover, the police are expected to vigorously enforce the new provisions because many *sokai-ya* are members of organized crime syndicates in Japan.[249] For example, two weeks after the new provisions became effective the Tokyo Metropolitan Police arrested a "one-time top rank sokai-ya racketeer," Koaru Ogawa.[250] Ogawa was actually arrested on sus-

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[240] *Id.* art. 497. Assuming a median rate of exchange of ¥200 = $1.00, ¥300,000 equals approximately $1,400.00.

[241] *Id.* art. 497.

[242] *Id.* art. 294-2, para. 2.

[243] *See, e.g.*, TAKEUCHI, *supra* note 178, at 223-24; White Paper, *supra* note 45, at 58.

[244] White Paper, *supra* note 45, at 64.

[245] MOTOKI, *supra* note 117, at 207.

[246] White Paper, *supra* note 45, at 59.

[247] *Id.* at 60.

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

[249] Some Japanese gangsters are known as "Yakuza."

[250] Hawaii Hochi, Oct. 19, 1982, at 8; Japan Times, Oct. 15, 1982, at 2, col. 1. Ogawa was the first top level *sokai-ya* to be arrested after the Revised Commercial Code went into force on Oct. 1, 1982.

picion of blackmailing a doctor. It was presumed that Ogawa was short of funds because businesses were refraining from giving "contributions" to *sokai-ya* as a result of the Code revisions.[351] Ogawa reportedly used to collect about one billion yen ($4.7 million) annually in "donations" from companies.[352]

It remains to be seen how thoroughly *sokai-ya* practices will be eliminated. While 96% of companies polled thought that *sokai-ya* activity would decrease and 27% thought that *sokai-ya* would actually go into retirement, 42.5% felt that *sokai-ya* would continue to operate by disguising their tactics.[353] Indeed, *sokai-ya* may simply find new ways to extort money which are not adequately covered by the law or which are difficult to detect. The problem of proof surrounding transactions with nonshareholders may become a major loophole in the law. Also, companies are sometimes coerced by *sokai-ya* into buying advertising space in magazines because of the fear that damaging information or rumors will be printed about the companies that refuse to do so.[354]

c. *Directors Duty to Explain*

The new amendments also seek to invigorate shareholder meetings by imposing upon directors and auditors a "duty to explain" at meetings.[355] Any reasonable question submitted in advance of a shareholders' meeting must be fully answered and explained if raised at the meeting. Where notice of the question has not been given in advance, the directors or auditors must still answer it unless unable to do so without preliminary research and preparation.[356] The new requirement is apparently being taken seriously by companies: Of companies polled before the new law became effective, 60% said that they were already in the practice of preparing answers to hypothetical questions before shareholder meetings; half of these companies said that they will be putting more effort into the preparations after the new law becomes effective.[357] Another 23% of the companies responded that although they had not done so in the past, they will begin to prepare answers for shareholder meetings because of the new law.[358]

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[351] Hawaii Hochi, Oct. 19, 1982, at 8; Japan Times, Oct. 15, 1982, at 2, col. 1.

[352] *Id.*

[353] White Paper, *supra* note 45, at 62.

[354] Nevertheless, over 82% of the companies polled felt that their magazine advertising and subscription costs would decline because of the new law. White Paper, *supra* note 45, at 63.

[355] Commercial Code, art. 237-3.

[356] *Id.*

[357] White Paper, *supra* note 45, at 36.

[358] *Id.*

d. Effects of the Amendments on General Meetings Since October 1, 1982

Seven shareholders' meetings which were held after the new Code amendments became effective preview the impact the revisions will have on shareholder participation.[259] The complete absence of *sokai-ya* hired by companies to control the meetings was particularly noteworthy. However, antagonistic *sokai-ya* remained in attendance at the meetings.

Uchida Yoko Co., a leading office equipment supplier, enjoys the distinction of being the first major company to hold its regular shareholders' meeting under the new law.[260] The most notable change was that company officials were in control of the October, 1982 meeting, "unlike past occasions where sokaiya racketeers virtually directed the proceedings."[261] While attendance was up, the numbers were still not substantial: seventy "insider" shareholders, fourteen regular shareholders and six *sokai-ya* shareholders were present.[262] For the first time the company explained in detail its business operations, using elaborate slides projected on the conference room wall.[263] Because of a twenty-one minute slide presentation, the entire meeting lasted forty-five minutes, longer than usual.[264] No questions were asked by shareholders, however, and the company's reports were unanimously approved.[265]

The companies which held meetings in November and December also reported lengthier meetings than usual, with one company requiring one hour and forty minutes.[266] As in the case of Uchida Yoko, these compa-

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[259] *See Kaisei Shoho no "Kireaji" wa?* (How Effective is the Amended Commercial Code?) NIKKEI BUS. 157 (Jan. 10, 1983) [hereinafter cited as "NIKKEI BUS."] (describing the October 1982 meeting of Uchida Yoko Co., the November meetings of Jujiya Co. and Katakura Chikkarin Co. and the December meetings of Nikko Securities Co., Daiwa Securities Co. and Nomura Securities Co.); Hawaii Hochi, Feb. 2, 1983, at 1, col. _ (describing the Jan. 28, 1983 meeting of Isuzu Motors, Ltd.).

[260] Hawaii Hochi, Oct. 21, 1982, at 1, col. 3; Japan Times, Oct. 19, 1982, at 2, col. 7. The Uchida Yoko meeting was held on Monday, Oct. 18. The company is a leading commercial house dealing in office equipment, educational equipment and small size computers. It not only controls several manufacturers and has a strong nationwide sales network but also has branches in Hong Kong, Hamburg and New York. JAPAN COMPANY HANDBOOK, *supra* note 36, at 772.

[261] Hawaii Hochi, Oct. 21, 1982, at 1, col. 3; Japan Times, Oct. 19, 1982, at 2, col. 7.

[262] *Zenkiroku Yonjugofun* (The Whole Thing in Forty-Five Minutes), in Shukan Daiyamondo (Diamond Weekly), Nov. 6, 1982, at 82 [hereinafter cited as "Forty-Five Minutes"]. Also present were television crews, reporters, police and executives from 50 securities and industrial companies. *Id.* As of January 1982, Uchida Yoko had 2418 shareholders. It should also be noted that the eight major shareholders own more than 30% of the total shares outstanding. JAPAN COMPANY HANDBOOK, *supra* note 36, at 772.

[263] Hawaii Hochi, Oct. 21, 1982, at 1, col. 4; Forty-Five Minutes, *supra* note 262, at 82.

[264] Forty-Five Minutes, *supra* note 262, at 82.

[265] *Id.; cf.* Hawaii Hochi, Oct. 21, 1982, at 1, col. 4.

[266] NIKKEI BUS., *supra* note 259, at 157, 160.

nies had fewer *sokai-ya* in attendance.[267] Two factors in particular contributed to their absence. In all cases, no company-hired *sokai-ya* appeared.[268] Secondly, many *sokai-ya* who had previously owned only a few shares of stock did not purchase additional shares in time to become "unit" stockholders.[269] Nevertheless, antagonistic *sokai-ya* were present at all the meetings. Unlike Uchida Yoko, these companies did experience shareholder inquiries, usually raised in a dilatory fashion by one or two *sokai-ya*.[270]

The general shareholders' meeting of Isuzu Motors, Ltd., in January 1983, lasted an unprecedented five hours and fifty minutes and was attended by 370 persons, almost three times the usual number, of whom 120 were *sokai-ya*.[271] *Sokai-ya* took turns asking questions and giving lengthy speeches on the amended Commercial Code.[272] Police reportedly suspect that the delaying tactics used at this meeting were intended to demonstrate the *sokai-ya*'s power prior to June when a large number of companies have shareholders' meetings scheduled.[273] This suggests that some *sokai-ya* intend to circumvent the new laws.

At all of these first few meetings participation by regular shareholders remained minimal.[274] Not only were few questions raised by regular shareholders, but most increases in attendance came from insider shareholders affiliated with management.[275] However, there appears to be a trend toward companies making their meetings much more informative for shareholders. Companies are preparing elaborate presentations, often with slide shows, to create more informative meetings.[276] Company executives have, for the most part, carefully answered all questions raised by shareholders in spite of the obvious efforts by *sokai-ya* to filibuster.[277] And while in the past only the chairman of the meeting spoke on behalf of the company, in a number of the recent cases, a variety of company representatives spoke and answered questions.[278]

There also seems to be a trend toward improved appearance and content of the reports and brochures sent by companies to their sharehold-

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[267] *Id.* at 157-59.

[268] *Id.*

[269] *Id.* at 159. While an individual *sokai-ya* was able to participate in hundreds of companies' shareholders' meetings with a small investment of a few shares in each company before the amendments took effect, he must now purchase at least one "unit" of 1000 shares and hold it for the required period to participate in a company's meeting. This requires an investment of a few thousand dollars per company.

[270] *Id.* at 157-58.

[271] Hawaii Hochi, Feb. 2, 1983, at 1, col. __.

[272] *Id.*

[273] *Id.*

[274] NIKKEI BUS., *supra* note 259, at 157, 160.

[275] *Id.* at 157-58.

[276] *Id.*

[277] *Id.* at 157-59.

[278] *Id.* at 159.

ers.[279] There appears to be more effort on the part of management to cast its company in a positive light and to appeal to the ordinary individual shareholders. This could lead to heightened awareness and interest on the part of layman investors in the operations of the companies in which they hold stock, coupled with more incentive to utilize their enlarged rights under the new law. Also, consumer advocates or other citizens' groups may try to experiment with the increased rights available to shareholders at the general meetings. In any event, by October 1983, all listed companies will have experienced at least one shareholders' meeting under the new law. Surveys and studies of the events of 1983 promise to be both numerous and revealing.

2. *Proxy Voting*

a. *The Present Situation*

The proxy system in Japan perpetuates the position of management to an even greater extent than in the U.S. One reason for this is the practice of soliciting a "power of attorney" from a shareholder to vote stock, rather than simply a proxy ballot on which the shareholder indicates the way the stock is to be voted.[280] Thus the employee of the company to whom the power of attorney is given can vote the stock in the manner desired by management. In over half of the companies responding to surveys, "blank" proxies, i.e., power of attorneys, were returned which represented more than 50% of the company's outstanding stock.[281]

Although a good portion of proxy ballots are returned with voting instructions indicated by the shareholders, the proxy holders selected by management often do not vote any proxy which directs that a vote be made in opposition to management. Sometimes proxy holders ignore the directions given and vote the proxy in favor of management.[282] Relying on theories of agency, some Japanese scholars argue that this practice is acceptable in that a proxy holder who is bound by the directions of the shareholder cannot be the shareholder's agent because he becomes a mere tool of the principal.[283]

The prevalence of proxy solicitations in Japan is indicated in Table C. Generally over 80% of the companies surveyed[284] each year solicited

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[279] Nomura Securities International.

[280] Morimoto, *supra* note 89, at 126.

[281] *Id. See also* Hirata, *Waga Kuni Kabunushi Sokai Shusseki Kabunushi no Jittai* (The Realities of Shareholders Who Attend General Meetings in Japan), 84 HITOTSUBASHI RONSO (The Hitotsubashi Review) 77 (Nov. 1979) [hereinafter cited as "Hirata"].

[282] Morimoto, *supra* note 89, at 126; Yazawa, *supra* note 17, at 552.

[283] Yazawa, *supra* note 17, at 552. The original requirement to vote in accordance with the shareholders' proxy instructions was deleted in 1949. *Id.*

[284] Only counting those that responded.

proxies. Most of these companies solicit proxies from all shareholders, although some companies do not bother to send solicitations to the mass of smaller shareholders due to cost considerations.[285] Many companies court larger shareholders; for example, management personnel may pay them personal visits when soliciting proxies (see Tables D and E).

The shareholder's response to proxy solicitation also varies according to the size of his shareholding. In more than four-fifths of the companies surveyed between 10% and 40% of the shareholders mailed in proxies.[286] However, in the same portion of companies the shares *represented* by the proxies returned amounted to more than 50% of all outstanding shares.[287] Obviously many small shareholders do not bother to send proxies back in.[288]

b. Proxy Statements

While proxy regulations in both Japan and the U.S. are disclosure oriented in approach, the "informations [*sic*] to be supplied by proxy statements are [*sic*] quite meager compared with those required under U.S. Proxy Rules."[289] Presently the regulations promulgated by the Ministry of Finance (MOF) pursuant to the Japan Securities Exchange Law (SEL)[290] Article 194[291] require such statements to be sent only to the shareholders whose proxies are solicited. Although the regulations prohibit the use of untrue materials,[292] the MOF does not review the proxy materials prior to dissemination.[293] The MOF is apparently not vigorous in its enforcement of the regulations.[294]

Supplementing these SEL regulations are new Commercial Code amendments requiring all large-scale corporations with 1000 or more shareholders to attach reference materials for the exercise of voting rights to the notice of convocation of the general shareholders meeting.[295] The

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[285] Tatsuta, *supra* note 98, at 21-22.

[286] Hirata, *supra* note 281, at 82.

[287] *Id.* at 83.

[288] *See also* Tables G and H.

[289] Tatsuta, *supra* note 98, at 21.

[290] Shoken Torihiki Ho (Securities Exchange Law) (Law No. 25 dated Apr. 13, 1948 as amended) [hereinafter cited as "SEL"], "Public corporations are subject to the Securities Exchange Law as well as the Commercial Code with regard to disclosures." Tatsuta, *supra* note 98, at 11.

[291] Regulation Concerning Solicitation of Proxies for Listed Stock (Proxy Regulation: Jojo kabushiki no giketsuken no dairikoshi no kan'yu ni kansuru kisoku) Securities and Exchange Commission Regulation No. 13, 1948, arts. 1-3, 7, *cited in* Tatsuta, *supra* note 98, at 21.

[292] Tatsuta, *supra* note 98, at 21.

[293] *Id.*

[294] *Id.*

[295] Special Audit Law, art. 21-2.

content of the "reference materials"[296] will be specified by an ordinance of the Ministry of Justice.[297] These changes have been touted as a means of helping shareholders to cast more informed votes.[298]

c. *An Alternative to Proxy Voting: The New "Vote-in-Writing" System*

The 1981 amendments institute a new system of absentee voting.[299] Under this system a shareholder will receive an actual absentee ballot for writing in his vote on the agenda items. The shareholder will in fact cast a vote rather than give a power of attorney or voting rights to a proxy. The absentee ballots must be submitted to the company at least one day prior to the general meeting.[300] The votes submitted in writing are tallied with those cast by attending shareholders, unless a new motion is raised at the meeting.[301]

This "vote-in-writing"[302] system is presently optional for listed companies.[303] The old proxy voting system has been in use since 1948 so there is great reluctance to immediately impose such a drastic change across-the-board.[304] Either system is cumbersome because of the large number of shareholders affected. Companies electing the vote-in-writing system must still meet the new requirements for sending reference materials to shareholders.[305]

While the new system favors shareholders, it has certain advantages from the companies' perspective as well. The power of attorney system gives management considerable leeway, but a tax is imposed on each power of attorney (or proxy) solicitation card. This can amount to tens of thousands of dollars for large companies.[306] No tax is exacted under the vote-in-writing system.[307] A 1982 survey of listed companies revealed that about 10% planned to adopt the vote-in-writing system, whereas 20% planned to reject it and 70% remained undecided.[308]

Some confusion has been avoided by making the new system optional since it enables companies to evaluate the system in practice prior to

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[296] *"Sanko shorui."*

[297] Special Audit Law, art. 21-2.

[298] INABA, *supra* note 83, at 147-49.

[299] Special Audit Law, art. 21-3.

[300] Special Audit Law, art. 21-3, para. 3.

[301] Johnson, Kosugi & Motoki, *supra* note 70, at 345.

[302] *"Shomen tohyo seido."*

[303] Supplemental Rules, *supra* note 3, art. 26. *See also* Morimoto, *supra* note 89, at 129; INABA, *supra* note 83, at 170.

[304] Johnson, Kosugi & Motoki, *supra* note 70, at 348-49; INABA, *supra* note 83, at 169-70.

[305] Special Audit Law, art. 21-3, para. 6. White Paper, *supra* note 45, at 81.

[306] Some feel that the tax is not high enough to actually exert much influence on most companies. Morimoto, *supra* note 89, at 129.

[307] Morimoto, *supra* note 89, at 129.

[308] White Paper, *supra* note 45, at 31.

adopting it.[309] It is anticipated that the new system will eventually be made mandatory.[310] Proponents of shareholder democracy advocate a mandatory vote-in-writing system.[311]

d. Inspection of Proxies and Absentee Ballots

Companies that employ the proxy solicitation system must prepare a document establishing the proxy's power of representation.[312] Under the new Code these documents must be placed at the head office for three months from the date of the general meeting and a shareholder has the right to inspect or copy them during business hours.[313] Where a company elects to use the new vote-in-writing system, the absentee ballots and accompanying documents are subject to shareholder access[314] to insure that absentee ballots are counted correctly.[315]

3. Shareholder Proposal Rights

While Japan's securities laws originally bestowed a proposal right on shareholders, it was deleted in 1949 after only one year in force.[316] The new amendments reinstate a limited shareholder proposal right in Article 232-2 which is designed to stimulate shareholder participation: "Shareholders owning. . . not less than 300 shares may demand the directors to make stated matters the purpose of the general meeting by submission of such request in writing six weeks before the date designated for the meeting. . . ."[317] For most listed companies, the substantial market value of 300 units[318] would seemingly defeat the purpose of the rule; however, provision is made for aggregation of shares to enable small shareholders to

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[309] Morimoto, *supra* note 89, at 129.

[310] *Id.*

[311] *Id.*

[312] Commercial Code, art. 239, para. 3.

[313] *Id.* art. 239, paras. 6 and 7.

[314] Special Audit Law, art. 21-3, para. 6.

[315] Johnson, Kosugi & Motoki, *supra* note 70, at 348.

[316] Yazawa, *supra* note 17, at 553. This rule was contained in Proxy Regulations, art. 8-3, and was repealed by Security Exchange Commission Regulation No. 1, 1949. *Id.* at 553, n. 29.

[317] Commercial Code, art. 232-2, para. 1 (*translation from* Nakatsu in 2 JAPAN BUS. L.J. 309 (1981)). Proposal rights are also available for anyone holding 1% or more of the company's stock.

[318] The requirement of 300 shares refers to the new stock "units" and thus represents 300,000 old shares. Supplemental Rules, *supra* note 3, art. 21. These 300 shares must have been held for at least six months prior to the date of the meeting. Commercial Code, art. 232-2. The average market value of 300 units of stock amounted to $465,000 in 1980. NRI MANUAL, *supra* note 23, at 72. ¥220 = $1.00. The weighted stock price average for all exchanges in 1981 was ¥341.68.

combine their holdings and appoint an agent to submit their proposal.[319]

The shareholders making the proposal may also submit a short statement in justification. Upon shareholder demand, the directors must send both the proposal and accompanying statement to shareholders along with the notice of the general meeting.[320] While the length of the shareholders' statement is severely limited, there is no limit imposed on the length of any statements sent out by the directors opposing the proposal.[321] The directors may also refuse to include the proposal where the proposal:

(1) does not fall within the scope of the purpose of the general meeting,

(2) is in contravention of law or the Articles of Incorporation, or

(3) is the same in substance as a proposal which failed to obtain the approval of at least 10% of the votes represented at a general meeting held less than three years prior to its submission.[322]

Despite the limitations on the scope of the shareholder proposal right, it is expected to have considerable impact.[323] Management can be expected to be vigilant for proposals that seek removal of individual directors, enlargement of minority shareholders' influence or publicity for criticisms of incumbent management.[324]

4. *Shareholders' Rights Concerning Removal of Directors*

The Commercial Code grants broader powers to Japanese shareholders to remove directors and auditors than its American statutory counterparts. Removal may be accomplished with or without cause upon passage of a special resolution at a shareholders' meeting. This right is buttressed by a right to resort to the courts for judicial indorsement of the removal, in the event the resolution fails to pass. However, the judicial remedy is only available for cases of grave director misconduct, and must be pursued by at least 3% of the company's shareholders.[325]

Shareholders holding at least 3% of the company's outstanding shares, have a corresponding right to convene shareholder meetings to vote upon removal of directors and auditors.[326] If directors fail to convene a meeting upon demand, the shareholders may call the meeting themselves after re-

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[319] INABA, *supra* note 83, at 132.

[320] Commercial Code, art. 232-2, para. 2.

[321] Sanko Shorui Kisoku (Rules Regarding Proxy Statements) art. 4-1, para. 1. *See also* INABA, *supra* note 83, at 158-59.

[322] Commercial Code, art. 232-2. *See* Johnson, Kosugi & Motoki, *supra* note 70, at 316-17.

[323] *See, e.g.*, Japan Econ. J., Oct. 15, 1982, at 11, col. 1; Morimoto, *Kabunushi Teianken to Shomen Tohyo Seido* (pt. 2) 751 JURISUTO 90 (Oct. 15, 1981).

[324] *See, e.g.*, Japan Econ. J., Oct. 5, 1982, at 11, col. 3.

[325] Commercial Code, art. 257, para. 3. The holding period must be at least six months. *Id.*

[326] *Id.* art. 237, para. 1. The holding period must be at least six months. *Id.*

ceiving judicial approval.[327]

The removal rights have been exercised to a great extent in small and medium-sized corporations, but have remained dormant rights in the case of larger corporations since shareholders' meetings are more cumbersome to convene and the 3% requirement is more difficult to meet.[328] The difficulty of meeting the 3% requirement will make the shareholder proposal right a more potent vehicle for removing directors in larger corporations because 300 units of stock will be easier to acquire.[329]

5. *Inspection Rights*

Shareholders have the right to inspect or copy articles of incorporation, minutes of shareholders' meetings, registers of shareholders and debenture holders,[330] financial statements, auditor's reports and the accounting auditor's reports.[331] Other documents, however, such as accounting books and ledgers, may only be inspected by shareholders holding at least 10% of the company's outstanding stock.[332] Directors must permit inspection of accounting books and ledgers by shareholders who hold the requisite 10%, unless reasonable grounds for refusal exist.[333]

Before the 1981 amendments, shareholders could also inspect or copy the minutes of board meetings.[334] In practice, however, this liberal law invited preparation of cryptic and misleading board minutes to protect business secrets and avoid scandals and *sokai-ya* blackmail.[335] To remedy this, the Code was amended to state that shareholders can inspect the minutes only to the extent necessary to exercise their rights; creditors

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[327] *Id.* art. 237, para. 2.

[328] Tatsuta, *supra* note 98, at 22.

[329] Morimoto, *supra* note 89, at 125. For example, the average market price of 3% of a company's outstanding stock for all listed companies in Japan was well over six million dollars in 1981, more than 12 times the cost of the 300 stock units required to qualify for the new shareholder proposal rights. NRI MANUAL, *supra* note 23, at 72 (based on a weighted stock average of ¥341.63).

[330] Commercial Code, arts. 263, 408-2.

[331] *Id.* art. 282; Special Audit Law, art. 16. Shareholders owning at least 1% of a company's outstanding stock may also apply to the court for the appointment of an inspector to investigate the proceedings of a shareholders' meeting. Commercial Code, art. 237-2.

[332] Commercial Code, art. 293-6.

[333] *Id.* art. 293-7. Such grounds may include: (1) demand of inspection for reasons not related to the protection of the shareholder's statutory rights; (2) if the shareholder seeks to hinder the company's management, or injure the common interests of the shareholders; (3) where the shareholder is a business competitor or has any interests in a business competitor; (4) where the shareholder seeks to profit from the information taken from company books; and (5) where the shareholder demands an unreasonable time for the inspection of company books. *Id.*

[334] Pre-1981 Commercial Code, art. 263.

[335] Johnson, Kosugi & Motoki, *supra* note 70, at 321-22; INABA, *supra* note 83, at 242-43; TAKEUCHI, *supra* note 178, at 153-55; MOTOKI, *supra* note 117, at 121.

may do so only when necessary to determine the personal liability of directors or auditors.[336] Moreover, the shareholder or creditor must obtain the permission of the court in order to exercise this right.[337] The court may not give permission if it is apparent that the company would sustain serious damage.[338] The burden is placed on the company to prove the likelihood of serious damage.[339]

An anticipated consequence of diminished access to minutes of board meetings is that the minutes will become more detailed and accurate.[340] As before, directors who tacitly approve of decisions made by other directors that prove harmful to the company are jointly and severally liable for the damage done.[341] The cryptic board minutes usually did not reveal enough information to assist a shareholder in bringing suit.[342] With greater detail in the record concerning board discussions and voting records, individual directors should be exposed to greater vulnerability for rubber-stamping decisions made by powerful presidents. There should now be greater incentive for individual directors to exert more control over corporate matters and to register dissenting opinions in the minutes when appropriate. Thus, while less accessible than before, board records should become more effective protection for shareholders when inspection

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[336] Commercial Code, art. 260-4, para. 4. *See* Johnson, Kosugi & Motoki, *supra* note 70, at 322. Under the pre-1981 Code, copies of the minutes had to be kept at branch offices of the company as well as at the head office, and there was no time period specified during which the minutes had to be preserved. To facilitate the objectives of the new provision, minutes need now only be kept in the head office, and they must be kept for at least ten years. *Id.*

[337] Commercial Code, art. 260-4, para. 4.

[338] *Id.* art. 260-4, para. 5.

[339] Johnson, Kosugi & Motoki, *supra* note 70, at 322.

[340] INABA, *supra* note 83, at 243; TAKEUCHI, *supra* note 178, at 155.

[341] Commercial Code, art. 266, paras. 1 and 2.

[342] Two instances of dramatic change occurred within corporate boards before the new laws became effective on October 1 of last year that would have illustrated the impact of the new inspection rights if they had occurred later. On September 22, 1982, the board of directors of Mitsukoshi, Ltd. orchestrated the unexpected removal of the company's president, Shigeru Okada. Nihon Keizai Shinbun, Sept. 22, 1982, at 1 (evening ed.); ZAIKAI (Financial World), Nov. 22, 1982, at 24. In another surprise maneuver, the chairman and majority owner of Tachibana Securities Co. ousted the company's president, Tadahiro Nakata, on September 28. SHUKAN SHINCHO (New Currency Weekly), Oct. 28, 1982, at 122; ZAIKAI (Financial World), Nov. 22, 1982, at 24. Both of these presidents had histories of misappropriating funds and other corporate abuses. SHUKAN SHINCHO (New Currency Weekly), Oct. 28, 1982, at 122; ZAIKAI (Financial World), Nov. 22, 1982, at 24. If either attempt to oust the company president had been made after the new law took effect, the targeted president could have demanded explanation, for the record, of his removal. This would have exposed the company to scandalous publicity. Also, more detailed minutes under the new law might have incriminated other board members who had knowingly allowed the alleged wrongdoings to continue unchecked. SHUKAN SHINCHO (New Currency Weekly), Oct. 28, 1982, at 122. The close connection between the new law and the September 28 ouster of Tachibana's president evoked this observation: "In terms of timing, there definitely has never been a better timed, dramatized removal than this." ZAIKAI (Financial World), Nov. 22, 1982, at 24.

is granted.

C. Other Controls: Judicial Remedies and Government Enforcement

1. Shareholder Derivative Suits

Under the Commercial Code a shareholder may bring a derivative suit against directors and supervisors for breach of their duties,[343] even without an unjustified refusal on the part of the corporation to initiate suit.[344] A 1950 addition to the Code imposes upon directors fiduciary duties similar to those in the United States. Article 254-2 requires directors "to perform their duties faithfully on behalf of the company."[345] There is dispute over whether this provision comprehends American concepts of fiduciary duty or merely reaffirms the duty of care of a good manager under the Japanese civil law.[346] Judicial constructions have not resolved the issue conclusively.[347] The Japan Supreme Court held in a case that involved the propriety of political contributions made by directors, that the Commercial Code article 254-2 did not impose any greater duty than that of a civil law "good manager."[348] The Court reasoned that no breach of duty had occurred as long as the contributions were made in the interests of the corporation rather than for the personal profit of the director.[349] This case has little precedential value in other factual settings because political contributions by corporations are considered in the corporation's best interest and are common practice in Japan.

a. Restrictions on the Scope of Derivative Suits

Courts in Japan have been reluctant to countenance derivative suits that seek to compel directors to take affirmative action, except where an

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[343] Commercial Code, arts. 254-3, 264-268, 280. For a discussion of the specific duties and restrictions placed on directors by the Commercial Code, see *supra* notes 112-21 and accompanying text.

[344] Commercial Code, art. 267, para. 3; Matsumoto, *Management Responsibility to Minority Shareholders in Japan: Derivative Suit in West-East Melting Pot*, 18 N.Y.L.F. (1972) [hereinafter cited as "Matsumoto"].

[345] Commercial Code, art. 254-2 (1950), *renumbered* Commercial Code, art. 254-3 (1981). *See also* Shibuya, *Fiduciary Duty of Directors - Fairness in Regulation of Corporate Dealings With Directors* (Torishimariyaku no Chujitsu Gimu), 5 LAW IN JAPAN: AN ANNUAL 115 (1972), *from* 32 SHIHO 153-67 (1970).

[346] Civil Code, art. 644. The duty of care of a good manager under the civil law is a lesser standard than the American concept of fiduciary duty.

[347] Arita v. Kojima, 24 Sai-han minshū (Sup. Ct., June 24, 1970) (Yawata Steel Political Contribution Case), *cited in* Matsumoto, *supra* note 344, at n. 28; SUZUKI & TAKEUCHI, *supra* note 127, at 223, n. 12.

[348] Matsumoto, *supra* note 344, at 385.

[349] *Id.*

injunction is necessary to prevent irreparable damage to the corporation.[350] There is also strong sentiment against derivative suits that seek to compel the performance of a director's duties in his individual capacity. This issue would arise when a shareholder sought to compel a director to observe a commitment to lend money to the corporation. The judicial resistance stems from a desire to avoid penalizing directors' loyalties to their corporations.

> [T]he tradition-minded Japanese directors tend to overcommit themselves or even sacrifice their private affairs for the corporate interest. For example. . . [when needed] a director. . . might promise in writing to donate his private property to the corporation although his official duties do not require it. On the strength of his credit, the corporation obtains a bank loan. . . . It scarcely seems just and sound to require the director to perform his duty when the banks do not object to relieving the generous director of his liability.[351]

b. Other Barriers to Derivative Actions

Certain procedural requirements inhibit derivative suits against incumbent directors. Plaintiffs must incur the expense of purchasing revenue stamps that are required to be affixed to each document filed with the court. The cost of the stamps, based on a nominal percentage of the amount in controversy, may rise to prohibitive levels in cases involving large claims.[352] To this cost may be added the expense of posting a bond, which may be required at the court's discretion upon demand by the defendant.[353]

Economic disincentives also directly affect the willingness of the plaintiff's attorney to represent aggrieved shareholders because of a unique combination of attorney billing practices, statutory constraints and judicial conservatism. Japanese attorneys typically compute their litigation fees as a percentage of the amount in controversy or of the benefit accruing to the plaintiff.[354] Thus, Japanese attorneys may be more reluctant to prosecute derivative suits than their colleagues in the U.S. who bill on an hourly basis.

Although the Commercial Code provides that a successful shareholder

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[350] *Id.* at 382-83.

[351] *Id.* at 385 (citation omitted). It should be noted that while derivative suits have been given limited use in enforcing duties or imposing liabilities, Japanese courts have taken a much more expansive approach in lawsuits brought by damaged third parties. In these cases directors have more often been found liable for damages caused to third parties due to the director's breach. In addition, transactions with third parties have been upheld although arguably invalid because of lack of board approval. Tatsuta, *supra* note 98, at 13-14.

[352] Matsumoto, *supra* note 344, at 389.

[353] Commercial Code, art. 267, para. 4.

[354] Matsumoto, *supra* note 344, at 388-89.

may demand reimbursement of attorney's fees from the corporation,[355] the award of attorney's fees must be "reasonable" and "within the limit of" the actual fees assessed. This nominal benefit to the shareholder-plaintiff is offset by the tendency of the Japanese bench to construe the statute narrowly and award less than the going rate.[356] Consequently, the Japanese attorney who brings a derivative action may be undercompensated for his efforts on behalf of the client.

Perhaps the major obstacle to derivative suits is the judiciary's reluctance to entertain novel policy arguments. "Even if [the attorney] considers unjust the previous decisions which are all unfavorable to his client, without explicit authority he would not risk his client's money in an effort to change that law."[357] Less costly alternatives to derivative suits, such as direct suits for injunctions and out of court settlements, also contribute to the infrequency of derivative action.[358]

2. *Insider Trading*

The Securities and Exchange Law of Japan explicitly allows only one type of derivative suit: to recover short-swing profits from insiders.[359] Unlike Section 16(b) of the United States Securities Exchange Act of 1934, Japan's statute has produced almost no litigation against insider trading.[360] The primary reason for this is that there are no reporting requirements imposed for directors and principal shareholders so monitoring and enforcement is problematic.[361] Such a requirement was deleted in 1953. Moreover, both the U.S. and Japanese statutes rely on enforcement by private citizens. The prospect of financial gain under U.S. securities law has made victims effective watchdogs but similar incentives are lacking under Japan's scheme. Present levels of self-dealing by insiders will have to be tolerated unless stronger legislation is passed.[362] There is academic pressure in Japan for such legislative reforms,[363] but there does not ap-

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[355] Commercial Code, art. 268-2.

[356] Matsumoto, *supra* note 344, at 389.

[357] *Id.* at 389-90.

[358] A more detailed illustration of alternatives to derivative suits may be found in Matsumoto, *supra* note 344, at 390-92.

[359] SEL, art. 189, para. 2.

[360] Ishizumi, *Insider Trading Regulation: An Examination of Section 16(b) and a Proposal for Japan*, 47 FORDHAM L. REV. 449, 487-88 [hereinafter cited as "Ishizumi"]. Section 10(b) and Rule 10b-5 promulgated thereunder of the U.S. SEC Act of 1934 have also been frequently used to attack insider trading. Japan's SEL art. 189 corresponds to the U.S. SEC §16(b). Other relevant articles of Japan's SEL are art. 58 (anti-fraud provision) and art. 50 (prohibition of insider trading by officers or employees of a securities corp.).

[361] Ishizumi, *supra* note 360, at 488-89.

[362] *Id.* at 490-92.

[363] *Id.* at 451, n. 8, 491-92.

pear to be a strong movement afoot in government to change the law.[364]

3. *Disclosure Requirements*

a. *The S.E.L. and Civil Liabilities For Breach*[365]

The Securities and Exchange Law requires that all publicly held corporations file registration statements, and annual, semi-annual and current reports.[366] These documents must be available for public inspection at the Ministry of Finance (MOF), stock exchanges and offices of the issuer.[367]

There are three basic types of civil liability for violations of the registration laws: (1) Absolute liability for the issuer, seller, underwriter or securities company that offers to sell a security in violation of registration and prospectus requirements.[368] This law (Article 16, SEL) is modeled after Section 12(1) of the United States Securities Act of 1933. A major difference between 12(1) and 16 is that the latter has been amended to allow offers to be made during the waiting period. This amendment was made to enable underwriters to legally continue the practice of testing the market before underwriting an issue.[369] (2) Liability for general misstatements or omissions in connection with the sale of securities.[370] Modeled after Section 12(2) of the U.S. Securities Act, Article 17 requires that the purchaser prove the existence of a misrepresentation or omission, lack of knowledge and resulting harm. Due diligence is a defense to liability. (3) Liability for misstatements or omissions in registration statements.[371] Any person who acquires securities issued after a false or misleading registration statement has been submitted can sue if damages are suffered. Modeled after Section 11 of the U.S. Securities Act, Article 18 originally imposed liability only on the issuer or notifier,[372] but the list of potential defendants was later expanded to include: all those who sign the registra-

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[364] *Id.* at 491-92; The Ministry of Finance, however, has been making efforts to curb insider trading through the use of administrative guidelines. Yanase, *Disclosure System*, in JAPAN SECURITIES RESEARCH INSTITUTE, LECTURES ON JAPANESE SECURITIES REGULATION 65, 76-78 (1980) [hereinafter cited as "Yanase"].

[365] For more detailed descriptions, see Hamada & Matsumoto, *Securities Transaction Law in General*, in 5 DOING BUSINESS IN JAPAN 66 pt. 8, at 8-1 (Z. Kitagawa ed., 1981); Tatsuta, *Enforcement of Japanese Securities Legislation*, 1 J. COMP. CORP. L. & SEC. REG. 95 (1978); Misawa, *Securities Regulation in Japan*, 6 VAND. J. TRANSNAT'L L. 447 (Spring 1973) [hereinafter cited as "Misawa"].

[366] SEL, art. 25.

[367] *Id.*

[368] SEL, art. 16.

[369] Misawa, *supra* note 365, at 495-96.

[370] SEL, art. 17.

[371] SEL, art. 18.

[372] Misawa, *supra* note 365, at 496-97.

tion statement, the directors, every expert who certifies a part of the statement and underwriters.[373]

Remedies for violations of disclosure requirements have had little practical effect in Japan. Reasons include the lack of class-action devices as well as the procedural obstacles discussed earlier. Moreover, the express civil remedies have not been supplemented by implied causes of action as is the case in the United States. While the Ministry of Finance has tightened the standard for reviewing registration statements and periodic reports,[374] the dearth of civil suits has failed to counteract a lax attitude on the part of corporate personnel towards disclosure obligations. One Japanese attorney explained:

> No court decision with respect to a claim based on the civil liability provisions in the SEL having been reported, the degree of care which the directors and auditors, the certified public accountants or audit corporations and the underwriters should exert in order to establish the due diligence defense has not been developed before the court. Degree of care required for preparation of the Securities Registration Statement or Prospectus and the Securities Report does not seem to have been discussed in detail by Japanese companies in the light of potential civil liabilities, and lawyers do not normally participate in preparation of [these documents].[375]

b. *Accounting and Auditing Practices*

Shareholder inspection rights are of little practical value if the information reported is inaccurate or misleading. Ambitious accounting regulations have been passed by the Japanese Diet, but the accounting profession lags far behind in its ability to meet the standards imposed by law.[376] As a result of loose accounting practices, shareholders and investors have

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[373] *Id.* at 497, and n. 206.

[374] M. TATSUTA, SECURITIES REGULATION IN JAPAN 58 (1970) (with addendum sketching the 1971 amendments to the SEL); SECURITIES MARKET IN JAPAN, *supra* note 11, at 143.

[375] Yanase, *supra* note 364, at 75.

[376] Although Japan had 100 years of experience in business accounting, its system of corporate financial reporting was "poor and primitive" when the securities and industrial systems were reorganized after World War II. Nakajima, *Corporate Accounting*, in LECTURES ON JAPANESE SECURITIES REGULATION 53, 59. (Japanese Securities Research Institute ed. 1980) [hereinafter cited as "Nakajima"]. Attempts by the Ministry of Finance to conform Japanese accounting and auditing practices to uniform international standards have been hindered in part by the inexperience and underrepresentation of the CPA as a profession, and in part by the administration of reforms under separate statutes; i.e., the Commercial Code and the SEL, each having somewhat different emphasis. Nakajima, *supra* at 53. For other illuminating descriptions of Japanese accounting and auditing practices, as well as some differences of opinion as to the current state of reform, see generally Yanase, *supra* note 364, at 65; STOKES, *supra* note 61, at 3; SECURITIES MARKET IN JAPAN, *supra* note 11, at 138-47; Ballon, *supra* note 131, at 149-57.

difficulty ascertaining the solvency of a company.[377] The situation in the mid-1970's was described in the following way:

> Accounting has always been slapdash: employees are rotated in and out of accounting departments. The twin functions of finance and accounting are often coupled in practice; there is no such person as the controller of a U.S. corporation. Budgets are not instruments of control but just targets; payments are made less on contractual obligations than on instinctive feelings. Most people in finance and accounting have no formal training at all, even in big corporations; nor is there any such individual as the 'chief accountant' in a permanent post.[378]

Reform of Japanese accounting practices was stimulated by the Sanyo Specialty Steel bankruptcy in 1965.[379] Sanyo Special Steel Co., Ltd. (Sanyo Tokushu Seiko K.K.) was a leading manufacturer of special steel which had applied for court relief under the Corporate Reorganization Law in 1965, even though it had distributed dividends and paid bonuses from "surplus" for seven consecutive years prior to 1965. The court proceedings and investigation by the Securities Bureau of the MOF revealed that in fact the company experienced deficits in most of those years, and had made false entries of huge amounts in its financial statements to conceal its fiscal predicament.[380]

For the first time in the history of the SEL, the Securities Bureau lodged an accusation in the public prosecutor's office against the company and its president for making untrue statements in its periodic report.[381] The registration of the CPA who had knowingly certified the false financial statements was revoked, and fifteen of the company's executives were assessed damages in a civil suit brought by the company through its reorganization trustee.[382]

Since the mid-1970's, several events have led to increased accuracy of accounting statements. One such development was the institution of the requirement of independent audits by CPAs in 1974. However, compliance on the part of corporations has been hindered due to a shortage of CPAs.[383] The "internationalization" of Japanese stock listings has also contributed to improved accounting practices: Japanese companies that wish to list their stock on the exchanges of other countries must revise their financial reports to conform to exchange requirements.

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[377] Mikuni, *supra* note 61, at 81, col. 1, 82, col. 1.

[378] STOKES, *supra* note 61, at 9.

[379] *Id.* at 2.

[380] Tatsuta, *Enforcement of Japanese Securities Legislation*, 1 J. COMP. L. & SEC. REG. 117 (1978).

[381] *Id.* The Securities Bureau has no authority to prosecute; it must file a complaint with the Public Prosecutor's Office.

[382] *Id. Citing* Harada (reorganization trustee for Sanyo Tokushu Seiko K.K.) v. Ogino *et. al.*, 17 Kakyū minshū 222 (Lower Ct. Rptr., Apr. 11, 1966).

[383] STOKES, *supra* note 61, at 9.

D. Market Forces

1. The Role of Takeover Bids in Controlling Management

The growth of takeover bids has armed American shareholders with a new weapon for controlling management. Dissatisfied shareholders drive the company's stock price down by selling their shares, thus making the corporation an attractive takeover target. Takeover bids operate as "powerful instruments of displacement"[384] of unresponsive incumbent management. As a result, in the U.S. market forces reinforce shareholder democracy. This type of restraint on management control is absent in Japan where hostile takeover bids are a rarity.[385] The absence of takeovers is a product of concentrated shareholdings and cultural attitudes.

2. Shareholder Activism and Public Opinion

In the U.S., the influence exerted on management through the exercise of shareholders' rights is sometimes more a product of the publicity generated than of direct control. For example, "Campaign GM"[386] was a dismal failure when measured by the number of votes acquired by the proposals. But when measured by the amount of publicity attracted and the resulting changes made by management, the campaign was a tremendous success.[387] Indeed, public opinion not only exerts pressure directly on corporate management but also indirectly by its effect on stock prices, legislative decisions and government actions. In Japan, freedom of the press exists, but the individualism, open confrontations and grassroots activism are not yet a common or comfortable part of the society.

IV. Conclusion

The American model of corporate governance was transplanted to Japan, yet the ideal of shareholder democracy has never taken root in a soil

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[384] Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 Colum. L. Rev. 388, 403 (1977).

[385] Henderson, *supra* note 34, at 266-67; Securities Market in Japan, *supra* note 11, at 147-49.

[386] *See* Schwartz & Weiss, *An Assessment of the SEC Shareholder Proposal Rule*, 65 Geo. L. J. 635 (1977).

[387] "Campaign GM" was one of the most ambitious and most publicized attempts to effect social change by shareholders throughout the corporate world. *See* Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 Mich. L. Rev. 421 (1971). Of nine resolutions proposed by Campaign GM, two resolutions dealing with mixed questions of corporate and public policy were included in the 1970 proxy statement of the General Motors Corporation. Despite an intensive campaign to persuade large institutional investors to vote in favor of these resolutions, the proposals received less than three percent of the vote.

that is foreign to Western traditions of individualism. The 1981 Code amendments equip the individual shareholder with the tools to increase his participation in corporate decision-making. Time will tell whether these statutory revisions will repeat Japan's past record of legislative reform or whether nonlegal forces will bolster the statutory changes and improve the position of the individual shareholder. The need to attract new equity should compel corporations to make investment in stock more attractive. Moreover, as more and more Japanese companies are registering stock issues on foreign exchanges, foreign corporate and accounting requirements should increase corporate disclosures. The latent shareholder rights may be more fully utilized in the future if American notions of individualism and consumerism make inroads in Japanese society.

Much has been said about the status of shareholders in Japan, but little has been said about whether increased shareholder activism would be desirable. One observer characterized the differences between the Japanese and American shareholder thus: "Management power as it is actually administered is vastly different from the way it is perceived legally. Were the Japanese system transferred to the U.S., the whole economy would come to a screeching halt in a flood of stockholder lawsuits and injunctions from the Securities and Exchange Commission."[388] But, as another commentator marvelled: "And yet it works! This is the 'no hands' Japanese economy. In such a system human ties are far more important than contractual obligations. It is a world in which lawyers and accountants, let alone auditors - have little place."[389] What can be said of the major Commercial Code revisions of 1981? Two decades ago Lester Salwin wrote an article about the 1950 revision of the Code imposed by the Occupation forces. He entitled the article: "*The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals.*" The title is apt today as well.[390]

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[388] Browne, *supra* note 6, at 32-33; *see* Schwartz, *Proxy Power and Social Goals - How Campaign GM Succeeded*, 45 ST. JOHN'S L. REV. 764 (1971).

[389] STOKES, *supra* note 61, at 10.

[390] Salwin, *supra* note 26, at 478.

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Table 1

Shareholdings in Listed Companies—Japan

FISCAL YEAR:	1951	1956	1961	1966	1971	1976	1978	1980	1981
I. Investor Classification[1]									
1. Financial Institutions %	13.2	21.7	22.0	27.4	34.0	36.2	37.8	38.5	
2. Investment Trusts %	5.2	3.9	9.2	4.1	1.4	1.5	2.3	1.6	
3. Securities Co's. %	9.2	7.1	2.7	5.7	1.5	1.4	1.8	1.8	
4. Other Domestic Co's. %	13.8	17.0	17.7	17.5	22.8	25.8	25.6	25.2	
5. Foreign %	na	1.5	1.7	1.8	3.7	2.6	2.1	4.1	
6. Individuals and others %	57.0	49.9	46.6	43.2	36.4	32.3	30.1	28.6	
Total percent	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	
II. Total Market Value ($ billions)[2]									
1. All listed co's.	0.76	4.7	17.9	27.0	65.3	183.1	328.9	355.2	431.2
2. First Section co's. (Tokyo S.E.)	0.71	4.6	15.2	24.2	59.7	169.2	298.6	325.4	399.9
III. Number of Listed Companies									
1. All listed co's.	729	786	1265	1562	1606	1716	1709	1729	1745
2. First Section co's. (Tokyo S.E.)	554	596	662	654	771	914	939	966	983
IV. Number of Shareholders (millions)									
1. First Section co's. (all exchanges)	5.4	8.7	14.1	15.8	15.9	18.2	17.9	18.1	

Source: MANUAL OF SECURITIES STATISTICS (Nomura Research Institute ed. 1982).

Note 1: Percentages for investor classification are for all First Section companies, figures for all listed companies are comparable.

Note 2 ¥: $ exchange rates used for computation: 1981: ¥220 = $1.00; 1980: ¥225 = $1.00; 1978: ¥210 = $1.00; 1976: ¥300 = $1.00; all earlier years: ¥360 = $1.00.

Table 2

Shareholdings by Type of Investor—United States
(all listed stocks)

Investor Classification (%)	1956[a]	1966[a]	(voting rights) 1976[b]	(by account) 1976[c]	1979[c]	1980[c]
1. Institutional (total)	24.5	29.8	(43.2)	(65.0)	(55.0)	(51.7)
Banks & Trust Co's.[d]	na	na	25.2	27.0	19.8	17.7
Investment Co's.	na	na	5.3	4.9	3.1	3.0
Life Insurance Co's.	na	na	4.3[g]	3.4	3.4	3.4
Non-Life Insurance Co's.	na	na		1.7	2.1	2.1
Others[e]	na	na	8.4	28.0	26.6	25.5
2. Foreign	3.2	2.8	6.5	6.4	7.8	7.3
3. Individuals and other	72.3	67.4	50.3	29.0	37.9	42.0
TOTAL (%)	100.0	100.0	100.0	100.0	100.0	100.0
TOTAL MARKET VALUE ($ billion)	322.1	647.8		1005.6	1177.6	1573.3
Number of Co's. (New York S.E.)[f]	na	12.86		1576	1565	1570

Note: Percentages may not add to 100 due to rounding.

Table 2a

Number of Shareholders of U.S. Stock
(thousands)

	1959	1965	1970	1975	1980	1981
ALL LISTED COMPANIES[f]	12,490	20,120	30,850	25,270	30,200	32,260
NYSE COMPANIES[f]	8,510	12,430	18,290	17,950	23,804	26,084

a. Source: STAFF OF SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., VOTING RIGHTS IN MAJOR CORPORATIONS 594 (Comm. Print 1978).

b. Source: Same as a, at 14. These figures were compiled based on who held the voting rights to stock.

c. Source: FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, TRUST ASSETS OF BANKS AND TRUST CO'S. (1976, 1978-80); U.S. SECURITIES AND EXCHANGE COMM'N, SEC MONTHLY STATISTICAL REVIEW (Aug. 1981). These figures were based on the account the stock was listed under.

d. Includes common and preferred stock.

e. Comprised of private noninsured pension funds, personal trust funds, mutual saving banks, state and local retirement funds, foundations and educational endowments.

f. Source: NEW YORK STOCK EXCHANGE FACT BOOK (1982).

g. Life and non-life insurance companies combined.

Table 3

Cross-Shareholdings in Japan's Enterprise Groups

GROUP	# OF CO'S.	CROSSHOLDING OF SHARES AMONG MEMBERS
Mitsubishi	136	33.0%
Mitsui	101	29.1%
Sumitomo	109	41.1%
Fuyo	103	31.1%
Dai-Ichi Kangyo	66	31.1%
Sanwa	78	30.1%
Tokai	25	18.1%
Industrial Bank of Japan	22	24.5%
Nippon Steel	41	32.7%
Hitachi	40	44.6%
Nissan	26	40.1%
Toyota	30	35.0%
Matsushita	21	52.5%
Toshiba-IHI	25	37.5%
Tokyu	20	38.5%

Source: DODWELL MARKETING CONSULTANTS, INDUSTRIAL GROUPINGS IN JAPAN 10, 12 (rev. ed. 1978) (figures are for 1976).

NOTES TO TABLES "A" THROUGH "K"

Source for years 1971-1978: Hirata, *Waga Kuni Kabunushi Sokai Shusseki Kabunushi no Jittai* (The Realities of Shareholders Who Attend General Meetings in Japan) 82 HITOTSUBASHI RONSO (Hitotsubashi Rev.) (No. 5) 77 (Nov. 1979).
Source for 1982: SHOJI HOMU KENKYUKAI, KABUNUSHI SOKAI HAKUSHO (White Paper on Shareholder Meetings) (Shoji Homu No. 956, 1982). These figures were obtained by annual surveys done of almost all of Japan's listed corporations. The response rate averaged about 40%. For each table the question posed to the surveyed corporations is described at the top. The alternative responses are listed with a breakdown of the number and percentage of responding companies that gave a particular answer.

TABLE A

The number of shareholders who actually attended the general meeting representing themselves

Answer: # of People / Years	0-20	21-40	41-60	61-80	81-100	101-150	151-200	201-300	301 & above	no ans.	TOTAL	
												Companies:
1971-1974	66	182	137	81	52	59	27	27	18	22	671	#
	9.9%	27.1%	20.5%	12.0%	7.8%	8.8%	3.9%	4.0%	2.7%	3.2%	100%	%
1975-1978	51	167	153	106	64	74	43	36	27	14	734	#
	7.0%	22.8%	20.8%	14.4%	8.7%	10.1%	5.8%	4.9%	3.7%	1.9%	100%	%
1982	45	140	155	101	66	68	33	34	24	3	669	#
	6.7%	20.9%	23.2%	15.1%	9.9%	10.2%	4.9%	5.1%	3.6%	0.4%	100%	%

TABLE B

Percent of all shares outstanding represented by the number of shares held by people who actually attended

Response (%) / Years	1 or less	3 or less	5 or less	10 or less	15 or less	20 or less	30 or less	over 30	no ans.	TOTAL	
											Companies:
1975-1978	213	115	67	91	57	43	58	70	23	734	#
	29.0%	15.6%	9.1%	12.3%	7.8%	5.8%	8.0%	9.5%	3.1%	100%	%
1982	227	109	52	74	61	42	42	52	10	669	#
	33.9%	16.3%	7.8%	11.1%	9.1%	6.3%	6.3%	7.8%	1.5%	100%	%

TABLE C

Proxy Solicitations

Years	Companies that solicited all shareholders	Companies that solicited only particular shareholders	Companies that did not solicit	no ans.	TOTAL
1971-1974	468 69.8%	36 5.8%	146 21.7%	11 1.7%	671 100%
1975-1978	605 82.3%	28 3.8%	92 12.5%	8 1.1%	735 100%
1982	624 93.3%	13 1.9%	12 1.7%	20 3.0%	669 100%

TABLE D

Solicitation approach used for major shareholders

Year	Answer: In addition to the solicitation used for all shareholders, some other, more aggressive methods were used	Same as for ordinary shareholders	no ans.	TOTAL	
					Companies:
1978	167	370	187	724	#
	23.1%	51.1%	25.8%	100%	%
1977	270	440	53	763	#
	35.4%	57.7%	6.9%	100%	%
1978	236	367	171	774	#
	30.5%	47.4%	22.1%	100%	%

TABLE E

Methods used to solicit proxies of major shareholders

Year	Answer:	Personal Visit	Telephone	Other	no ans.	TOTAL	
							Companies:
1976		80	81	6	—	167	#
		47.9%	48.5%	3.6%	—	100%	%
1977		99	157	14	—	270	#
		36.7%	58.1%	5.2%	—	100%	%
1978		119	120	—	—	239	#
		49.8%	50.2%	—	—	100%	%

TABLE F

Percent of all shareholders represented at general meeting (either in person or by proxy)

Answer: (%) / Years	5 or less	10 or less	15 or less	20 or less	25 or less	30 or less	35 or less	40 or less	45 or less	50 or less	over 50	no ans.	TOTAL	
1972-1974	194	25	34	80	113	74	61	37	20	9	39	19	705	Companies: #
	27.5%	3.5%	4.8%	11.4%	16.0%	10.5%	8.6%	5.3%	2.9%	1.3%	5.9%	2.7%	100%	%
1975-1978	145	15	32	113	147	104	58	36	20	10	29	26	734	#
	19.7%	2.1%	4.4%	15.4%	20.0%	14.1%	7.9%	4.9%	2.7%	1.3%	3.9%	3.5%	100%	%
1982	85	11	41	135	188	84	39	28	12	8	29	9	669	#
	12.7%	1.6%	6.1%	20.2%	28.1%	12.6%	5.8%	4.2%	1.8%	1.2%	4.3%	1.3%	100%	%

TABLE G

Percent of outstanding shares represented at general meeting

Answer: (%) / Years	10 or less	20 or less	30 or less	40 or less	50 or less	60 or less	70 or less	80 or less	90 or less	over 90	no ans.	TOTAL	
													Companies:
1972-1974	31	23	24	33	33	76	141	162	119	33	30	705	#
	4.4%	3.5%	3.4%	4.7%	4.7%	10.8%	20.0%	23.0%	16.9%	4.7%	4.2%	100%	%
1975-1978	24	17	17	20	22	74	162	231	98	31	19	735	#
	3.4%	2.3%	2.3%	2.7%	3.0%	10.1%	22.0%	31.4%	13.3%	4.2%	2.5%	100%	%
1982	20	7	7	1	6	46	168	249	135	26	13	669	#
	3.0%	1.0%	1.0%	0.1%	0.9%	6.9%	25.1%	35.9%	20.2%	3.9%	1.9%	100%	%

TABLE H

Of the shares represented at the meeting, the percent represented by proxy

Answer: (%) / Year	20 or less	30 or less	40 or less	50 or less	60 or less	70 or less	80 or less	90 or less	over 90	no ans.	TOTAL	
1975-1978	42	22	29	28	51	69	82	99	275	41	735	Companies: #
	5.7%	3.0%	3.9%	3.8%	6.9%	9.4%	11.1%	13.4%	37.4%	5.6%	100%	%
1982	29	16	12	22	48	71	83	107	264	17	669	#
	4.3%	2.4%	1.8%	3.3%	7.2%	10.6%	12.4%	16.0%	39.5%	2.5%	100%	%

TABLE I

Length of meetings (number of minutes)

Answer (in minutes): / Year	0-10	11-15	16-20	21-25	26-30	31-40	41-50	51-60	61 & over	no ans.	TOTAL	
												Companies:
1971-1974	63	197	198	82	62	25	12	7	5	20	671	#
	9.5%	29.3%	29.5%	12.3%	9.2%	1.9%	1.8%	1.0%	0.8%	2.9%	100%	%
1975-1978	51	194	257	107	70	29	11	4	7	6	736	#
	7.0%	26.3%	34.9%	14.5%	9.5%	2.0%	1.5%	0.6%	0.9%	0.9%	100%	%
1982	16	174	253	124	69	21	8	2	1	1	669	#
	2.4%	26.0%	37.8%	18.5%	10.3%	3.1%	1.2%	0.3%	0.1%	0.1%	100%	%

TABLE J

Number of shareholders who spoke in the meeting

Answer: # of People / Years	0	1	2	3	4	5	6	7 & up	no ans.	TOTAL	
											Companies:
1971-1974	99	149	192	121	44	27	8	7	24	671	#
	14.8%	22.2%	28.7%	18.1%	6.6%	4.0%	1.2%	1.0%	3.6%	100%	%
1975-1978	161	171	201	124	40	15	4	4	15	735	#
	22.0%	23.3%	27.3%	17.0%	5.4%	2.0%	0.5%	0.5%	2.0%	100%	%
1982	285	156	125	68	19	7	1	4	4	669	#
	42.6%	23.3%	18.7%	10.2%	2.8%	1.0%	0.1%	0.6%	0.6%	100%	%

TABLE K

Number of shareholders who expressed opinions in opposition to the agenda proposals

Answer: # of People: / Years	0	1	2	3	4	5	6 & up	no ans.	TOTAL	
										Companies:
1975-1978	689	5	3	1	.25	.75	.25	35	735	#
	93.8%	0.6%	0.4%	0.2%	0.03%	0.1%	0.03%	4.8%	100%	%
1982	657	5	1	0	0	1	0	5	669	#
	98.2%	0.7%	0.1%	0%	0%	0.1%	0%	0.7%	100%	%

DISTINCTIONS CREATED BY THE 1981 COMMERCIAL CODE AMENDMENTS — CHART I

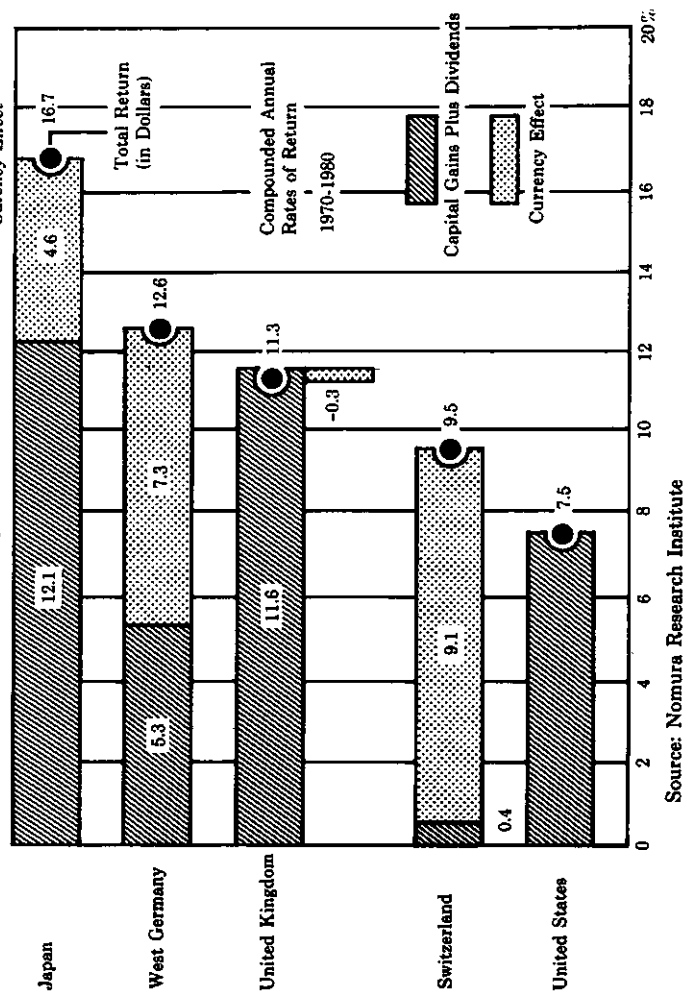
DIVISION OF COMPANIES	LARGE COMPANIES			MEDIUM COMPANIES	SMALL COMPANIES
	companies with stated capital of at least 500 million yen, or with liabilities of at least 20 billion yen			stated capital of more than 100 million yen but less than 500 million yen, and liabilities of less than 20 billion yen	stated capital of no more than 100 million yen and liabilities of less than 20 billion yen
	at least 1000 unit shareholders		companies with fewer than 1000 unit shareholders		
	listed companies	unlisted companies			
"UNIT STOCK" SYSTEM	mandatory (effective 10/1/82)	optional (declaration must be in the articles of incorporation)			
"VOTE-IN-WRITING" SYSTEM	mandatory except when all shareholders are sent proxy solicitations		not applicable		
AUDITORS	minimum two auditors required (one must be a full-time auditor)			one auditor sufficient, may be part-time	
AUDITS	financial and operational audits required			only financial audit is required	
AUDITORS' REPORT	required			required	not required
ACCOUNTING AUDIT BY Commercial Code	required			not required	
CPA FIRM SEL	2 audits required	required only for over-the-counter issues			
BALANCE SHEET & PROFIT/LOSS STATEMENT: APPROVAL	by the board of directors			by a general meeting of the shareholders	
BALANCE SHEET & PROFIT/LOSS STATEMENT: PUBLIC NOTICE	public disclosure of both required			public disclosure only of the balance sheet is required	

Source: Nomura Securities International, Inc.

CHART II

STOCK-MARKET RETURNS AROUND THE WORLD 1970-1980

Returns of Major Stock Markets



Source: Nomura Research Institute

INDEX

1981-82 HAWAII SUPREME COURT CASES IN BRIEF

The alphabetical index provides a summary of each Hawaii Supreme Court case decided from the date of the last summary in the preceding volume of this law review through the end of Volume 64 of the Hawaii Reports. The index departs from *A Uniform System of Citation* by utilizing the term "Court" in reference to the Hawaii Supreme Court. The explicit or implicit date of a statute construed in a supreme court opinion is included in the citation along with any amendments acknowledged by the Court. However, where a date for the statute could not be discerned from the opinion, the reader is referred to the most recent compilation of Hawaii Revised Statutes (1976) and the appropriate supplement. The name of the justice who wrote the opinion is italicized at the beginning of each summary. If the opinion is a *per curiam* opinion, it is noted as such.

Adair v. Hustace, 64 Hawaii 314, 640 P.2d 294 (1982)

Richardson. Cross-claimants, requesting cancellation of a deed, alleged that the deed was procured from the grantor, their ancestor, through the fraud of cross-defendants' predecessor-in-title. A jury found that the deed was procured by fraud, but that the cross-claimants were barred by the statute of limitations, laches, estoppel and adverse possession. In affirming the circuit court, the Court first established two necessary components of laches: (1) there must have been a delay by the plaintiff in bringing his claim; and (2) that delay must have resulted in prejudice to the defendant. The Court found that there was substantial evidence of delay because thirty-nine years had passed from the occurrence of the alleged fraud to initiation of the action. The Court also found substantial evidence that such delay was attributable to a lack of reasonable diligence by cross-claimants and their predecessor in ascertaining and prosecuting this claim.

Augustin v. Dan Ostrow Construction Co., 64 Hawaii 80, 636 P.2d 1348 (1981)

Lum. Plaintiff—appellants sued the contractors who had constructed their homes nine years earlier when falling shingles led to the discovery that non-corrosion-resistant nails had been used in the roofs, although the construction contract required the use of corrosion-resistant nails. The circuit court dismissed the com-

plaint, ruling that the suit was barred by HAWAII REV. STAT. § 657-8 (1976 & Supp. 1981), which prohibits any suit brought to recover for personal or property damage "arising out of any condition of an improvement to real property" unless it is brought not more than "two years after the cause of action has accrued, but in any case not more than six years after completion of the improvement . . . " It appeared that the suit was barred by the outside limit of six years on the face of the statute as nine years had elapsed since completion of the homes. However, the version of HAWAII REV. STAT. § 657-8 (1976 & Supp. 1981) in effect at the time of construction established a ten-year outside limit, which was subsequently reduced to six years by Act of May 30, 1972, No. 133, 1972 Sess. Laws Hawaii 464. A savings clause accompanying the 1972 amendment provided that "[t]his Act does not affect the rights and duties that matured . . . before its effective date." The Court held that the homeowners acquired a cause of action against the contractors when the homes were constructed which constituted a "matured" right. Since their rights matured less than ten years before suit, the suit was not barred by HAWAII REV. STAT. § 657-8. The Court rejected the contractor's argument that the statutory language "matured" was synonymous with "accrued," noting that different words in a statute are presumed to have different meanings. Thus, the plaintiffs-appellants' rights matured prior to their discovery that non-corrosion-resistant nails had been used and it was error for the circuit court to dismiss the complaint.

Ahuna v. Department of Hawaiian Home Lands, 64 Hawaii 327, 640 P.2d 1161 (1982)

Richardson. In 1971, a circuit court judge issued an order which found the use permit system practiced by the Department of Hawaiian Home Lands (DHHL) to be in violation of the Hawaiian Homes Commission Act, 1920; Act of July 9, 1921, c. 42, 42 Stat. 108, *reprinted in* 1 HAWAII REV. STAT. 146 (1976). In fashioning relief, the circuit court ordered the DHHL to award a lease of a specific lot to the plaintiff or to show cause why such lease could not be issued. The DHHL awarded 6.5 acres of the ten-acre lot in question to the plaintiff, retaining 3.5 acres for a proposed road extension. The circuit court, upon subsequent review of the DHHL's actions, ordered the DHHL to issue a lease of the full ten acres to the plaintiff. The DHHL appealed the question of whether the subsequent order awarding the ten-acre lease property implemented the circuit court's original order. On appeal, the Court interpreted the original order as directing the issuance of a lease on the entire ten-acre lot, absent a showing of "cause" by the DHHL. Upon examining the evolution of the Hawaiian Homes Commission Act, the Court concluded that the DHHL owed fiduciary duties to its native Hawaiian beneficiaries. Since plaintiff was a beneficiary, the DHHL had breached its fiduciary obligations in retaining 3.5 acres for the road extension by impermissibly weighing the interests of the State and citizens of Hawaii at the expense of its beneficiaries. The DHHL also breached its fiduciary duty of loyalty in setting aside the 3.5 acres because a reasonably prudent landowner in dealing with his own property would not have let 3.5 acres of agricultural land lie unproductive pending the possibility that it would be used for a roadway in the indefinite future. Thus, the Court held that the DHHL had not shown cause and affirmed the circuit court award of the ten-acre lot.

Aiea Lani Corp. v. Hawaii Escrow & Title, 64 Hawaii 638, 647 P.2d 257 (1982)

Hayashi. Appellee developer contracted with appellant title company to receive reimbursement of its title insurance premium for a construction loan in exchange for the referral of the individual units in the development to the title company. Prior to the closing of any units, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 (1976) (RESPA), was passed which prohibited kickbacks or referral fees in a business "incident to or a part of a real estate settlement service involving a federally related mortgage loan." In reversing the circuit court's clearly erroneous decision that RESPA was inapplicable, the Court found that (1) the transaction involved real estate settlement services; and (2) the loans which the individual buyers obtained to finance the purchase of their separate units qualified as federally related mortgage loans under the requirements set forth in Regulation X promulgated by the Secretary of Housing and Urban Development. Therefore, because RESPA was applicable, appellant title company was released from its contractual obligation to reimburse referral fees to the developer because the government regulation made performance impossible.

Allen v. Allen, 64 Hawaii 553, 645 P.2d 300 (1982)

Nakamura. The plaintiff arrived in Hawaii with her son from New Jersey and six days later commenced a proceeding to determine custody, invoking the court's equity powers since she could not satisfy the requirement of domicile or physical presence within the circuit for three months. Three weeks later, her husband in New Jersey commenced similar proceedings. The family court dismissed the action for lack of jurisdiction, but on appeal, the Intermediate Court of Appeals found that HAWAII REV. STAT. § 583-3(a)(2) (1976) did provide a basis for jurisdiction if it was in the best interest of the child. Reversing the ICA on a grant of certiorari, the Court noted that one purpose of the Uniform Child Custody Jurisdiction Act, HAWAII REV. STAT. ch. 583 (1976), is to avoid the shifting of children from state to state while their parents battle over their custody in the courts of several states. In addition, the court had previously decided in *Griffith v. Griffith,* 60 Hawaii 567, 574, 592 P.2d 826, 831 (1979), that a "judgmental test" is used to decide what is in the child's best interest. The facts failed to manifest (1) the requisite connection with Hawaii or (2) that substantial evidence of the child's present or future care, protection, training and personal relationship was present in Hawaii. Mere physical presence in Hawaii was not sufficient to confer jurisdiction. Thus, the family court did not err when it refused to hear the matter.

Black Construction Corp. v. Agsalud, 64 Hawaii 274, 639 P.2d 1088 (1982)

Nakamura. The Court upheld the decisions of the Unemployment Insurance Division of the Hawaii State Department of Labor and Industrial Relations, the Referee for Unemployment Compensation Appeals, and the circuit court in which appellant Black Construction (Black) was found to be an employer responsible for contributions to the Unemployment Compensation Fund maintained by the State pursuant to the Hawaii Employment Security Law, HAWAII REV. STAT. ch. 383 (1976). After conceding that it was subject to the federal payroll tax imposed by 26 U.S.C. § 3301 (the Federal Unemployment Tax Act), Black argued that (1) it was subject to Nevada, not Hawaii, law because its principal place of business was

in Nevada; and (2) that the imposition of "an employment tax on a foreign corporation's employment of employees who perform no services in the taxing state" was a violation of due process. The Court concluded that it would be reasonable and just for Hawaii rather than Nevada to enforce the unemployment insurance obligation in spite of Black's legal "presence" in Nevada. Black's activities focused on Guam and its corporate reports were located in Nevada. It was neither licensed to do business in Hawaii nor did it do any construction work in Hawaii. Nonetheless, the Court concluded that Hawaii unquestionably served as Black's American base of operations and as its "principal place of business" because Black's parent and highest ranking corporate fiduciaries were in Hawaii and its corporate policies were determined in Hawaii.

Campbell v. Animal Quarantine Station, 63 Hawaii 557, 632 P.2d 1066 (1981)

Lum. Plaintiffs sued the Animal Quarantine Station for negligent infliction of emotional distress after being informed by telephone that their pet dog had died from heat prostration due to confinement in a hot van while in the defendant's custody. The defendant appealed the trial court's damage award of $1,000 for emotional distress. Affirming the damage award, the Court held that the case was controlled by *Rodrigues v. State,* 52 Hawaii 156, 472 P.2d 509 (1970) and *Leong v. Takasaki,* 55 Hawaii 398, 520 P.2d 758 (1974), and that it was unnecessary for the plaintiffs to witness the negligent destruction of their property in order to recover damages for serious emotional distress. Rejecting the defendant's contention that medical testimony substantiating the emotional distress was a prerequisite to recovery, the Court noted that medical testimony is relevant to the seriousness of the distress suffered since *Rodrigues* announced that liability is confined to the infliction of *serious* emotional distress. Because serious mental distress may be found where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case, the trial court did not err in awarding damages when the proof of the mental distress was not of a medically significant nature.

Carlsmith, Carlsmith, Wichman & Case v. CPB Properties, 64 Hawaii 584, 645 P.2d 873 (1982)

Menor. In 1973, the plaintiff entered into a long-term lease agreement for two floors of office space in a high-rise building adjacent to the defendant's property while a 150-foot restriction was in effect for the Hawaii Capitol District. In 1975, the city began to update the zoning in the district and the City Council's consultant's first draft of an updated plan contained guidelines which would have allowed a projected building on defendant's property to go up to 310 feet. However, in July, 1976, the consultant submitted a second draft in which the height limit was reduced to 250 feet. Subsequently, public hearings were held on the proposed ordinance (Bill 111, Draft 1) and the commission recommended its passage. The plaintiff did not offer any written or oral testimony at these hearings. A second draft of the bill, which ultimately became law, changed the permitted heights from 250 to 310 feet without further public hearings. After the change in height limits, plaintiff sought to enjoin defendant from constructing a 264-foot building on the defendant's property that would obstruct the view from the plaintiff's

leased offices. Plaintiff challenged the validity of Honolulu Ordinance 77-60 because of the lack of public hearings on the second draft. Rejecting plaintiff's arguments, the Court noted that it is implicit in the procedure outlined in Honolulu Charter § 6-1006, *reprinted in* 2 HAWAII REV. STAT. at 564 (1976) that changes in the original proposal might ensue as a result of the views expressed at the hearings. Thus, neither the plaintiff nor the public had a right to expect that the final legislative product, especially with regard to height, would be limited to that embodied in the first proposal. Since the first draft was merely a vehicle by which zoning issues could be fully aired and discussed by the City Council and all interested parties, the Court found that the spirit and intent of § 6-1006 had been complied with. Stressing that the Court was not suggesting that the City Council could adopt a proposal that was different from the noticed proposal merely because it was discussed or advocated at the public hearing, the Court stated that "an amendment will be declared invalid where, as finally adopted, it is so fundamentally different from that originally proposed as to amount to a new proposal." Further noting that the height limits that were adopted were not incompatible with those governing the immediately adjacent property, the Pacific Trade Center, the Court affirmed the circuit court's summary judgment for the defendant, and held that the final action taken by the City Council was not so drastic a departure from the noticed proposal to warrant invalidation of the ordinance.

Chang v. Planning Commission, 64 Hawaii 431, 643 P.2d 55 (1982)

Lum. In his appeal of a circuit court order upholding a decision by the Maui County Planning Commission (Commission) which granted Makena Surf a special management area (SMA) permit for property adjoining his land, plaintiff-appellant contended: (1) the Commission did not give him adequate notice of its rescheduled hearing on the SMA application; and (2) the Commission's subsequent closed deliberations violated statutory, charter and rule provisions governing public agency meetings. On the first issue, the Court held that SMA permit application proceedings are "contested cases" within the meaning of the Hawaii Administrative Procedures Act (HAPA) that are required by law to be determined after an opportunity for agency hearing. HAWAII REV. STAT. § 91-1(5) (1976 & Supp. 1981); *Town v. Land Use Commission,* 55 Hawaii 538, 524 P.2d 84 (1974). However, neither HAWAII REV. STAT. § 205A-29 (1976 & Supp. 1981), HAWAII REV. STAT. chs. 91 and 92 (1976 & Supp. 1981), nor the Commission rules required that notice of a meeting rescheduled for a later date conform to the time limitations imposed on the original notice. The technical deficiency in the notice under the HAPA was cured and any prejudice to appellant was eliminated upon receipt by him of sufficient notice via another source. On the second issue, the Court held that while the Commission's closed deliberations violated agency rules and the county charter's "sunshine" provisions, the reviewing court may not reverse the Commission's decision unless appellant alleges and establishes prejudice to his substantive rights. HAWAII REV. STAT. § 92-6(a)(2) (1976); HAWAII REV. STAT. § 91-14(a) (1976). Therefore, the Court affirmed the order.

Chedester v. Stecker, 64 Hawaii 464, 643 P.2d 532 (1982)

Padgett. Plaintiffs, homeowners in a subdivision, were assessed $1,000 for a waterline which was to be installed in their neighborhood. At the homeowners' asso-

ciation meeting, plaintiffs requested substantiation of the assessment and were assured by defendants that facts and figures would be forthcoming. However, no substantiation was ever made, so plaintiffs did not pay the assessment. Fifteen months later, plaintiffs received a letter from an attorney demanding payment. One defendant wrote a letter to another defendant which inplied that the Association had to clean its house of "such dissidents, freeloaders and rabblerousers," which could have been construed as a reference to plaintiffs. Plaintiffs sued for negligent and intentional infliction of emotional distress for the threatening attempts to collect, and libel for the letter. The trial court (1) sent only the issue of negligent infliction of emotional distress to the jury; (2) granted summary judgment, dismissing the libel action; and (3) granted a directed verdict for defendants on the intentional infliction of emotional distress claim. Defendants appealed the jury verdict awarding damages on the negligence claim and plaintiffs cross-appealed, claiming that the other claims should have been sent to the jury as well. On appeal, the Court reversed the jury award, the directed verdict and the summary judgment below. The Court agreed with defendants that there is no liability for *negligent* infliction of emotional distress in the context of a creditor's verbal pressure on a delinquent debtor absent the elements of intent, unreasonableness and foreseeability of harm. *Fraser v. Blue Cross Animal Hospital*, 39 Hawaii 370 (1952); *Ailetcher v. Beneficial Finance Co.*, 2 Hawaii Ct. App. 301, 632 P.2d 1071 (1981). However, the evidence was held sufficient to reach the jury on the intentional infliction of emotional distress claim because liability attaches where an actor intentionally employs unreasonable means of collection resulting in foreseeable mental and emotional distress. As to plaintiffs' allegation of libel, the Court held (1) it is sufficient, not *de minimus*, if libel is communicated to only one person other than the person defamed; (2) where words in the context used were reasonably susceptible of both innocuous and defamatory meaning, the question whether it is libel *per se* is one for the jury; and (3) where special damages were pleaded, words would be actionable even if, in context, they were libelous only *per quod*. The action was reversed and remanded for new trial.

Chung v. Animal Clinic, Inc., 63 Hawaii 642, 636 P.2d 721 (1981)

Lum. Appellee Chung suffered a heart attack while jogging after work. At the time, he was president, sole stockholder and sole director of a professional corporation with which he had an employment contract. Affirming the grant of workers' compensation benefits to appellee by the State Labor and Industrial Relations Appeals Board (Labor Board), the Court held: (1) at the time of the injury, appellee was an "employee" within the workers' compensation statute, HAWAII REV. STAT. § 386-1 (1976 & Supp. 1980) because (a) appellee's exclusive stock ownership and control of the corporation did not violate Hawaii's corporation statute or public policy, or constitute fraud on creditors, (b) the corporation employed persons other than appellee and (c) appellee spent his workday primarily performing veterinarian work; (2) in determining that appellee's injury arose "out of and in the course of" employment under HAWAII REV. STAT. § 386-3 (1976), the Labor Board properly applied a one-step "work-connection" test which focuses on whether an injury was caused by work (where work activity aggravated or accelerated the injury), not on when and where the injury occurred; and (3) although the statutory presumption that an injury is work-related that applies at the outset is rebuttable by "substantial evidence to the contrary," the fact that appellee was

jogging when he had a heart attack does not alone meet that standard.

Clark v. Cassidy, 64 Hawaii 74, 636 P.2d 1344 (1981)

Per Curiam. The issue on appeal was whether the amendment to HAWAII REV. STAT. § 467-24 (1976 & Supp. 1980) which increased the recovery limit allowed from the Real Estate Recovery Fund, allows the claimants to recover up to the new limit on a judgment preceding the effective date of the amendment. Defendant-intervenor-appellant Real Estate Commission argued that the appellees' recovery was subject to the statutory limit in effect when the cause of action accrued. The Court agreed and reversed the circuit court order allowing appellees' motion for an order of payment of unpaid judgment based on the new recovery limit. Unless expressed or obviously intended, a law has no retroactive operation, especially when the statute or amendment involves substantive rights. There is nothing to the language of the Act of June 9, 1977, No. 197, 1977 Sess. Laws 428, that expresses an intent to apply the new maximum liability to pending claims.

Costa v. Sunn, 64 Hawaii 389, 642 P.2d 530 (1982)

Nakamura. Appellee Director of the Department of Social Services and Housing (DSSH) published a notice pursuant to HAWAII REV. STAT. § 91-3 (1976 & Supp. 1981), the Hawaii Administrative Procedure Act (HAPA), which announced substantive changes to the rules of the Public Welfare Division. A second notice was published several months later announcing public hearings. The circuit court granted summary judgment in favor of appellee on the ground that the two notices did not conform to applicable provisions of the HAPA. The Court reversed, finding that the notices (which stated little more than the headings of the new rules): (1) failed to fairly apprise the interested parties of what was being proposed; and (2) denied the parties the opportunity to formulate and present rational responses to the proposal.

Crawford v. Financial Plaza Contractors, 64 Hawaii 415, 643 P.2d 48 (1982)

Richardson. In 1963, decedent was diagnosed as suffering from arteriosclerosis. In April 1968, decedent was hired as a machine operator by a local contracting firm. In July 1968, while working on a construction project, the decedent suffered a heart attack and died. The autopsy revealed the cause of death as cardiac failure due to severe arteriosclerosis. The decedent's wife applied for, but was denied, compensation for herself and a minor child with the State Department of Labor and Industrial Relations (DLIR). The wife appealed the decision to the Labor and Industrial Relations Appeals Board (Board), which determined that the wife was entitled to receive workers' compensation benefits from the contracting company, but declined to apportion the payment of death benefits between the employer and the state special compensation fund. On appeal, the Court found that the legislature's intent in enacting HAWAII REV. STAT. § 386-33 (1976) was to encourage the hiring of persons "already handicapped by pre-existing permanent partial disabilities" because of the apportionment of the payment of benefits between the employer and the special compensation fund. The Court stated that where an employee "with a permanent partial disability which pre-exists employ-

ment dies as a result of a combination of that pre-existing disability and a subsequent work-related injury, the DLIR should determine the relative contributions of the two injuries to the cause of death." The employer is responsible for the amount of death benefits commensurate with the contribution of the second injury and the special compensation fund is responsible for the remaining death benefits. The case was reversed and remanded for a determination of relative contributions.

Employees' Retirement System v. Aina Alii, Inc., 64 Hawaii 457, 643 P.2d 65 (1982)

Per Curiam. Holdover tenants claiming to be sub-sublessees under a sublease which was the subject of a foreclosure action, in which a receiver had been appointed, appealed two orders. Appellants appealed an order denying them standing at the receiver's instructions hearing in which the circuit court instructed the receiver of the sublease not to execute a sub-sublease with appellants and to collect back rentals from them. Appellants also appealed the denial of their motion to intervene which was made after the confirmation of the judicial sale of the sublease. The appeals were consolidated. On the first order, the Court noted that since their rights were not adjudicated in the receiver's instructions hearing, appellants could have litigated the issues of the duty to execute the lease and the obligation to pay back rent in an appropriate proceeding. The Court held that the appellants were not "aggrieved persons having standing to appeal the order" on instructions. On the second order, the Court found that appellants' motion was untimely because they had knowledge of the proceedings and of the circuit court's position that they lacked standing. Further, the Court stated that the purchaser at the judicial sale took title free and clear of appellants' unrecorded sub-sublease by operation of statute under HAWAII REV. STAT. § 501-82 (1976) and land court statutes.

Graham Construction Supply v. Schrader Construction, 63 Hawaii 540, 632 P.2d 649 (1982)

Nakamura. A supplier of building materials sought to collect the amount of a default judgment rendered against a building contractor from a special fund maintained by the Contractors License Board pursuant to HAWAII REV. STAT. ch. 444 (1976 & Supp. 1982). A statutory amendment to HAWAII REV. STAT. § 444-26 enacted subsequent to the entry of judgment limited the class of persons entitled to payment from the fund to "owners or lessees of private premises." The original statute had applied to "any person aggrieved" by a licensed contractor. The supplier appealed the denial of his motion to order payment, contending that the district court retrospectively applied a statutory amendment in contravention of the canon of statutory construction that laws are applied prospectively in the absence of clear expression to the contrary. The Court agreed and reversed the denial of payment, applying the test set forth in *Employees Retirement System v. Chang,* 42 Hawaii 532 (1958), which defined a retrospective law as "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past . . . . "

Hawaii Carpenters' Trust Funds v. Aloe Development, 63 Hawaii 566, 633 P.2d 1106 (1981)

Nakamura. The trustees of an employee benefit trust fund filed an application for a mechanic's lien on a condominium development that had been improved in part by the employee-beneficiaries after the subcontractor-employer had breached his obligation under the employees' collective bargaining agreement to make fringe benefit contributions to the fund. Recognizing that it is well-settled that "the remedial provisions of the mechanic's lien statutes should be liberally construed," the Court followed *United States v. Carter,* 353 U.S. 210 (1957), which construed the terms "person who has furnished labor" under the Miller Act to include the trustees of a fringe benefit trust fund. The Court held that the trustees of an employee benefit trust fund fall within the statutory definition of a "person . . . furnishing labor" so as to qualify as a proper party to bring a lien under the Mechanics' and Materialmens' Law, HAWAII REV. STAT. § 507-42 (1976). The Court also held that the statute's purpose and policy dictate that the statutory phrase "price agreed to be paid" covers fringe benefit contributions to trust funds and is not limited to wage payments.

Huihui v. Shimoda, 64 Hawaii 527, 644 P.2d 968 (1982)

Lum. The defendant had been denied bail under HAWAII REV. STAT. § 804-3(b)(3) (1976 & Supp. 1980) because the circuit court had determined his extortion charges to be "serious offenses," there was strong proof that he had committed the offenses, and petitioner was free on $100,000 bail for felony charges at the time of the indictment. In granting the defendant's petition for writ of habeas corpus, the Court stated that the notion of an accused being incarcerated prior to adjudication of guilt on the assumption of his dangerousness is in conflict with the principle that every accused is presumed innocent until proven guilty. The Court further found the bail statute to be in violation of both U.S. CONST. amend. 14 (due process) and HAWAII CONST. art. I, § 12 (prohibiting excessive bail) because it exceeded the bounds of reasonableness and due process by conclusively presuming a defendant's dangerousness from the fact that he had been previously charged with a serious crime and was presently charged with a felony, leaving no discretion with the trial judge.

In re Girod, 64 Hawaii 580, 645 P.2d 871 (1982)

Per Curiam. The Court reversed several orders concerning the approval of final accounts and the settling of an estate, holding that where there is a contest over the validity of a will and the contest is settled, the court must give notice of the hearing pursuant to HAWAII REV. STAT. § 560:3-1102(3) (1976) to all "interested persons" before final approval. A finding by the trial court that appellant actually had notice of the "proceedings" was clearly erroneous insofar as it applied to the settlement of the will contest.

In re Ikuta, 64 Hawaii 236, 639 P.2d 400 (1981)

Richardson. The probate court had issued an order which approved decedent's accounts, determined the trust, distributed the estate and discharged the ancillary executor. Two sets of persons appealed and cross-appealed the order: (a) the

decedent's first wife and their three sons (first family); and (b) the decedent's second wife and their son (second family). The first family contested the probate court's conclusions that: (1) one-half of certain property located in Wailupe, Hawaii was includable in the inventory of the estate because it was held as tenants by the entirety until the divorce, and after the divorce, title was held as tenants in common; (2) the will should not be reformed because (a) extrinsic evidence should not have been admitted and (b) reformation of wills is against public policy; and (3) the election of the second wife to take her dower interest did not accelerate the termination of the trust. The second family contested the probate court's conclusions that: (4) the decedent's three sons from the first marriage were not "contesting" the will so as to cause a forefieture; and (5) an additional trustee be appointed. The Court affirmed the probate court on all issues for the following reasons: (1) the probate court had correctly applied Hawaii law, even though there was a California divorce decree and a 1948 property management agreement had not changed the title to the property; (2) extrinsic evidence was necessary to ascertain the settlor's intent and since the reformation was made to reflect the testator's true intent, it was not against public policy; (3) the doctrine of acceleration was not applicable because the unfulfilled condition precedent of Mary T. Ikuta's death created a contingent remainder interest and acceleration would defeat the testator's general plan for the distribution of his property; (4) the action for will construction was not a "contest" to which a "no-contest" clause would apply; and (5) there was sufficient evidence to establish that appointment of Bishop Trust as co-trustee would be conducive to the better administration of the Ikuta trust in light of the conduct between the first and second families, Mary Ikuta's residence in California and the inclusion of Hawaii property in the trust res.

Fong Dissenting. The probate court should have been reversed because (1) the action was a "contest" of the will and the valid "no-contest" provision of the will should preclude recovery for the sons of the first family because the action was brought without good faith or probable cause; and (2) an additional trustee should not have been appointed because it was not necessary and it was contrary to the intent of the testator.

In re Lopez, 64 Hawaii 44, 636 P.2d 731 (1981)

Richardson. An intervivos trust was created by the settlor in 1905 which provided that after his death the income was to be paid to his wife and to his seven children and one godchild (the named eight). The "children" of any of the named eight were entitled to their parents' share of the income prior to the termination of the trust. The corpus of the trust was to be distributed among all of the children of the beneficiaries, upon the death of the last survivor of the named eight. Petitioner, Bishop Trust Company, Ltd., the successor trustee of the trust, filed a petition for instructions regarding distribution of the trust in 1973. In 1976, Petitioner moved the probate court for partial summary judgment urging that the surviving widow of one of the named eight's children could assign the right to her share of the income to her son until termination of the trust, and that any grandchild entitled to a share of the settlor's trust could convey the right to intervivos disposition or by will. The respondents, comprising the settlor's great-grandchildren, opposed the motion, urging that the corpus and income of the trust be distributed *per stirpes* among the settlor's lineal descendants. Other

grandchildren and great-grandchildren concurred with the Petitioner's motion and also argued that the corpus should be distributed *per capita* among the living grandchildren at the end of the trust. The trial court denied Petitioner's motion. On appeal, the Court reversed, holding that: (1) the provisions in the trust referring to child or children meant immediate offspring or issue of the first generation; (2) the children of the named eight who died before termination of the trust should receive income distributed *per stirpes*; and (3) the corpus of the trust should be divided *per capita* among the surviving children.

In re Tax Appeal of Fasi, 63 Hawaii 624, 634 P.2d 98 (1981)

Richardson. APCOA contracted to operate parking facilities on State land at the Honolulu International Airport. On April 7, 1977, the then-Honolulu mayor appealed to the Tax Appeal Court contesting a real property tax exemption granted to APCOA on the land beginning in tax year 1972 through the contract's 1984 termination. Normally, State land is exempt from property taxes. However, under HAWAII REV. STAT. § 246-36(1)(D) (1976), a private person occupying State property for commercial purposes for at least one year is deemed an "owner" and must pay property taxes on the land. As to tax years 1972 to 1976, the Court held that the Tax Appeal Court did not have jurisdiction over the appeal because the mayor's appeal was not timely within the meaning of HAWAII REV. STAT. § 246-46 (1976), which mandates that the Honolulu mayor or city council appeal property tax assessments or exemptions before September 25 of the tax year. As to tax years 1977 to 1984, using rules of statutory construction, the Court held that persons will be "owners" and liable for property taxes only if they received some kind of property interest; HAWAII REV. STAT. § 246-36(1)(D) (1976) would not apply to primarily service contracts. Reversing the Tax Appeal Court, the Court held that since the State was the true "owner" of the airport facilities, APCOA was not liable for the property tax. The Court pointed to "ownership" indicia such as (1) the State's provision of maintenance, security and equipment to the facilities; and (2) the State's contract right to enter the land and construct improvements without APCOA's permission or regard to the impact of such improvements on APCOA's operation. The Court also noted that the State and APCOA agreed that they intended to execute a contract in which use of the property was an incident thereof.

In re Tax Appeal of McCormac, 64 Hawaii 258, 640 P.2d 282 (1982)

Per Curiam. Taxpayers appealed a decision and order of the Tax Appeal Court which affirmed the assessment by the Director of Taxation of net income taxes on amounts disbursed to appellants as beneficiaries of a trust agreement. The Court affirmed, finding that a non-resident beneficiary of a resident trust may be taxed on trust income derived from intangible trust property where such income would be taxable under HAWAII REV. STAT. ch. 235 (1976 & Supp. 1981) if received directly by the beneficiary. HAWAII REV. STAT. § 235-4(b) (1976) makes clear that the State's ability to tax the income of non-residents turns upon the situs of the income-generating property. Appellants argued that the situs of the property was the domicile state of appellants (California), citing the maxim *mobilia sequuntur personam*, "movables follow the person of the owner." However, the Court applied the "business situs" exception under which the situs of the property de-

pends on the extent to which trust property is located within the State. The trust had a business situs in Hawaii because Bishop Trust: (1) exclusively held, controlled and administered the corpus of the trust; (2) possessed virtually unlimited discretion in the investment of the trust principal and accumulation; and (3) was responsible for the collection and disbursement of any income generated under the trust. Thus, the Director of Taxation could properly assess net income taxes because the source of the trust income was in Hawaii.

In re Tax Appeal of Photo Management, Inc., 63 Hawaii 579, 633 P.2d 535 (1981)

Richardson. Taxpayer Photo Management, Inc. (PMI) photographs tourists and sells the developed prints to retail photo companies for resale. When the State Department of Taxation rejected PMI's classification as an "intermediary service" (taxable at the rate of .05%) and reclassified PMI's business as a "service business or calling" (taxable at the rate of 4%), PMI appealed to the Tax Appeal Court, which concluded that the proper classification was "wholesaling" (taxable at .05%). In the Director of Taxation's appeal of the Tax Appeal Court's ruling, the Court affirmed, noting that under HAWAII REV. STAT. § 237-4(1) (1976), any sale to a licensed taxpayer who is taxed in his sales constitutes a wholesale transaction. Even though PMI engaged in some incidental service activities, the Court held that PMI was engaged in the "wholesale" business because: (1) it mass-produces photos with photographers who are not highly skilled; (2) the substance of the transaction between PMI and the photo retailers is the print itself; and (3) the photo retailers purchase the prints from PMI in order to resell them at a profit. The Court also held that although PMI reported its receipts from sales of prints as "intermediary services," it was not estopped from gaining a proper determination of taxation classification for its receipts.

Jones v. Hawaiian Electric Co., 64 Hawaii 289, 639 P.2d 1103 (1982)

Lum. Jones filed a complaint with the Public Utilities Commission (PUC) against Hawaiian Electric Co., (HECO) alleging that HECO's holding of property in Heeia Kea Valley, Kaneohe, Oahu, either by lease or purchase, violated its franchise to do business as a public utility and that HECO's acquisition and holding of property under a lease-purchase agreement required approval of the PUC. The complaint was dismissed by the PUC as legally insufficient and Plaintiff appealed. Applying the standard of review required by the Hawaii Administrative Procedures Act, HAWAII REV. STAT. § 91-14(g)(5) (1976 & Supp. 1980), the Court held that the PUC was not clearly erroneous in dismissing the complaint for three reasons. First, the lease agreement was not "evidence of indebtedness" in violation of HAWAII REV. STAT. § 269-17 (1976) since it was an executory contract which did not involve the issuance of stock or borrowings of a permanent nature designed to supplement equity capital and it had no effect on the capital structure of HECO or its utility expenses. Therefore, the legislature did not intend for the PUC to regulate such an agreement under § 269-17. Moreover, the lease was not a conditional sales contract. Second, the lease was not an "encumbrance" within the meaning of HAWAII REV. STAT. § 269-19 (1976) because it was an unsecured contract; the Heeia Kea property was being carried at no expense to the ratepayers and the agreement had no effect on the financial structure of HECO.

Thus, the PUC did not fail to protect the public interest. Third, the acquisition and holding of the Heeia Kea property, although unnecessary for HECO's business, did not violate HECO's franchise since it was not prohibited by the specific statute or franchise provision. Fourth, the lease agreement did not affect the rates charged to utility users since HECO's rents for Heeia Kea were absorbed by its stockholders. Finally, the Court found that the PUC acted within its authority in dismissing the complaint without an evidentiary hearing since there were no substantial and material factual issues.

Jordan v. Hamada, 64 Hawaii 446, 643 P.2d 70 (1982)

Lum. Appellant Jordan intervened in a petition filed by the Hawaii Government Employees' Association (HGEA) for service fee certification with the Hawaii Public Employment Relations Board (HPERB). HPERB issued a decision certifying the service fee and appellant appealed to the Fourth Division of the First Circuit. That court remanded the case to HPERB for further consideration of certain issues raised but not resolved on appeal. HPERB then issued a second decision and Jordan appealed, but this time to the Seventh Division of the First Circuit. The seventh division court dismissed the appeal for lack of jurisdiction since the first appeal awaited final judgment. On appeal of the seventh division dismissal, the Court remanded the case to the fourth division court, noting that once a court has acquired jurisdiction over a case, that court retains its power over the case to the exclusion of any other court of coordinate jurisdiction until a final judgment in the case is rendered or until the action is terminated by the parties. Since remand by the fourth division court of the administrative agency decision did not terminate the administrative proceeding, the fourth division retained exclusive jurisdiction to review the second agency decision. Further, under the facts of this case and the doctrine of the "law of the case," appellant was limited on appeal to arguing the issues that had been remanded and other issues that were not disposed of by the original appeal.

Jordan v. Hamada, 64 Hawaii 451, 643 P.2d 73 (1982)

Lum. Appellee Hawaii Government Employees' Association (HGEA) filed a petition with co-appellee Hawaii Public Employment Relations Board (HPERB) for certification of an increased service fee which HGEA sought to have deducted from the payrolls of the six bargaining units it represented. HPERB certified the increase, applying it retroactively. Appellant Jordan, a University of Hawaii employee who retired without paying any additional amounts caused by the increase, challenged the decision by filing a notice of appeal with the circuit court. The circuit court dismissed the appeal on the ground that appellant lacked standing. On appeal, the Court sustained the dismissal, finding that at the time of the appeal to the circuit court, appellant had not met the first component of HAWAII REV. STAT. § 91-14(a) (1976) that he be a "person aggrieved," even though the second component of being a participant in the contested case had been met. Since the determination of whether the party is "aggrieved" should be made at the time the right to appeal is asserted and the agency's decision was to be implemented after appellant retired, the decision did not affect appellant. (See companion cases: *Jordan v. Hamada,* 64 Hawaii 446, 643 P.2d 70 (1982) (this index); *Jordan v. Hamada,* 62 Hawaii 444, 616 P.2d 1368 (1980).)

Klinger v. Kepano, 64 Hawaii 4, 635 P.2d 938 (1981)

Richardson. The patentee under a land patent grant died intestate, leaving his issue (plaintiff-appellants) in possession of the land. During various time periods, issue of the patentee occupied the land and the estate paid the property tax. On October 15, 1962, the Department of Taxation issued a notice of proposed tax lien foreclosure sale of the land due to nonpayment of real property taxes. Notice was published in the local newspaper on four occasions and posted on the property on the day it was issued. However, there was no evidence that the notice was mailed or made personally known to the issue listed on the tax records. Defendant-appellees' predecessors-in-interest purchased the land at public auction on November 4, 1971, later conveying it to defendant-appellees who brought an action in ejectment. The trial court granted appellees' motion for summary judgment, holding that there had been compliance with the notice procedure in Rev. Laws of Hawaii §§ 128-39 & -41 (1955) (current version at HAWAII REV. STAT. §§ 246-56 & -58 (1976)) and that the notice was constitutionally adequate. On appeal, the Court reversed and held that the notice given, even if statutorily sufficient, failed to meet minimum standards of due process under both U.S. CONST. amend. XIV and HAWAII CONST. art. I, § 4; hence the tax deed was invalid.

Land v. Highway Construction Co., 64 Hawaii 545, 645 P.2d 295 (1982)

Ogata. The plaintiffs filed separate suits alleging negligence against Highway Construction Co., Ltd. (Highway) and the State for placing a concrete piling to block a Honolulu-bound lane of a portion of the H-3 freeway which plaintiffs struck with their automobiles. The State cross-claimed against Highway, alleging that Highway's negligence caused the injuries to the plaintiffs. One day prior to the trial, the plaintiffs dismissed their claims with prejudice against Highway, leaving the State as the sole defendant. During the bench trial, the circuit court dismissed the State's cross-claim against Highway, and the State's request to file a third-party complaint against Highway as being untimely. The circuit court found that: (1) the State was negligent; (2) the State was the sole proximate cause of the accident; and (3) the plaintiffs were not contributorily negligent. These findings resulted in the dismissal of the State's third-party complaint against one of the plaintiffs. The State appealed the trial court's dismissal of the cross-claim, arguing that Highway was still a party to the action at the time the cross-claims were filed and that the subsequent dismissal of Highway by the plaintiffs did not dismiss the cross-claim. The Court agreed, citing *Frommeyer v. L. & R. Construction Co.*, 139 F. Supp. 579 (D. N.J. 1956). The Court also found that the State had been substantially prejudiced by the trial court's erroneous dismissal of the cross-claim against Highway because the dismissal with prejudice raised res judicata problems which prevented the State from litigating its claims of indemnity or contribution in a subsequent action. Accordingly, the Court vacated the order dismissing the State's cross-claim and remanded the case for further proceedings.

Larsen v. State Savings and Loan Ass'n, 64 Hawaii 302, 640 P.2d 286 (1982)

Per Curiam. Plaintiff-appellant sustained an eye injury while opening a champagne bottle when the plastic stopper ejected and struck plaintiff in the eye. At trial, defendant objected to plaintiff's expert, arguing that he was not qualified to

testify as to the defective nature of the product. The trial court sustained the objection and, at the close of trial, directed a verdict for the defendant. On appeal, the Court reversed, holding that the trial court abused its discretion in granting a directed verdict for the defendant because the overall background of plaintiff's expert as an engineer gave him the ability to understand and explain the characteristics of champagne bottles and stoppers. In addition, the expert's experiments on champagne bottles and consulting work gave him experience with the subject matter of the case. Thus, the expert in this case was qualified to testify on the issues of whether the champagne bottle stopper was defective and whether the champagne was negligently transported, stored or cared for. Any lack of experience of the expert should have gone to the weight rather than the admissibility of the testimony.

Lui v. City & County of Honolulu, 63 Hawaii 668, 634 P.2d 595 (1981)

Per Curiam. Plaintiff-appellant, a temporary administratrix, filed suit in circuit court against the City and County of Honolulu for false arrest, false imprisonment and negligence in detaining the decedent who was discovered hanging dead in his cell the morning after arrest. The lower court denied appellant's motions *in limine* and for partial summary judgment which addressed the constitutionality of the detainment statute and the negligence of the police, but permitted an interlocutory appeal of the denials. The Court raised *sua sponte* the question of whether the trial court had abused its discretion in allowing the appeal and held that the saving of time and litigation expense, without more, does not meet the requirement of speedy termination as provided in HAWAII REV. STAT. § 641-1(b) (1976).

McGlone v. Inaba, 64 Hawaii 27, 636 P.2d 158 (1981)

Ogata. Plaintiff-appellants, a group of persons interested in the preservation of the environment at Paiko Lagoon, Kuliouou, Oahu, were denied a permanent injunction to prevent defendant-appellees (officials of the Board of Land and Natural Resources (BLNR) and the department) from approving the construction of underground utilities on conservation land. The BLNR had approved the application without requiring the filing of an environmental impact statement because the primary and secondary impacts of the proposed construction would probably not have a significant effect on Paiko Lagoon within the meaning of HAWAII REV. STAT. § 343-1(8) (1976) (now renumbered as § 343-2(11) Supp. 1981). In the appeal of the Board's findings under the Hawaii Administrative Procedures Act, HAWAII REV. STAT. § 91-14 (1976), reviewing only the designated record because plaintiffs were not entitled to a trial *de novo*, the circuit court concluded that the BLNR had properly approved the conservation district use application pursuant to HAWAII REV. STAT. ch. 343 (1976). The Court affirmed and held that the circuit court had properly excluded further testimony and additions to the record and that the findings of the BLNR were not clearly erroneous.

Monick v. State, 64 Hawaii 399, 641 P.2d 1341 (1982)

Per Curiam. The State appealed a circuit court decision that suppressed thirty-eight out of forty-two sets of medical records seized from the office of appellee (a doctor) in a Medicaid fraud investigation. The affidavit supporting the search

warrant had identified only four of the forty-two patients whose records were seized. Citing *State v. Kalai*, 56 Hawaii 366, 537 P.2d 8 (1975), in affirming the suppression, the Court found no evidence to support the requisite finding of probable cause.

Montalvo v. Chang, 64 Hawaii 345, 641 P.2d 1321 (1982)

Nakamura. In a consolidated appeal of three class actions brought by recipients of financial assistance under the Aid to Family with Dependent Children program (AFDC), the State argued that the circuit court abused its discretion in awarding attorneys' fees because HAWAII REV. STAT. § 346-33 (1976) renders public assistance payments inalienable. Proper standing of the State to appeal was based on the State's interest concerning potential loss of matching funds if the fees in question were improper. The Court found that the circuit court was vested with the power to allow the fees because the attorneys' work was consistent with the statute's purpose of ensuring that public assistance payments reach recipients in amounts specified by law. However, the circuit court's determination of the amount of the fees was not based on evidentiary hearings, not articulated, and thus was incorrect. The Court adopted the widely-recognized method of calculating award of attorneys' fees from common funds enunciated in *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) and refined in *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976). This method involves: (1) determination of a "lodestar" based on the number of hours spent on the action, and in what manner by which attorneys, with an estimate of the worth of the time spent; and (2) determination of a possible adjustment of the "lodestar" based on "the contingent nature of the success" and the quality of the attorney's work. Expressing doubt that a strong case could be made for an upward adjustment of the "lodestar," the Court vacated the order awarding attorneys' fees and remanded the cases for redetermination of the awards.

Nakamoto v. Fasi, 64 Hawaii 17, 635 P.2d 946 (1981)

Menor. Plaintiff-appellants sought a permanent injunction to prohibit the City from enforcing a policy requiring patrons to be searched for bottles and cans as a condition to entering the Neal Blaisdell Center for rock concerts. In reversing and remanding the lower court's denial of the injunction, the Court stated that a warrantless search is valid if within the totality of circumstances voluntary consent to search is given. If refusal to consent forefeits the patron's right to attend the concert, consent is coerced and will not validate the warrantless search. Moreover, the City's policy could not be justified on the grounds of public necessity. Weighing the potential harm presented by the introduction of cans and bottles when used for their intended purposes against an individual's right to be free from unreasonable intrusion, and examining the flawed procedure which would necessarily result in selective enforcement and unequal treatment of individuals, the policy was unconstitutional under U.S. CONST. amend. IV and HAWAII CONST. art. I, § 7.

Neighborhood Board v. State Land Use Commission, 64 Hawaii 265, 639 P.2d 1097 (1982)

Lum. Appellants, five organizations composed of residents of Waianae, Nanakuli and Maili, Oahu, challenged a decision of the Land Use Commission (LUC) granting a special use permit to appellee Oahu Corporation for the construction of a major amusement park on 103 acres of land situated in an agricultural district at Kahe Point on the Waianae Coast. The Court concluded that the special use permit should not have been granted and held that appellee's special use permit application did not meet the substantive requirements for special permits set forth in HAWAII REV. STAT. § 205-6 (1976) and the Land Use District Regulations promulgated by the LUC. The essential purpose of the special use permit is to provide landowners relief in exceptional situations where the desired use will not change the essential character of the district or be inconsistent with the district. HAWAII REV. STAT. § 205-6 (1976) allows the County Planning Commission and the LUC to issue special permits for certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified, but only when such use would promote the effectiveness and objectives of Hawaii's land use scheme. The granting of the special use permit in this case essentially amounted to a boundary change in land use districts which would undermine the zoning scheme guaranteed to landowners by the more extensive procedural protections of the boundary amendment provisions of HAWAII REV. STAT. § 205-6.

Office of Disciplinary Counsel v. Silva, 63 Hawaii 585, 633 P.2d 538 (1981)

Per Curiam. Accepting the Disciplinary Board's recommendation, the Court ordered respondent (an alcoholic) disbarred from practicing law. It based its decision on several unrelated instances including conversion of clients' funds, dishonesty and fraud, intimating that he could improperly influence a public official, and failing to carry out an employment contract by not paying estate bills for a client. Stating that respondent's misappropriation of clients' funds by itself would be grounds for disbarment, the Court could find no clearly mitigating factors to warrant a lesser penalty. In some cases, such mitigating factors might include an attorney's rehabilitation based on timely efforts to control the alcoholism, as well as past suffering and humiliation. However, respondent showed "no real progress" in controlling his alcoholism. In a case where disciplinary violations are severe and extensive, including misappropriation of client funds, it should be difficult if not impossible to establish sufficiently strong evidence of mitigation to warrant a lesser penalty than disbarment.

Peters v. Peters, 63 Hawaii 653, 634 P.2d 586 (1981)

Nakamura. Plaintiff was injured when a U-drive vehicle driven by her husband collided with a truck on the island of Maui. Although the couple was domiciled in New York which permits interspousal suits, plaintiff sued her husband for negligence in Hawaii, concededly to recover the liability insurance proceeds. The circuit court granted the husband's motion for summary judgment on the strength of Hawaii's interspousal immunity rule. On appeal, the Court affirmed the grant of summary judgment. Declining to adopt the mechanical rule of "lex loci delecti," the Court adopted a conflicts-of-law approach which assessed the "inter-

ests and policy factors involved with a purpose of arriving at a desirable result in each situation." 63 Hawaii at 664. The policy behind the interspousal rule is preservation of marital harmony and the prevention of collusive suits. The Court recognized that New York had the predominant interest in the couple's marital harmony, yet had chosen to abrogate that immunity. However, the Court held that considerations of public policy and demonstrated state interests justified applying Hawaii law. Hawaii's interests included: (1) maintaining the reasonable expectations of Hawaii insurers whose policies were written with the laws of Hawaii in mind; (2) preventing an increase in insurance premiums payable by Hawaii residents due to an increase in the number of tort actions that would be brought if nonresidents were allowed to sue their spouses in Hawaii courts; and (3) deference to the legislative judgment to retain the immunity doctrine.

Santos v. State, 64 Hawaii 648, 646 P.2d 962 (1982)

Per Curiam. Appellant was not promoted by the State as an equipment operator despite his claim that he was more qualified than the person selected. Instead of utilizing the exclusive grievance procedure set forth in the union contract, appellant brought his claim to the Civil Service Commission which declined to exercise jurisdiction. Since the grievance time had expired, appellant took his claim to the Hawaii Public Employment Relations Board (HPERB). After HPERB found in favor of the appellant, the State appealed the decision to the circuit court which reversed on the ground that HPERB should have deferred to the grievance procedure. That circuit court decision was not appealed. Meanwhile, appellant initiated two actions in circuit court. The first action was for injunctive and declaratory relief. The second sought damages and to overturn the promotion of the other person. The first action was dismissed since appellant had not exhausted all of his remedies; this action was not appealed. In the second action, the State argued on motion for summary judgment that appellant had not exhausted his contractual and administrative remedies or alternatively that the doctrines of res judicata and collateral estoppel applied. After the trial court granted the motion for summary judgment, appellant argued on appeal that he need not make an attempt to exhaust contractual remedies when it can be shown that the union would not fairly represent him. However, the Court found that since HPERB had already decided that issue, as well as other issues relating to the merits of the case, appellant's claims could not be reconsidered. Finally, on the issue of the other employee's falsification of his employment application, review was also unavailable because that issue had been decided in the dismissal of yet another circuit court case which was considered an adjudication on the merits and no appeal there had been taken. Thus, the Court found no error and affirmed the judgment in favor of the State.

Silver v. George, 64 Hawaii 503, 644 P.2d 955 (1982)

Nakamura. Plaintiff-appellant loaned $100,000 to three borrower-appellees. An associate of a law firm prepared a promissory note specifying 20% interest on the loan. Plaintiff charged both the associate and the firm (attorney-appellees) with negligence in drafting the instrument. Appellant believed that the interest was set at 20% because he had borrowed the sum through separate loans at interest rates ranging from 10% to 14% and the parties had agreed to repay the principal sum

and his costs of borrowing the money, plus interest at 6%. Appellant sued on the unpaid note and the borrower-appellees asserted the defense of usury. The circuit court awarded judgment for the plaintiff in the amount of principal, pursuant to HAWAII REV. STAT. § 478-4 (1976), and granted summary judgment to the attorney-appellees based on its assumption that there was no attorney-client relationship between the attorneys and the appellant. The Intermediate Court of Appeals reversed the summary judgment and found that the note constituted a "flat out violation" of HAWAII REV. STAT. § 478-6 (1976). The Court affirmed the ICA's reversal, but reviewed the case because of the ICA's strict application of the usury statute. The Court noted that the particular transaction did not possess all of the elements of usury, particularly because appellant had not intended to enter into a usurious agreement. The test applied was whether the agreement, according to its terms, would produce a higher rate of interest than allowed by law for the lender, and whether such a result was intended. The Court noted that this transaction was not typical in light of the close relationship of the parties, since the borrowers were appellant's stepson and a former business associate. The loan was made to fulfill an urgent short-term need and the parties knew that appellant borrowed from lending institutions at prevailing interest rates specifically for this purpose. That the borrower-appellees knew the 20% interest rate was not the actual interest rate was inferrable under the circumstances. The Court concluded that the preparation of the note did not itself represent legal malpractice, even though it did not reflect the agreement in the most accurate manner. Therefore, the case was remanded to the circuit court.

State v. Adams, 64 Hawaii 568, 645 P.2d 308 (1982)

Per Curiam. The defendant, a physician, was indicted for promoting a harmful drug in the second degree and promoting a dangerous drug in the second degree. The trial judge dismissed the charges because (1) the State, having knowledge of a defense that the physician was possibly in possession of the drugs as a practitioner, was required to frame the language of the charge to include the defense; and (2) the prosecutor failed to present the facts supporting such a defense to the grand jury. Reversing the trial court, the Court noted that (1) an indictment must be in a form legally sufficient to advise a defendant of the nature of the accusation against him; and (2) the indictment need not anticipate and negate possible defenses because the defendant is left to show his defenses at trial. Thus, the Court held that the indictment was sufficient. The Court further noted that the prosecutor has wide discretion in selecting and presenting evidence to the grand jury and that only evidence which clearly exculpates the defendant needs to be presented to the grant jury. Since HAWAII REV. STAT. § 712-1240.1 (Supp. 1981) did not provide an absolute defense, the prosecutor was not required to present facts supporting the defense to the grand jury.

State v. Bloss, 64 Hawaii 148, 637 P.2d 1117 (1981)

Ogata. Defendant distributed handbills advertising a shooting gallery from pockets affixed to the exterior of his van in Waikiki and was arrested for violating HONOLULU, HAW., REV. ORDINANCES § 26-6.2(b)(7) (amended by Ord. 4302, 1974). The 1974 amendment to the ordinance prohibited the distribution of commercial handbills. Partially affirming the circuit court, the Court held the ordinance to be

an impermissible regulation of protected commercial speech under U.S. CONST. amend. I, and HAWAII CONST. art. I, § 3, and a violation of due process under U.S. CONST. amend. XIV and HAWAII CONST. art. I, § 4, on the ground of vagueness. However, partially reversing the circuit court, the Court reinstated the language of the ordinance which had existed prior to the 1974 amendment.

In determining the free speech question, the Court applied a four-part test set forth in *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The instant ordinance met the first three prongs. First, the defendant's commercial speech concerned lawful activity and was not misleading. Second, the state interest in preserving and maintaining tourism, a major industry, fulfilled the requisite substantial government interest. Third, a direct relationship existed between the ban on commercial handbilling and the state's interest in preventing detrimental nuisances. However, the ordinance did not meet the fourth prong because it was more extensive than necessary to serve the state's interest since the ordinance prohibited commercial speech at all times and the place and manner of expression was incompatible with the retail commercial activity of the area.

On the issue of vagueness, the Court found: (1) that the term "commercial handbills" was unclear as to whether it meant protected and unprotected speech, or merely unprotected speech; and (2) the ordinance failed to provide explicit standards for determining guilt.

State v. Bright, 64 Hawaii 226, 638 P.2d 330 (1981)

Per Curiam. Evidence of fingerprints or palm prints may be sufficient to support a criminal conviction of burglary in the second degree when the prints are found in the place where the crime is committed and under such circumstances that they could only have been impressed at the time of the alleged crime.

State v. Bumanglag, 63 Hawaii 596, 634 P.2d 80 (1981)

Nakamura. Based on a police officer's affidavit, warrants were issued authorizing seizure of allegedly obscene films and arrest of defendants (theater projectionists or ticket sellers). The Court held that procedural defects in Hawaii's anti-pornography law, HAWAII REV. STAT. § 712-1216(1) (1976), rendered the films inadmissible as evidence under the exclusionary rule. Where free speech interests are implicated in a seizure, added procedural safeguards are required, including a prompt judicial determination of the obscenity issue in an adversary proceeding at the request of any interested party. The Court stated that such seizures are subject to the following requirements: (1) warrants must be issued contemporaneously with or subsequent to the filing of an arrest warrant, complaint or charge; (2) warrants cannot be issued solely on the conclusory opinion of a police officer that the material is obscene; (3) warrants can be issued after an adversary hearing or *ex parte;* (4) if issued *ex parte,* the warrant must contain notice that an interested party can move to have the obscenity issue determined promptly on at least 48-hours notice to all other interested parties; (5) once a party moves for a hearing, the proceeding must begin within seven days and a decision rendered ten days thereafter unless justice demands otherwise; (6) if the material is found obscene, the State can keep it as evidence in the related prosecution; if not, the film must be returned; (7) when a showing is made that other copies of the seized film are unavailable for public exhibition, the owner or exhibitor can make a copy for

showing pending determination of the obscenity issue.

Because the parties received no hearing and the films impounded were unavailable for showing for almost three months, suppression of the films as evidence was the only effective sanction. However, the Court warned that suppression is proper only where the want of a prompt post-seizure adversary hearing will significantly limit public access to expressive material and information. The Court also found unconstitutionally overbroad the state's statutory presumption that a person promoting pornography did so with knowledge of the character of the material disseminated. The statute could cause merchants to restrict their wares to what was "safe," thereby inhibiting free expression.

State v. Costa, 64 Hawaii 564, 644 P.2d 1329 (1982)

Per Curiam. The defendant-appellant, indicted for murder and attempted murder, appealed a trial court order denying his motion to withdraw his plea of guilty for the murder charge. Defendant was sentenced to life imprisonment with probation after ten years for murder, and twenty years with parole after ten years for the attempted murder. Appellant claims that the State's filing of a motion for mandatory imprisonment for ten years pursuant to HAWAII REV. STAT. § 706-660.1 (1976) was a violation of a plea agreement in which the defendant was to plead guilty in exchange for the prosecution recommending that the maximum term be twenty years, not life imprisonment. Finding no abuse of discretion by the trial court, the Court noted that a defendant does not have an absolute right to withdraw a guilty plea and that the defendant has the burden of establishing plausible and legitimate grounds for the withdrawal. The Court further held that although the terms of a plea agreement which serves as the inducement or consideration for entering the plea must be fulfilled, there has been no breach of the bargain since the clear intent of the agreement was for the State to recommend only a maximum term of imprisonment, not a minimum term. The Court pointed out that the court itself is not obligated to abide by the terms agreed to by the parties. *State v. Gumienney,* 58 Hawaii 304, 568 P.2d 1194 (1977).

State v. DeSilva, 64 Hawaii 40, 636 P.2d 728 (1981)

Per Curiam. Defendant was convicted by jury for murder, attempted murder and possession of a firearm without a permit. On appeal, defendant alleged that a proper chain of custody was not established for two bullets removed from the victim's body. Affirming the conviction, the Court stated that the mere possibility that others may have access to an exhibit does not mean tampering or substitution occurred. Because it appeared reasonably certain from the record that no tampering had occurred, the trial court did not abuse its discretion in admitting the evidence after finding that the chain of custody was established adequately.

State v. Doyle, 64 Hawaii 229, 638 P.2d 332 (1981)

Per Curiam. At a bench trial, the trial court may hear a motion to suppress and a trial on the merits contemporaneously, where the parties have been so advised and no objection is voiced to the proposed procedure.

State v. Faalafua, 64 Hawaii 376, 641 P.2d 979 (1982)

Per Curiam. Defendant was stopped and frisked after police officers were informed by a person that the defendant was carrying a gun. Defendant appealed his conviction on the ground that his motion to suppress the gun should have been granted. The Court reversed, noting that there was nothing in the conduct of the defendant to suggest that he was carrying a weapon and that the reliability of the informant's information was not sufficiently established.

State v. Faulkner, 64 Hawaii 101, 637 P.2d 770 (1981)

Lum. Defendant called the police because someone had smashed his windshield with an angle iron. After the police arrived at the scene (the Monsarrat exit of the Honolulu Zoo), the defendant began arguing with the officers in a loud tone of voice which attracted the notice of passersby. Defendant was arrested and later convicted by a jury for disordery conduct under HAWAII REV. STAT. § 711-1101(1)(b) (1976 & Supp. 1980). The Court reversed this conviction because the statutory requirements had not been met. The noise created by the defendant was not unreasonable when viewed in light of the fact that the incident did not contribute materially to the rush hour traffic and did not occur in the vicinity of any private residences. Nor did the defendant's conduct necessarily cause physical inconvenience to a member of the public, since people stopping or slowing down to satisfy their own curiosity cannot be said to be physically inconvenienced or alarmed within the meaning of the statute; although onlookers could be "offended" by the defendant's conduct, this was not the type of conduct towards which the statute was directed.

Incident to his arrest for disorderly conduct, the defendant was also charged with the unlawful possession of a firearm under HAWAII REV. STAT. § 134-6 (1976). The defendant's jury conviction was affirmed because the warrantless search of the defendant's car (which revealed a 22-caliber rifle) was justified since (1) a witness described being threatened with the rifle just before police arrived and the failure to locate the rifle on the defendant or in the surrounding area gave police probable cause to believe the rifle was in the trunk of the car; and (2) exigent circumstances existed because the windshield of the car had been smashed and the car was standing in the open on public premises next to a public street.

State v. Furuyama, 64 Hawaii 110, 637 P.2d 1095 (1981)

Nakamura. In a consolidated appeal, the Court divided eleven defendants who had been charged with promoting pornography in violation of HAWAII REV. STAT. § 712-1214 (1976) into three groups on the basis of similarities in the dispositive facts. In the first group of five cases, a police officer examined only the front and back covers of cellophaned pornographic material. The circuit court concluded that the inspection of the magazine covers did not furnish grounds for a warrantless arrest of defendants because examination of the materials in their entirety was a prerequisite. Therefore, the circuit court dismissed the prosecutions. In the second group of five defendants, the circuit court found that the police officer's thumbing through half of the magazine furnished probable cause, but the purchase of the magazines was an attempt to circumvent the constitutional requirement regarding seizure of evidence in first amendment situations. Thus, the

evidence was suppressed. In the third group of only one defendant, a private individual leafed through several publications and handed them to the police officer who then "purchased" the magazines and arrested the defendant. The circuit court recognized that private conduct is not regulated by the constitutional prohibition against warrantless searches and seizures, but nevertheless a warrantless seizure had occurred because the police and citizen's group had acted in concert; therefore the evidence was also suppressed. In the State's appeal, the Court found no error in the circuit court's determinations that the seizures of persons and evidence was unreasonable. However, in the first group, the remedy of dismissal was too drastic and the public interest was better served by suppressing the evidence. In the second and third groups, the circuit court had properly suppressed the evidence. Thus, the dismissal of the five defendants in the first group was reversed and the orders suppressing evidence were affirmed.

State v. Haili, 63 Hawaii 553, 632 P.2d 1064 (1981)

Per Curiam. Police officers stopped a lone vehicle travelling on the unfinished portion of the H-3 freeway after receiving a report of gunshots in the area. Defendant and his companions were ordered out of the car and frisked. Upon scanning the interior of the car, the officers spotted a rifle casing on the front floor and a closed but unlocked ukulele case on the rear floor of the vehicle. The officers conducted a warrantless search of the ukulele case and discovered a rifle and ammunition. The trial court granted the defense motion to suppress the contents of the ukulele case. On appeal, the Court affirmed the trial court's holding that the warrantless search of the case was unconstitutional in the absence of exigent circumstances. The Court found that the officers' safety was assured once the defendant and his companions were in custody. The Court noted, however, that the officers' actions prior to the search were constitutional since the circumstances indicated specific and articulable facts justifying the frisk and probable cause for the search.

State v. Hawkins, 64 Hawaii 499, 643 P.2d 1058 (1982)

Per Curiam. Defendant was observed by police distributing handbills advertising a time-sharing presentation. The circuit court dismissed the State's complaint against defendant for violation of HONOLULU, HAW., REV. ORDINANCES § 26-6.2(b)(7), which had been amended by Ordinance No. 4302 (unpublished). Affirming, the Court held that *State v. Bloss,* 64 Hawaii 148, 637 P.2d 1117 (1981) was dispositive of the issues on appeal. See summary of *Bloss* in this index.

State v. Heard, 64 Hawaii 193, 638 P.2d 307 (1981)

Per Curiam. The credit cards of a Lahaina murder victim were seized in appellant's room in New York without his consent and without a search warrant. During his trial in which he was convicted of first degree murder, the appellant unsuccessfully sought to suppress the testimony of a police officer that consent to enter the home had been given by others. The Court affirmed, concluding that the error, if any, in the admission of hearsay evidence did not contribute to the verdict because other evidence of substantial weight led the jury to its decision. The Court also found no merit in the appellant's assertion that the sentencing statute (HAWAII REV. STAT. § 706-606 (1976)) was unconstitutional for failure to set forth

sentencing criteria.

State v. Hehr, 63 Hawaii 640, 633 P.2d 545 (1981)

Per Curiam. See *State v. Pendergrass,* where the same issue was decided in a similar per curiam opinion.

State v. Hilongo, 64 Hawaii 577, 645 P.2d 314 (1982)

Per Curiam. The defendant appealed his conviction of firearm possession under HAWAII REV. STAT. § 134-7(b) (1976 & Supp. 1981). He claimed that he was prejudiced by the joinder of his indictment for being a convicted felon in possession of a firearm and his indictment for murder. The jury acquitted him of murder. The Court affirmed the judgment below, holding that there was a sufficient showing that the offenses of being a convicted felon in possession of a handgun and the murder were based on a series of acts connected together, thereby satisfying HAWAII R. PENAL P. 13(a) that the offenses could have been joined in a single action.

State v. Kahlbaun, 64 Hawaii 197, 638 P.2d 309 (1981)

Ogata. The lower court dismissed an indictment against defendant on the ground that the independent grand jury counsel, provided for under HAWAII CONST., art. I, § 11, was not present during the grand jury proceedings. The Court reversed, stating that article I, section 11 of the Hawaii Constitution required only that independent counsel be available to advise the grand jury upon request. The function of advising the grand jury could be accomplished without requiring that counsel be physically present throughout the grand jury proceeding.

The record showed that the independent counsel was available to render advice and that the grand jury did not seek any advice from the independent counsel. The defendant was unable to carry his burden of establishing that the absence of the independent counsel was prejudicial.

State v. Kapoi, 64 Hawaii 130, 637 P.2d 1105 (1981)

Nakamura. The circuit court suppressed as evidence a handgun obtained in the warrantless seizure from an automobile parked on a public street in the prosecution of defendant-appellee Robert Kapoi for the alleged violation of HAWAII REV. STAT. § 134-7 (1976 & Supp. 1981), felon in possession of a firearm. Reversing the trial court, the Court found (1) the fruit of the poisonous tree doctrine was not available because the defendant had been arrested for a violation of HAWAII REV. STAT. § 708-815 (1976), simple trespass; (2) the holstered handgun was in "open view" on the passenger side of the locked auto, which provided probable cause for the officer to believe a crime had been committed; and (3) there were exigent circumstances because the car was located in a "trouble spot" and at 2:00 a.m. it was not feasible to post a guard on the car until a warrant could be obtained. The case was remanded for further proceedings.

State v. Kasprzycki, 64 Hawaii 374, 641 P.2d 978 (1982)

Per Curiam. The appellant was arrested and charged with the offense of harassment. At his arraignment hearing, appellant entered a plea of not guilty and sub-

sequently demanded a trial by jury. The case was then bound over from the district court to the circuit court for a trial by jury. The State's motion for remand of the case from circuit court to district court for trial without a jury was granted. Applying the rule of *State v. Shak*, 51 Hawaii 612, 466 P.2d 422, *cert. denied* 400 U.S. 930 (1970), the Court held that a trial by jury is not constitutionally mandated when the defendant is charged with a petty offense. Under HAWAII REV. STAT. § 711-1106(2) (1976), the offense of harassment was classified as a petty misdemeanor. Thus, the appellant was not entitled to a jury trial for the offense of harassment.

State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982)

Richardson. Appellant was convicted of the rape of his thirteen year-old stepdaughter, in violation of HAWAII REV. STAT. § 707-731 (1976 & Supp. 1981) (Rape in the Second Degree). During the trial, a psychiatrist who had interviewed the victim was allowed to testify after the appellant had attempted to impeach the victim's credibility. Although the psychiatrist testified solely on the issue of the victim's credibility, appellant objected on the ground that the testimony's prejudicial effect outweighed its probative value. On appeal, after the trial court overruled the objection, appellant also asserted that allowing the expert to testify invaded the province of the jury and that the subject matter was not one which required expert testimony. In finding that the trial court had not abused its discretion, the Court noted that the purpose of expert testimony is to aid the jury. The Court adopted the modern trend which permits the trial court to "balance the probable probative value of proffered expert testimony against any deleterious effect and preclude such testimony as will not assist the jury." The expert's opinion of how victims of such abuse react and the consistency of the victim's reaction was not inherently useless to the jury. The Court also found that the circumstances of the expert's evaluation of the victim constituted a sufficient factual foundation for this testimony since his opinions were based on a voluntary, out-of-court evaluation. Even though the expert's conclusory remarks about the victim's credibility encroached on the jury's function, the Court was hesitant to exclude such testimony because it could "serve the simple purpose of clarifying and consolidating the gist of the expert's testimony, thereby avoiding 'awkward and confusing circumstances.'" Commentary, HAWAII R. EVID. 704. Rather, the expert's opinion naturally followed from the rest of the testimony and was not "substantially more prejudicial than the testimony which led to the conclusion." Finally, taken as a whole, the evidence was not so prejudicial as to require exclusion since the testimony was such that the jury could adequately assess and discard the opinion if it so desired.

State v. Krause, 64 Hawaii 522, 644 P.2d 964 (1982)

Per Curiam. Defendant sought to overturn his jury conviction of murder on the grounds that his confession to a fellow inmate was inadmissible because the inmate had acted as a "government agent" to secure information against him, constituting a violation of defendant's right to counsel under U.S. CONST. amend. VI and HAWAII CONST. art. I, § 14. Examining the factors set forth in *Massiah v. United States*, 377 U.S. 201 (1964) and *United States v. Henry*, 447 U.S. 264 (1980), the Court found that defendant's jailmate was not a "government agent"

because: (1) the informant had never before been an informant for the government; (2) the accused initiated the conversations about the murder; (3) the informant became a confidante of the accused before he contacted the law enforcement officials; and (4) the informant was not promised anything for further information after he relayed the initial details of the murder to the FBI agent. Affirming the conviction, the Court held that the incriminating statements were not deliberately elicited within the meaning of *Massiah* and thus the government did not violate the defendant-appellant's sixth amendment right to counsel.

State v. Lester, 64 Hawaii 659, 649 P.2d 346 (1982)

Lum. Appellant-defendant Lester had contracted with another appellant-defendant and co-indictees to have his wife murdered. The prosecution's case consisted primarily of the testimony of defendant Lester's co-indictees who had been granted immunity. In addition, a taped conversation in which Lester incriminated himself was introduced. In affirming the jury conviction, the Court held that the warrantless recordation of Lester's conversation with a co-indictee was not a violation of U.S. CONST. amend. IV, HAWAII CONST. art. I, §§ 6 & 7, or HAWAII REV. STAT. ch. 803 (Supp. 1981) (Electronic Eavesdropping), because the co-indictee, acting as a "government agent," had willingly taped a recording device to her body and consented to have the conversation recorded. This type of participant or consensual monitoring has withstood constitutional scrutiny by the U.S. Supreme Court. Thus, appellant Lester's claims were rejected. The Court also found no need to find a greater minimal protection under the Hawaii Constitution. In addition, the Hawaii Constitutional Convention Committee Report regarding "invasion of privacy protection" was not supportive in affording Lester any protection since the report must be construed in light of the language in *Katz v. U.S.*, 389 U.S. 347 (1967), in which the expectation of privacy is used as a test of whether the prohibition against search and seizure applies. Lester did not have a reasonable expectation of privacy since he had a conversation with another who was free to testify. Further, there was no violation of Hawaii's Wiretap Law, HAWAII REV. STAT. §§ 803-41 to 803-50 (Supp. 1981) since the tape was the result of consensual or participant monitoring.

The Court also found that the trial court did not abuse its discretion in denying a motion for separate trials since the appellant "failed in his burden of demonstrating prejudicial or unfair trial." Further, the trial court did not err in refusing appellant's request for a manslaughter instruction to the jury since it was not properly preserved. Even if it were preserved, there was no evidence from which the jury could conclude Lester was guilty of manslaughter.

Although there is no criminal offense for "murder by a hired killer," a jury instruction charging such an offense was not fatal since the phrase "by a hired killer" was not essential to the crime or an element of the offense and it was necessary for the jury to establish the factor of hiring because it carries a heavier sentence.

Gaut, a co-appellant, was convicted of manslaughter and Mori, another co-indictee, had pleaded guilty to manslaughter. The Court found that this factor did not negate a finding that the element of causation had been sufficiently proven since it was not inconsistent that Lester be found guilty of murder by hired killer because Mori's plea to manslaughter did not preclude the jury from rationally concluding that Mori intentionally or knowingly did the killing.

Finally, there was no abuse by the trial court in giving written responses to jury questions and denying a bifurcated trial. Grants of conditional immunity to co-indictees do not violate due process or a fair trial since they go to the credibility and not admissibility of the testimony of the co-indictees.

Menor Concurring. "The surreptitious recording or transmission of defendant's conversation with an undercover government agent within the confines of his private surroundings is proscribed." The conversation in this case occurred in a public park and the defendant made no efforts to insulate his statements; thus, it was not in violation of the Hawaii Constitution.

Nakamura Dissenting, joined by Richardson. The taped conversation was an invasion of appellant's privacy and barred by the Hawaii Constitution.

State v. Lima, 64 Hawaii 470, 643 P.2d 536 (1982)

Ogata. Defendant was convicted by a jury for rape in the first degree. He appealed to the ICA on the ground that the jury verdict was not supported by substantial evidence of forcible compulsion. Applying the "substantial evidence" test, the ICA reversed because there was a lack of substantial evidence of forcible compulsion. On certiorari, the Court noted that the test as to legal sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact, regardless of whether the conviction might be deemed to be against the weight of the evidence as a whole. Noting that: (1) earnest resistance is a relative term to be determined by the circumstances of the particular case; (2) a complainant need not resist to the utmost extent possible; and (3) in the case there was a genuine physical effort by the complainant to discourage and prevent the rape, the Court held that there had been substantial evidence adduced and the jury's verdict was affirmed.

State v. Marzo, 64 Hawaii 395, 641 P.2d 1338 (1982)

Per Curiam. The trial court dismissed three criminal assault charges against the defendant, finding that: (1) the State violated HAWAII R. PENAL P. 16(6)(2)(ii) because it failed to furnish a police report to the defendant before his trial; and (2) the omission violated the defendant's constitutional rights under *Brady v. Maryland,* 373 U.S. 83 (1963). On appeal by the State, the Court reversed, distinguishing *Brady* on the ground that the defendant here was not prejudiced by the State's failure to supply such evidence since the defense knew about the evidence from the time defendant was charged. Moreover, the trial court abused its discretion in dismissing the charges against the defendant because the trial court should have taken into account the reason for the non-disclosure (nonfeasance by the police who failed to forward the report to the prosecution), the extent of the prejudice, if any, the feasibility of rectifying the prejudice by a continuance, and any other relevant circumstances. The Court held that this reversal would not subject the defendant to double jeopardy because "where the defendant moved for and obtained a dismissal immediately after the jury was sworn, preventing a trial to determine his guilt or innocence, no jeopardy attaches."

State v. McCully, 64 Hawaii 407, 642 P.2d 933 (1982)

Marumoto. Pursuant to a search warrant issued by a state district judge and

served upon the postmaster of the Hilo Airport Post Office, officers of the Hawaii County Police Department opened a first class U.S. mail parcel sent from California by one appellee to a second appellee located in Hilo. The mail parcel contained methamphetamine, classified as a dangerous drug. The circuit court granted appellees' motion to suppress on the ground that the state-issued search warrant was invalid since a federal search warrant was required. The Court reversed, stating that where an administrative agency is charged with the responsibility of carrying out the mandate of a statute containing words of indefinite meaning, a court should accord persuasive weight to administrative construction and follow the same unless such construction is palpably erroneous. Since the inclusion of state search warrants under the provisions of 39 U.S.C. § 3623(d) (requiring a "search warrant authorized by law") was not palpably erroneous, the evidence need not be suppressed.

State v. Melemai, 64 Hawaii 479, 643 P.2d 541 (1982)

Lum. Defendant hit a jogger with his truck, then fled the scene without giving information and rendering assistance as required under HAWAII REV. STAT. §§ 291C-12 and 291C-14 (1976). Based on a tip from an eyewitness, the investigating officer inquired of the defendant: (1) whether he had hit anyone with his truck; and (2) why he had fled. Defendant replied that he had hit someone and that he got angry when he saw the jogger and "went for him." Thereupon, defendant was arrested and later indicted. Defendant's motions to suppress the statements and for dismissal were granted by the trial court because the questions were asked before *Miranda* warnings had been given and because HAWAII REV. STAT. § 291C-14 (1976) violated the defendant's privilege against self-incrimination. Affirming and reversing in part, the Court (1) noted the limited application of *Miranda* since police are allowed to make general on-the-scene inquiries in the exercise of their investigatory duties; (2) found that under the totality of the circumstances "custody" attached and *Miranda* warnings were necessary after the defendant had replied to the first question. Therefore, the answer to the first question was admissible and the answer to the second question was not admissible. Further, HAWAII REV. STAT. § 291C-14 (1976) did not violate defendant's privilege against self-incrimination because the purpose of the statute is regulatory, not criminal, and the required disclosures of a driver's name, address, and vehicle registration number did not constitute self-incriminating testimony.

State v. Mitake, 64 Hawaii 217, 638 P.2d 324 (1981)

Ogata. The defendant, convicted for theft in the first degree, moved to suppress the lineup identifications by five witnesses on the ground that the lineup was impermissibly suggestive. Because he was not afforded the opportunity to examine the witnesses who identified him, the defendant claimed he was denied his due process and compulsory process rights under both the state and federal constitutions. Both the Intermediate Court of Appeals and the Hawaii Supreme Court found no constitutional violation and affirmed the conviction.

Although the due process clause requires a fair hearing and a reliable determination on the issue of admissibility of identification evidence, it did not require the testimony of the identification witnesses. In this case, the testimony of two people present at the lineup, as well as a photograph of the lineup, made the

examination of the identification witnesses unnecessary.

The Court found no violation of the compulsory process clause absent showing that the identification witnesses could offer any relevant evidence which would have aided the defendant.

State v. Miyazaki, 64 Hawaii 611, 645 P.2d 1340 (1982)

Hayashi. Defendant-appellant had been convicted for two counts of forgery in violation of HAWAII REV. STAT. § 708-852 (1976) in a consolidated trial after defendant had consented to a nolle prosequi of Count II and a mistrial of Count I. Affirming the trial court, the Court found all issues in favor of the State. First, the trial judge had not abused his discretion when he refused to dismiss the indictment after learning that hearsay was used at the grand jury proceeding since the defendant was unable to prove prejudice and the testimony was not deliberately used in place of better evidence to improve the case for indictment. Second, even though defendant had not raised any double jeopardy claim until the appeal was filed, it was reviewable because a defendant's right to be free from double jeopardy is a substantial right which the Court may notice under HAWAII R. PENAL P. 52. However, in applying the two-step constitutional analysis which involves a determination of when jeopardy attaches and an examination of the fact to determine if retrial is barred, the Court found that jeopardy had attached, but that defendant had waived the claim because: (a) timely objection had not been made in spite of numerous opportunities; (b) defendant had consented to the prosecution's nolle prosequi motion; and (c) the prosecutor had acted in good faith. Third, a prosecution witness' testimony at the second trial which vaguely referred to an "earlier trial" was not unduly prejudicial under the test adopted in *State v. Kahinu*, 53 Hawaii 536, 498 P.2d 635 (1972), *cert. denied*, 409 U.S. 1126 (1973), since the judge's cautionary instruction was more than adequate to cure any prejudice in the case. Finally, the trial court's consolidation of the two counts in a single trial was not an abuse of discretion. The trial court had applied the proper test enunciated by the Court in *State v. Matias*, 57 Hawaii 96, 98, 550 P.2d 900, 902 (1976), when it found that the two incidents arose out of the same conduct, the witnesses were identical, and the prejudice did not outweigh the need for judicial economy.

State v. Muliufi, 64 Hawaii 485, 643 P.2d 546 (1982)

Per Curiam. The district court dismissed a criminal charge brought against defendant for carrying a deadly weapon in violation of HAWAII REV. STAT. § 134-51 (1976). Rejecting the State's argument on appeal that under the doctrine of *ejusdem generis*, nunchaku sticks are within the ambit of HAWAII REV. STAT. § 134-51 (1976), the Court affirmed and held that nunchaku sticks are not per se deadly or dangerous weapons, given their wide use in martial arts. The phrase "deadly or dangerous weapon" refers to an instrument closely associated with criminal activity whose sole design and purpose is to inflict bodily injury or death upon another human being or is designed primarily as a weapon, or one which has been diverted from its normal use and prepared and modified for combat purposes.

State v. Nihipali, 64 Hawaii 65, 637 P.2d 407 (1981)

Lum. Defendant-appellant appealed from a conviction of theft in the first de-

gree by extortion pursuant to HAWAII REV. STAT. §§ 708-830(3) (1976 & Supp. 1981) and 708-831(1)(b) (1976), on the grounds that he was (1) denied his constitutional right to a speedy trial; and (2) the evidence was insufficient to support a conviction. Under the standard of review adopted in *State v. Almeida*, 54 Hawaii 443, 509 P.2d 549 (1973), once it is determined that the delay between arrest and trial is presumptively prejudicial, a court must consider four factors in deciding whether dismissal based on delay is warranted: (1) length of delay; (2) reasons for the delay; (3) defendant's assertion of his right to speedy trial; and (4) prejudice to the defendant. The Court noted that the delay of one year and three weeks which had elapsed between defendant's arrest and trial was presumptively prejudicial. However, the Court held that defendant's right to a speedy trial upon application of the *Almeida* factors had not been violated as the length of the delay resulted from numerous pre-trial motions of defense counsel, the time necessary to rule on the motions, and the congested court calendar. Since defendant consented to be tried with his co-defendants, he could not claim that the delays engendered by their motions were not attributable to him. A review of the record produced no evidence that defendant was prejudiced by the delay. The Court also held that defendant's claim that the delay violated the HAWAII R. PENAL P. 48(b) requirement that the trial be commenced within six months of arrest to be without merit as the decision in *State v. Soto*, 63 Hawaii 317, 627 P.2d 279 (1981), and construed HAWAII R. PENAL P. 48(c) to exclude from computation any delays resulting from a defendant's pre-trial motions. In addition, the evidence was found to be sufficient to convict defendant.

State v. Onishi, 64 Hawaii 62, 636 P.2d 742 (1981)

Per Curiam. Defendant-appellant, contending he was denied effective assistance of counsel in violation of his constitutional right, sought reversal of his jury conviction of four counts of promoting drugs in violation of HAWAII REV. STAT. §§ 712-1242(1)(c), 712-1245(1)(c) and 712-1247(1)(f) (1976). Appealing an order denying post-conviction relief, appellant alleged that his counsel failed to impeach two witnesses who testified against him at trial, and that counsel erred in subpoenaing witnesses and presenting evidence of the time appellant was in police custody. The Court noted that the burden of establishing ineffective assistance of counsel is on the appellant, who must establish that the errors reflect a lack of skill, judgment or diligence and that the errors resulted in withdrawal or substantial impairment of a potentially meritorious defense. Also noting that in a criminal trial, the decision to call certain witnesses is within the discretion of counsel and will not be second guessed by judicial hindsight, the Court affirmed, holding that defendant did not meet his burden and that counsel made an appropriate strategic decision in selecting witnesses.

State v. Oyama, 64 Hawaii 187, 637 P.2d 778 (1981)

Per Curiam. Appellant, convicted of manslaughter under HAWAII REV. STAT. § 717-702 (1976), contended that the trial court erred by stipulating into evidence the testimonies of ten State witnesses, all of whom were not present at trial, without first determining whether the appellant had waived his constitutional right of confrontation under U.S. CONST. amend. VI and HAWAII CONST. art. I, § 14. Affirming, the Court stated that defense counsel could waive certain aspects of

the right in making appropriate tactical decisions. Here, the defense counsel's tactical decision did not significantly impinge upon the appellant's constitutional right because confrontation of the witnesses was not material to the appellant's principal defense.

State v. Pendergrass, 63 Hawaii 633, 633 P.2d 1113 (1981)

Per Curiam. State v. Rodrigues, 63 Hawaii 412, 629 P.2d 111 (1981) controlled the Court's holding that the absence of independent grand jury counsel did not prejudice the grand jury proceedings; thus the trial court had not erred in denying appellant's motion to dismiss the indictment for rape in the first degree under HAWAII REV. STAT. § 707-730 (1976).

State v. Perez, 64 Hawaii 232, 638 P.2d 335 (1981)

Per Curiam. The Court affirmed defendant's jury conviction for rape, sodomy and robbery, holding that the circuit court properly admitted evidence of an anonymous phone call telling the police of a rape by defendant. The Court explained: (1) the contents of the telephone call were properly admitted to establish why the police officers included the defendant's photograph in a photographic lineup; (2) the trial judge gave a cautionary instruction to the jury to consider the evidence of the anonymous telephone call only to understand the subsequent actions of the police, thus preventing any prejudical effect upon the jury.

State v. Pioneer Mill Co., 64 Hawaii 168, 637 P.2d 1131 (1981)

Nakamura. The State appealed a jury award of $734,072.75 to defendant pursuant to an eminent domain proceeding for land located near Lahaina for highway construction. The subject property had a present agricultural use, but was zoned R-3 and the county general plan stipulated possible future use for apartments or hotels. The State had unsuccessfully sought to exclude at trial: (1) an appraisal figure involving a previous transaction; (2) figures representing the sale of hotel and apartment properties; and (3) testimony as to future use and redesignation of the subject property. The Court affirmed, stating that determination of fair market value was not limited to evaluation of the property's present use, but also includes its future use. In addition, the Court disallowed the defendant's cross-appeal claim for post-judgment interest since the judgment awarded included such interest. Accrual of pre-judgment interest was also denied since the trial was held in abeyance at the defendant's request. Finally, attorney's fees for the defendant could not be awarded since the subject property was not in fact taken for public use.

State v. Reiger, 64 Hawaii 510, 644 P.2d 959 (1982)

Per Curiam. Defendant has been convicted by a jury for attempted murder, rape in the first degree and burglary in the first degree. Noting that the opening brief failed to conform to HAWAII SUP. CT. R. 3(b)(5), the Court declined to exercise its power to disregard those portions of the brief where the rules had not been followed, but issued a warning to counsel that such sanctions may be exercised in a future case. Affirming the conviction, the Court held: (1) the indictment was not fatally defective; (2) the unobjected to repetition of the charge in the jury

instruction was not erroneous; (3) there was no error in the introduction of a photographic lineup; (4) the State's opening and closing arguments contained no more than fair comment upon the manner in which the attack on the victim had been carried out; (5) there was no error in admitting some testimony referring to the defendant's "long police record"; (6) there was no prejudicial error in allowing the jury to hear references to a newspaper article alluding to defendant's "possible connection with the underworld"; (7) HAWAII R. PENAL P. 16 was not violated since the prosecution had disclosed reports of experts who took fingerprints in the victim's apartment; (8) the trial court correctly disallowed impeachment of the State's witness by showing that she had been convicted of theft because it was not a crime involving moral turpitude; (9) defendant was not deprived of the right to a fair and impartial trial; and (10) defendant was not deprived of the right to effective assistance of counsel since his counsel's conduct was "within the range of competence demanded of attorneys in a criminal case."

State v. Sadino, 64 Hawaii 427, 642 P.2d 534 (1982)

Per Curiam. Defendant appealed his jury conviction for murder and criminal property damage, alleging that the trial court erred in: (1) failing to dismiss the indictment for lack of independent grand jury counsel; and (2) denying defendant's motion for acquittal for lack of sufficient evidence to support a finding of requisite intent. The Court refused to consider the issue involving lack of independent grand jury counsel on appeal as it was not raised below. Appellate courts will only consider an issue for the first time on appeal where there is plain error or defects affecting substantial rights of defendant. *State v. Naeole,* 62 Hawaii 563, 617 P.2d 820 (1980); *State v. Martin,* 62 Hawaii 364, 616 P.2d 193 (1980). The presence of independent grand jury counsel is not such a substantive right. On the issue of the sufficiency of evidence of intent, the Court held that the circumstantial evidence adduced at trial, namely that the victims had been bound to the bed and gagged, coupled with defendant's admission that the victims had refused to pay a debt owed to him, was sufficient to support a finding of intent.

State v. Shintaku, 64 Hawaii 307, 640 P.2d 289 (1982)

Per Curiam. A circuit court judge granted a motion for judgment of acquittal on jury verdicts pronouncing a defendant guilty on two murder counts. The State appealed to the Court for a writ of mandamus directing the judge or his successor in office to vacate the judgment of acquittal, to reinstate the conviction previously entered and to sentence the defendant accordingly. The State alleged the existence of exceptional circumstances justifying the issuance of mandamus, specifically: (1) that the judge had erroneously applied the "substantial evidence" standard of review to the facts before him when ruling on defendant's motion for acquittal; and (2) that the judge exceeded the scope of his review powers by invading the province of the jury in weighing the evidence and the credibility of the witness. Under HAWAII REV. STAT. §§ 602-5(4), (6) and (7) (1976 & Supp. 1981), the Court has the express power to issue a writ of mandamus. However, "because the object of mandamus is to supplement, not to supersede legal remedies in extraordinary cases, a court will not be warranted in issuing a mandamus unless it appears from the petition that petitioner has a 'clear and indisputable' right to performance of a duty owed by respondent." 64 Hawaii at 309. In addition, under

its previous ruling in *Chambers v. Leavey*, 60 Hawaii 52, 57, 587 P.2d 807, 810 (1978), that mandamus may not be issued to perform the function of an appeal; the Court found that Hawaii has long adhered to a legislative policy of denying the State the right to appeal a judgment of acquittal such as that entered in this case. Dismissing the petition, the Court held that the judge had acted fully within his prescribed powers as described in HAWAII R. PENAL P. 29(c) and that on its face, the State's petition did not establish a "clear and indisputable" case of a flagrant and manifest abuse of discretion.

State v. Simpson, 64 Hawaii 363, 641 P.2d 320 (1982)

Ogata. Defendant-appellant was convicted of murder based upon circumstantial evidence presented by the State. During the course of his trial, defendant had moved unsuccessfully for judgment of acquittal three times on the basis that the State had not produced sufficient evidence to convict him. The motions were presented at the close of the State's opening statement, after presentation of the State's case-in-chief, and after all evidence was presented. On appeal, the Court held: (1) the absence of the independent grand jury counsel as mandated by the Hawaii State Constitution did not render appellant's indictment defective, inasmuch as appellant made no showing of prejudice through such absence; *State v. Rodrigues*, 63 Hawaii 412, 629 P.2d 1111 (1981); (2) although the trial court had the authority to grant the motion for judgment of acquittal at the close of the prosecutor's opening statement, sufficient evidence was alleged from which the State could prove appellant's guilt and denial of the motion was therefore proper; and (3) the State presented a prima facie case of murder, albeit based on circumstantial evidence, and the evidence met the standard used in evaluating a motion for judgment of acquittal so that a reasonable mind might fairly reach a conclusion of guilt beyond a reasonable doubt.

State v. Sujohn, 63 Hawaii 516, 644 P.2d 1326 (1982)

Per Curiam. Defendant was arrested for murder on April 29, 1979. On July 3, 1980, the trial court granted the defendant's motion to dismiss the indictment on the grounds that more than six months of unexcused delay had occurred since defendant's arrest, even after the excluded periods set forth in HAWAII R. PENAL P. 48(c) had been taken into consideration. On appeal, the Court reversed the dismissal, holding that the six-month period for commencement of the trial under HAWAII R. PENAL P. 48(b) had not yet run at the time the motion to dismiss was made as the specific exception contained in HAWAII R. PENAL P. 48(c)(1) excluded the time during which a motion to suppress was pending. In addition, there was no infringement of defendant's constitutional right to a speedy trial under the test enunciated in *State v. Nihipali*, 64 Hawaii 65, 637 P.2d 407 (1981).

State v. Tamura, 63 Hawaii 636, 633 P.2d 1115 (1981)

Per Curiam. The Court affirmed the defendant's jury conviction for first degree robbery where the trial court imposed an extended term sentence.

State v. United States, 64 Hawaii 573, 645 P.2d 311 (1982)

Padgett. C. Stanard Smith, Jr., M.D., (Smith) obtained a judgment against the Department of Social Services & Housing, State of Hawaii (State) in the sum of $28,500. Because of competing claims, the State brought an interpleader action. After the action was brought, Smith assigned his interest in the fund to his attorney who had handled the case resulting in the judgment. The attorney made a partial assignment to the Department of Labor. After various motions for summary judgment, the circuit court entered an order basically affirming the assignments. The federal government (U.S.A.) appealed, claiming tax liens against Smith.

Rejecting U.S.A.'s arguments that the attorney's fees contract must be in writing, the Court affirmed the trial court's finding that an assignee receiving an assignment in consideration of past legal services is a "purchaser" within the meaning of 26 U.S.C. § 6323(h)(6) (1976). The Court also held that a lien for federal taxes, duly recorded under State law, prior to the recordation of an assignment of funds due from the State of Hawaii, will take precedence over the assignment to the extent of the amount outstanding under the lien. U.S.A. had not certified the tax lien recording it relied on. However, because the attorney had admitted a 1973 recordation, the amount of which was not adequately supported, the Court remanded to the lower court to determine how much of U.S.A.'s tax lien was protected.

State v. Von Geldern, 64 Hawaii 210, 638 P.2d 319 (1981)

Menor. On August 22, 1979, pursuant to HAWAII REV. STAT. § 706-606.5 (1976), the circuit court ordered defendant to serve a five-year mandatory minimum sentence of imprisonment. While his appeal was pending, the legislature added a subsection to HAWAII REV. STAT. § 706-606.5 (1976), the mandatory minimum sentence statute, which allowed a court to impose a lesser mandatory minimum sentence where there were strong mitigating circumstances. The defendant requested the Court to consider the retroactive effect of the added subsection.

Reversing and remanding, the Court held that the amendment, providing for lesser mandatory minimum sentences in special cases, was ameliorative in nature and could be applied retroactively to the defendant. There was sufficient indication that the legislature intended the amendment to apply retroactively so as to take advantage of more enlightened sentencing provisions.

State v. Woicek, 63 Hawaii 548, 632 P.2d 654 (1981)

Ogata. Defendant verbally abused a police officer after the officer grabbed the handlebars of his bicycle when defendant refused to stop riding on the sidewalk. At closing argument, the prosecution moved to amend the charge from disorderly conduct to harassment, for which defendant was convicted. Finding *State v. Kupai,* 63 Hawaii 1, 620 P.2d 250 (1980), to be dispositive, the Court held that harassment is not a lesser included offense under HAWAII REV. STAT. § 701-109(4), subsections (a) or (c) (1976). Harassment is not a lesser included offense under subsection (a) because disorderly conduct can be proved with a less culpable and different state of mind than that required for harassment. Harassment would be a lesser included offense under subsection (c): (1) if the harassment has lesser cul-

pability than disorderly conduct, or (2) if a less serious injury is necessary to establish harassment than disorderly conduct. Since neither subsection applied, harassment was found to be a separate and different offense; hence, amendment of the original charge was found to be so prejudicial and improper that reversal of defendant's conviction was justified.

State v. Yoshimoto, 64 Hawaii 1, 635 P.2d 560 (1981)

Per Curiam. Defendant-appellant was acquitted of rape and sodomy in the first degree, but was convicted of the lesser-included offense of sexual abuse in the first degree. The trial court denied appellant's motion for judgment of acquittal, despite acquittal on rape and sodomy charges because HAWAII REV. STAT. § 701-109(4) (1976) allows conviction of a lesser-included offense. Affirming the trial court, the Court stated that the reasons for the jury's decision would not be second-guessed where there is substantial evidence to support its conclusion.

THC Financial Corp. v. Managed Investment Corp., 64 Hawaii 491, 643 P.2d 549 (1982)

Lum. Defendant denied liability for interest due on a promissory note, relying on HAWAII REV. STAT. §§ 408-15 and 408-16 (1976), and counterclaimed for a refund of usurious interest allegedly paid on the grounds that the 365/360 accounting method used to compute the interest on the note unlawfully amounted to an interest charge over the legal rate. Rejecting defendant's counterclaim, the trial court granted plaintiff's motion for summary judgment on the note. Affirming, the Court stated that (1) the legislature has defined usury in different ways so as to draw distinctions between "charging," "receiving" and "contracting for" excessive interest; (2) "contracting for" is the standard applicable under HAWAII REV. STAT. § 408-16 (1976) (relating to industrial loan companies); and (3) merely charging or receiving excessive interest is insufficient to invoke the penalty under that section. The Court held there was no violation because the parties had expressly contracted for the legal rate of 18% per annum and there was no implied contract for excessive interest since the 365/360 method was not the lender's customary basis of computing interest.

Towse v. State, 64 Hawaii 624, 647 P.2d 696 (1982)

Ogata. Government officials had stated to the press that certain prison personnel were being transferred as part of an "overhaul" of the prison. There was evidence of inmate-guard problems. The employees who were transferred were detained while their lockers were searched as part of a "processing out" procedure. Defamation and false imprisonment claims were brought by the prison personnel who were transferred and loss of consortium claims were brought by the personnel's wives. Since the trial court had considered the memoranda and affidavits of counsel in its "dismissal" of plaintiffs' complaints, the Court determined that summary judgment in favor of the government officials was properly granted because: (1) plaintiffs failed to show any malice or improper purpose by the government officials; (2) the detainment was not false imprisonment since it was incident to proper legal authority; i.e., a valid search warrant; and (3) loss of consortium is a derivative action which must fail when the initial claim cannot be maintained.

Travelers Insurance Co. v. Hawaii Roofing, Inc., 64 Hawaii 380, 641 P.2d 1333 (1982)

Nakamura. Defendant-appellant Hawaiian Insurance & Guaranty Co., Ltd. (HIG), which issued a policy to the employer after plaintiff-appellee Travelers Insurance had cancelled its policy, paid workers' compensation benefits to three claimants under the mistaken belief that it was legally responsible for coverage. The Director of the Disability Compensation Division of the Department of Labor and Industrial Relations determined that Travelers was actually the responsible carrier because Travelers had informed the employer of its intention to cancel its policy without notifying the department, as mandated by HAWAII REV. STAT. § 386-127 (1976). Travelers appealed the director's decision to the Labor and Industrial Relations Appeals Board and simultaneously filed a complaint for a declaratory judgment in the circuit court. With the administrative proceedings before the Appeals Board held in abeyance pending the outcome of the suit, the circuit court denied HIG's motion to dismiss for want of jurisdiction and granted Traveler's motion for summary judgment. On HIG's appeal of the circuit court's determination, the Court held that the circuit court had no jurisdiction to resolve the workers' compensation dispute, because under the express provisions of HAWAII REV. STAT. § 386-73 (1976 & Supp. 1981), the sole remedy for Travelers lies on its appeal from the director's orders to the Labor and Industrial Relations Appeals Board. The Court vacated the summary judgment and remanded the case with instructions to dismiss the complaint.

Waianae Coast Neighborhood Board v. Hawaiian Electric Co., 64 Hawaii 126, 637 P.2d 776 (1981)

Per Curiam. Plaintiffs appealed the Department of Land Utilization's negative declaration that no environmental impact statement was required for the "Kahe 6" generating plant more than six months after the negative declaration had been published. The Court affirmed the trial court's dismissal because HAWAII REV. STAT. § 363-6 (1976) disallows the filing of judicial proceedings which would determine the necessity of an environmental impact statement for a proposed action after 60 days following the issuance of a negative declaration to the public.

Wong v. Hawaiian Insurance Companies, 64 Hawaii 189, 637 P.2d 1144 (1981)

Per Curiam. Plaintiff claimed no-fault insurance benefits for loss of profits incurred when she closed her business to care for her son, who had been injured in an automobile collision. The Court affirmed dismissal of the action since the language of HAWAII REV. STAT. § 294-3(a) (1976) clearly provided benefits solely to the person who had sustained "accidental harm." "Accidental harm" is defined in HAWAII REV. STAT. § 294-2(1) (1976 & Supp. 1980) as bodily injury, death, sickness or disease caused by a motor vehicle accident to a person. The trial court did not abuse its discretion in awarding plaintiff reasonable attorney's fees since the claim was not "manifestly and palpably without merit and frivolous" so as to bar recovery under the no-fault statute, HAWAII REV. STAT. § 294-30(a) (1976 & Supp. 1980).

Wong v. Hawaiian Scenic Tours, 64 Hawaii 401, 642 P.2d 930 (1982)

Per Curiam. Plaintiff was fatally injured by a school bus owned by defendant. The trial court permitted recovery against the city as a joint-tortfeasor because the aggregate negligence of both the city and Hawaiian Scenic Tours was greater than that of plaintiff's decedent, despite the jury's finding that the plaintiff's comparative fault exceeded that of the City. The Court construed the phrase "the negligence of the person against whom recovery is sought" HAWAII REV. STAT. § 663-31 (1975) to mean "the negligence of the persons against whom recovery is sought." *Note:* This holding is now obsolete because HAWAII REV. STAT. § 663-31 (1975 & Supp. 1981, amended in 1976) now expressly allows recovery where the negligence of the injured person was not greater than the *aggregate* negligence of the persons against whom recovery is sought.

Woodruff v. Keale, 64 Hawaii 85, 637 P.2d 760 (1981)

Lum. The family court terminated the parental rights of petitioners-appellants over their natural child who had been cared for by relatives (respondents-appellees) because (1) appellants were able to care for the child but had failed to do so; and (2) it would be in the best interest of the child. Affirming and reversing in part, the Court awarded custody to the natural parents and held: (1) although HAWAII REV. STAT. § 571-61(b)(1)(D) (1976) requires "at least one year" of lack of care and support by the parents before a termination of parental rights petition may be filed, the statutory period need not refer solely to the year immediately preceding the filing of the petition; (2) the family court had not erred in finding that the appellants had failed to provide for the child's care and support for approximately eighteen months; (3) "care and support" means financial support and the statute is not unconstitutionally vague for failure to warn parents with the required specificity; and (4) the burden of proof is on those seeking the severance since severance of the natural parent-child relationship is generally too drastic a remedy. Therefore, the case was remanded for further proceedings.

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